

**The Realisation of Children's Survival Rights in South Africa, Kenya  
and the Democratic Republic of Congo: A Comparative Analysis**

**By**

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## DECLARATION

I declare that **The Realisation of Children's Survival Rights in South Africa, Kenya and the Democratic Republic of Congo: A Comparative Analysis**

is my own work and that it has not been submitted for any degree or examination in any other university. All sources used or quoted have been fully acknowledged.

MAFUKU THOLAINE MATADI

SIGNED.....

## **ABSTRACT**

The thesis involved a comparative analysis of compliance with international conventions dealing with the application of children's rights in three Sub-Saharan jurisdictions, namely, South Africa, Kenya and the Democratic Republic of Congo (DRC). All the three countries selected for comparative analysis signed and ratified the Convention on the Rights of the Child (CRC). In this way they committed themselves to work towards the fulfillment of children's rights at domestic level respectively. However, for many years realising full compliance with regard to children's rights still presents a challenge for each of these countries selected. The purpose of the investigation is to explore the extent to which children's survival rights were fulfilled, and to identify ways to overcome the challenges that the three countries face. The concept of children's survival rights in this study denotes rights to basic nutrition, basic health care services and social security.

To answer the question the study relied on a qualitative evaluative approach based on desktop and library research. The researcher used primary and secondary sources. Although the investigation revealed that the three countries have domesticated children's rights norms within their laws, certain gaps in implementation present a cause for concern.

As a result the findings from the study confirm that despite the gaps highlighted herein, South Africa has made significant progress towards realising children's rights. Kenya as well is following in the foot prints evident in the South African example provided it tightens its law enforcement and adopts relevant legislative and other measures to realize its international obligation. The country where children's survival rights are yet to be realised is the DRC.

The study recommends that the South African department of social development should expedite the implementation of child support grants to include distributing

equal benefits to every child throughout all communities without discriminating for whatsoever reason.

The findings relevant to the scenario in Kenya suggest that Kenya has a duty to consider embarking on a vigorous programme to train its professional service to comprehend laws, policies, regulations and guidelines to maximize service delivery.

With regard to social protection in Kenya, and given the fact that forty percent of the population consists of children from poor families, the study recommends that the cash transfers purporting to benefit orphans and other vulnerable children in Kenya needs to be extended beyond orphans and vulnerable child-beneficiaries to include children throughout all communities regardless of financial or other status.

Deviating from better placed child-rights centres in South Africa and Kenya, by contrast the DRC needs to design, implement, monitor and evaluate child support grant programmes primarily targeting ultra-poor families. Furthermore, the study finds that the DRC can learn a lesson from South Africa if its government is to succeed to respect, protect, promote and fulfil the rights in the Bill of Rights as envisaged in the Constitution.

In view of the findings, the study produced a model guideline for effective realisation of children's rights. This study potentially contributes to a growing body of international and regional research about children's rights with a particular focus on children's survival rights in South Africa, Kenya and the DRC.

## **OPSOMMING**

Die proefskrif het betrekking op 'n vergelykende analise van die nakoming van internasionale konvensies wat handel oor die toepassing van kinderregte naamlik Suid-Afrika, Kenia en die Demokratiese Republiek van die Kongo. Al die drie lande wat gekies is vir vergelykende analise, het die Konvensie oor die Regte van die Kind (KRI) onderteken en bekragtig. Op hierdie manier het hulle hulself verbind tot die nakoming van kinderregte op huishoudelike vlak. Die volle nakoming van kinderregte bied egter steeds 'n uitdaging vir elkeen van die lande. Die doel van die ondersoek is om te ondersoek in watter mate kinders se oorlewingsregte vervul is en om maniere te identifiseer om die uitdagings wat die drie lande in die gesig staar, te oorkom. Die konsep van kinders se oorlewingsregte in hierdie studie dui op regte op basiese voeding, basiese gesondheidsdienste en sosiale sekerheid.

Om die vraag te beantwoord, het die studie staatgemaak op 'n kwalitatiewe evaluatiewe benadering gebaseer op rekenaar- en biblioteeknavorsing. Die navorser het primêre en sekondêre bronne gebruik. Alhoewel die ondersoek aan die lig gebring het dat die drie lande kinderregte geïnkorporeer het binne hul huidige wetgewings, is sekere gapings in die implementering van kinderregte 'n rede tot kommer.

As gevolg daarvan bevestig die bevindinge van die studie dat ten spyte van die leemtes wat hierin vanuit gelig word, Suid-Afrika beduidende vordering gemaak het om kinderregte te verwesenlik. Kenia volg ook in die voetafdrukke wat in die Suid-Afrikaanse voorbeeld voorkom, mits dit sy wetstoepassing stoot en toepaslike wetgewende en ander maatreëls aanvaar om sy internasionale verpligting te realiseer. Die land waar kinders se oorlewingsregte nog besef moet word, is die DRK.

Die studie beveel aan dat die Suid-Afrikaanse departement van maatskaplike ontwikkeling die implementering van kinderondersteunings toelaes moet bespoedig

om dieselfde voordele vir elke kind in alle gemeenskappe in te sluit, sonder om te diskrimineer vir watter rede ookal.

Die bevindings wat relevant is vir die senario in Kenia, dui daarop dat Kenia die plig moet oorweeg om 'n kragtige program te begin om sy professionele diensnemers op te lei om wette, beleide, regulasies en riglyne te verstaan om dienslewering te maksimeer.

Wat die sosiale beskerming in Kenia betref, en die feit dat veertig persent van die bevolking uit kinders uit arm gesinne bestaan, beveel die studie aan dat die kontantoordragte wat voornemens is om weeskinders en ander kwesbare kinders in Kenia te bevoordeel, verder na weeskinders en kwesbare persone moet verleng word sowel as kinderbegunstigdes om kinders in alle gemeenskappe in te sluit, ongeag finansiële of ander status.

In teensteeling met van beter geplaasde kinderregte-sentrums in Suid-Afrika en Kenia, moet die DRK daarenteen kindersondersteuningsprogramme ontwerp, implementeer, moniteer en evalueer. Verder vind die studie dat die DRK 'n les van Suid-Afrika kan leer as die regering daarin slaag om die regte in die Handves van Regte te respekteer, te beskerm, te bevorder en te vervul, soos beoog in terme van die Grondwet.

In die lig van die bevindings het die studie 'n modelriglyn vir effektiewe verwesenliking van kinderregte gelewer. Hierdie studie dra potensieel by tot 'n groeiende liggaam van internasionale en streeksnavorsing oor kinderregte met spesifieke fokus op kinders se oorlewingsregte in Suid-Afrika, Kenia en die DRK.

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Thank you for your constant prayers and intercessions for God's blessings.



## DEDICATION

To the Lord God Almighty, source of my strength and inspiration. To you Jesus Christ be the glory forever and ever.

To my father Professor Georges Josue Fongo Mvuemba, *papa* I promised that I would follow your academic legacy. *Alors je te dedie cette thèse.*

To all the children's rights activists.

## KEY TO ABBREVIATIONS AND ACRONYMS USED

### 1. Entities

COMESA	Common Market of Eastern and Southern Africa
ECD	Early Childhood Development
ECOWAS	Economic Community of West African States
ECDC	Early Childhood Development Centre
FAO	Food and Agriculture Organization of the United Nations
FDFA	Federal Department of Foreign Affairs
GMS	Grant Management System
ICC	International Criminal Court
NEPAD	New Partnership for African Development
NGO	Non-Governmental Organization
OCHA	Office for the Coordination of Humanitarian Affairs
SADC	Southern African Development Community
UCT	University of Cape Town

UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
WASH	Water Sanitation and Hygiene

## **2. Legal instruments**

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

## **3. Journals**

BYUJPL	Brigham Young University Journal of Public Law
CILSA	Comparative and International Law Journal of Southern Africa.
IJLPF	International Journal of Law, Policy and the Family
SALC	South African Law Reform Commission
SAPL	Southern African Public Law (formerly SA Public Law)

#### **4. Short names to law provisions**

Art	Article
Para	Paragraph
S	Section
Ss	Sections

#### **5. Other names**

AIDS	Acquired Immunodeficiency Syndrome
CT	Cash Transfer
HDI	Human Development Index.
HRP	Humanitarian Response Plan
HIV	Human Immunodeficiency Virus Infection
OVC	Orphan and Vulnerable Children
US	United States of America
\$	Dollar

'Blessed be the name of God forever. He controls the course of world events; he removes Kings and sets up other kings. He gives wisdom to the wise and knowledge to the scholars' (Daniel 2:21).

## CHAPTER ONE

### OVERVIEW OF THE STUDY

#### 1.1 Introduction

This chapter deals with the introduction and background to the study. The chapter also outlines the preliminary literature review, the problem statement, the aims, research questions, motivation of the study, research methodology, ethical considerations and the demarcation of the study, definition of key terms and conclusion.

#### 1.2 Background to the study

The concept of children's rights carries a strong international dimension.<sup>1</sup> As early as 1924, a number of countries collaborated to produce the Declaration of the Rights of the Child.<sup>2</sup> Despite its title, a critical analysis of this declaration highlights the fact that children were mainly conceived of as objects requiring adult protection.<sup>3</sup> From the more general human rights movement, the idea of children's rights emerged.<sup>4</sup> After the Second World War, the nations of the world decided to create general international standards for a proper treatment of all human beings throughout the world.<sup>5</sup> This was the beginning of the international human rights

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<sup>1</sup> S Burman, C Matthias, J Sloth-Nielsen & N Zaal 'Beyond the Rights of the Child' in S Burman (ed) *The Fate of the Child Legal Decisions on Children in the New South Africa* (2003)1, 1.

<sup>2</sup> The Geneva Declaration of the Rights of the Child was adopted on 26 September 1924. By this Declaration of Geneva, Men and women of all nations recognised that mankind owes to the Child the best that it has to give, they declared and accepted their duty, that, beyond and above all considerations of race, nationality or creed: the child must be given the means requisite for its development. This Declaration contains only 5 Articles. See S Human 'The Theory of Children's Rights' in T Boezaart(ed) *Child Law in South Africa* (2009)249. See also L Schafer *Child Law in South Africa-Domestic and International Perspectives* ed (2011)71. Also see J Tobin 'increasingly seen and heard: the Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal of Human Rights* 100.

<sup>3</sup> Human (note 2 above) 249.

<sup>4</sup> Schafer (note 2 above) 71.

<sup>5</sup> JC Mubangizi 'Towards a new Approach to the Classification of Human Rights with specific reference to the African Context' (2004) *African Human Rights Law Journal* 93.

movement. Subsequently, the United Nations<sup>6</sup> was created and the concept of universal human rights began to develop.<sup>7</sup>

In 1945, the Charter of the United Nations appeared and three years later came the Universal Declaration of Human Rights (UDHR) in 1948. Although the latter is concerned primarily with the rights of adults, article 25(2) refers to children as well and provides that all children must receive special care and assistance regardless of whether they were born in or out of wedlock. From the above, it must be recognized that the concept of children's rights emerged from the broader concept of fundamental human rights for all people.<sup>8</sup> In 1959, a Declaration of the Rights of the Child (UNDRC) was adopted by the UN Assembly.<sup>9</sup> The Declaration introduced the principle of the best interest of the child to guide all those who would be involved in making decisions that had the potential of ultimately affecting children. In 1979, a Declaration on the Rights and the Welfare of the African Child was concluded.<sup>10</sup>

In addition to the above instruments, the most important and more recent instruments which went furthest in creating a substantial body of important fundamental rights for children were the United Nations Conventions on the Rights of the Child of 1989 (CRC)<sup>11</sup> and the African Charter on the Rights and the Welfare of the Child of 1990 (ACRWC) was concluded in Monrovia, Liberia.<sup>12</sup>

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<sup>6</sup> The United Nations officially came into existence on 24 October 1945, when the UN Charter had been ratified by a majority of the original 51 member states. The purpose of the UN is to bring all Nations of the world together to work for peace and development, based on the principles of justice, human dignity and the well-being of all people. It affords the opportunity for countries to balance global interdependence and national interest when addressing international problems. There are currently 192 members of the UN. Available at <http://www.un.org/cyberschoolbus/unintro/unintro.asp>. Accessed on 16 September 2014.

<sup>7</sup> Art 1 of the Charter of the United Nations. See also the Preamble of the Universal Declaration of Human Rights.

<sup>8</sup> Schafer (note 2 above).

<sup>9</sup> The Declaration of the Rights of the Child was adopted on 20 November 1959 unanimously by all 78 Member States of the UN General Assembly in Resolution 1386 (XIV).

<sup>10</sup> This Declaration was adopted in 20 July 1979, Res.no AHG/ST.4 (XVI) Rev. I. Sixteenth Ordinary Session of the Assembly of Heads of States and Government.

<sup>11</sup> The UN General Assembly adopted the CRC and opened it for signature on 20 November 1989. It came into force on 2 September 1990 and was ratified by a number of nations except Somalia and United States.

<sup>12</sup> The ACRWC was adopted by the Organisation of African Unity (OAU) in 1990 (in 2001 the OAU officially became African Union). The ACWRC entered into force on 29 November 1999.

This study focuses on the most important children's rights convention, namely the CRC. Notably, this convention is binding on all the states which sign and ratify it.<sup>13</sup> It is notable however, that the effectiveness of the implementation of the children's rights instrument depends on the available mechanisms and resource capacities within a given participating state. As a result in this study, particular reference is made to South Africa, Kenya and the Democratic Republic of Congo (DRC). All three countries have committed themselves to implement and enforce basic rights for children.<sup>14</sup> It begs mention that in Africa there are also countries where extensive children's rights infringements go unchecked.<sup>15</sup>

It becomes necessary to pinpoint briefly the rationale behind the selection of the DRC, Kenya and South Africa as jurisdictions for singular attention for analysis of compliance with children's survival rights in this study.

In the first place the DRC attracted attention largely because of widespread poverty that exists there.<sup>16</sup> In addition, poor law enforcement of legal provisions coupled with an intractable internal conflict situation have conspired to render the realisation of children's rights a hard exercise in DRC.<sup>17</sup>

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<sup>13</sup> Art 44 (2) of the CRC. With regard to the application of international treaties three requisite steps are signature, ratification and domestication.

Signature: by signing a convention or treaty, a country proves that it will soon ratify such international instrument;

Ratification is the agreement by the State to be bound by the international treaty or instrument in the protection and the realisation of rights; it also describes the fact that the State has to take necessary measures under which the standard can be implemented.

Domestication is the process whereby the government converts international and regional instrument into domestic laws in order to enforce the provisions. See P Onyango & W Njuguna 'Child Rights and child protection in Kenya: a manual for Children's Service Providers' ANPPCAN, ISPCAN, Coalition on Child Rights and child protection in Kenya (2004). Available at [www.anppcan.org/wp-content/uploads/2014/11/Annual-Report-2004.pdf](http://www.anppcan.org/wp-content/uploads/2014/11/Annual-Report-2004.pdf). Accessed on 17 August 2017.

<sup>14</sup> South Africa ratified the CRC on 16 July 2003 and ACWRC on 7 January 2010, Kenya ratified the CRC on 30 July 1990, DRC ratified the CRC on 28 September 1990. See C.J Davel 'The African Charter on The Rights and Welfare of the Child, Family Law and Children's Rights' (2002) *De Jure* 281.

<sup>15</sup> J Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 165.

<sup>16</sup> C Conradie & S Whitman 'Our Work in the Democratic Republic of the Congo: 2009-2012' The Romeo Dallaire Childs soldiers initiative (2013). Available at <http://www.childsoldiers.org/publications/>. Accessed on 03 February 2015. See also UNDP 'Human Development Report 2011'. Available at <http://hdr.undp.org/en/data>. Accessed on 20 November 2014.

<sup>17</sup> Ibid.



Kenya takes second position largely because of its high level of poverty.<sup>18</sup> Sadly a high level of poverty affects a country's capacity to deal with the triple threats of child abuse, child exploitation and child trafficking.<sup>19</sup>

In South Africa, factors such as poverty, child abuse, lack of access to education, drug and substance abuse, exacerbated by family fragmentation induced by urbanization and forms of social ills also impact upon the welfare of a large segment of the child population.<sup>20</sup> However, in terms of the fulfillment of the children's rights, local programmes and legislation put in place in South Africa differ or can be considered far better to those of Kenya and the DRC. For instance, South Africa has a child support grant programme (CSG) funded by government. In Kenya, the allocation of this grant depends on the international donors' agendas whilst in the DRC, this type of programme is not even available. In addition, children's rights entrenched in the South African Constitution can be considered to be the most comprehensive by comparison.<sup>21</sup> As a result, including the three countries is considered crucial to the context of the present study as all three countries are still developing countries with differing social standards.

The main question the study sought to understand is the extent to which children's survival rights are being fulfilled in the three countries and if so, what it is that can be done to ensure effective implementation of children's rights. It is against this backdrop that the investigation below should begin with the preliminary literature review.

### **1.3. Preliminary literature review**

In reviewing articles in this area of study, the first issue that this research sought to understand was the concept of children's rights. It is worth reiterating that the CRC is the first major international instrument exclusively dedicated to the implementation and protection of children's rights. This instrument divides children's

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<sup>18</sup> African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) 'Towards elimination of Child Trafficking in order to address Child abuse and exploitation and neglect' Programmes Fact sheet. Available at [http://www.anppcan.org/files/File/08\\_ChildTrafficking.pdf](http://www.anppcan.org/files/File/08_ChildTrafficking.pdf). Accessed on 08 September 2014

<sup>19</sup> Ibid.

<sup>20</sup> Schafer (note 2 above) 53.

<sup>21</sup> Sloth-Nielsen (note 15 above) 64.

rights into four main categories, namely life and survival rights, protection rights, development rights and participation rights.<sup>22</sup> Scholars such as Freeman, Eekelaar, Wald and Hafen have also endeavored to provide a practical framework for children's rights by classifying them into certain categories.<sup>23</sup>

Contrary to Freeman's categorization of children's rights as the right to welfare, the right to protection, the right to be treated as an adult and the right against parents,<sup>24</sup> Eekelaar supports the interest theory of rights. According to him, the key precondition for rights is the social perception that an individual or class of individuals protects certain interests.<sup>25</sup> On the basis of this understanding, Eekelaar identifies three kinds of interests ranging from basic interest, developmental interest to autonomy interest.<sup>26</sup> This means that children can have more interests than can appropriately be protected as rights. Wald, on the other hand, tries to formulate a framework for analysing the concept of children's rights.<sup>27</sup> In this regard, he attempts to separate the types of claims made on behalf of children.<sup>28</sup> In Wald's view, the concept of children's rights reflects diverse claims with specific rights having the potential to attach different meanings to children's rights.<sup>29</sup>

Hafen divides children's rights into two groups, namely rights of protection and rights of choice.<sup>30</sup> In this division, Hafen argues that restricting the child's right of choice in fact acts as an important form of observing the rights of protection.<sup>31</sup> As a

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<sup>22</sup> A Kiprotich & O Charles 'An Assessment of the Level of Awareness about Children's Rights among Children in Eldoret Municipality, Kenya' (2013) *Journal of Emerging Trends in Educational Research and Policy Studies* 279.

<sup>23</sup> Human (note 2 above) 253.

<sup>24</sup> Ibid. See also Freeman 'The Right and the Wrong' (1992) *International Journal of Law and the Family* 60.

<sup>25</sup> J Eekelaar 'The Emergence of Children's Rights' in H D Krause (ed), *Child law: Parent, Child and State* (1992) 38. See also J Eekelaar 'Why children? Why rights?' in P Alston & G Brennan (eds) *the UN Children's Convention and Australia* (1991) 30.

<sup>26</sup> Ibid.

<sup>27</sup> Wald cited by Human (note 2 above) 256. M Wald 'Children's Rights: A Framework for Analysis' (1979) *University of California Davis Law Review* 255, 282.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, 261. Wald emphasized that factors such as nationality, gender, race, religion and other social and personal characteristics must be considered in giving content to the children's rights.

<sup>30</sup> BC Hafen 'Children Liberation and New Egalitarianism: Some Reservations about Abandoning Youth to their "Rights"' (1976) *Brigham Young University Law Review* 605.

<sup>31</sup> Ibid.

result Hafen, thus contends that parents have a critical role to play in guiding the development of their children's judgmental capacities towards maturity.<sup>32</sup>

It can be inferred from the approach adopted by the scholars so far mentioned<sup>33</sup> that the theories of children's rights<sup>34</sup> bring together two significant ideas.<sup>35</sup> The first idea is that as a human being every individual is entitled to fundamental rights.<sup>36</sup> The second idea is that children should be treated as holders of their own rights and not as the property of their parents.<sup>37</sup> By combining these two ideas it can be concluded that children are entitled to be regarded as holders of fundamental rights and furthermore that any qualification of their rights has to be sustained with reference to human rights principles.<sup>38</sup>

It is worth reiterating that human rights principles are entrenched in the CRC and the ACWRC. As indicated already, this study will mostly refer to the CRC. The main categories of children's rights which are central to these legal documents include life and survival rights, protection rights, development rights and participation rights. Life and survival rights relate to the right to life, nutrition, shelter and adequate access to medical amenities whilst development rights relate to the right to education, play, leisure, cultural activities and access to information, freedom of thought, conscience and religion. Protection rights safeguard children against all forms of abuse, neglect and exploitation. In addition protection rights cover special care for refugee children, the protection and rehabilitation of children who have suffered exploitation and abuses of many kinds.<sup>39</sup> The last category refers to participation rights which cover children's freedom to express opinions, to have a say in matters affecting their own lives, to join associations and to assemble peacefully.

Against this backdrop, it is notable that children's rights provide a broad topic encompassing the four main categories of rights: survival rights, development

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<sup>32</sup> Ibid.

<sup>33</sup> Freeman, Eekelaar, Wald and Hafen.

<sup>34</sup> These theories will be discussed in more details in Chapter Two.

<sup>35</sup> Human (note 2 above) 261.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Human (note 2 above) 261.

<sup>39</sup> Schafer (note 2 above).

rights, protection rights and participation rights. In a capsule, this research is limited to survival rights which include the right to basic nutrition, basic health care and social security.<sup>40</sup> The emphasis on survival rights has a bias towards the human rights perspective because international organisations and agencies tend to understand child survival rights within a biomedical framework to include mortality (deaths and deaths related causes) and morbidity (disease patterns) affecting children under the age of five.<sup>41</sup>

However the point is made that looking at the survival rights from a medical perspective alone is not sufficient to give effect to the realisation of survival rights. Factors such as malnutrition, access to water and sanitation and other social services should also be taken into consideration.<sup>42</sup> Additionally, child survival is linked to child development.<sup>43</sup> Children have the right to survive under conditions that enable them to develop to their full potential.<sup>44</sup> As a result it is no surprise that a wide variety of rights in the CRC is related to the issue of survival.<sup>45</sup> It should also be noted that beneficiaries of rights in the CRC include all persons under the age of eighteen.<sup>46</sup> A further motivation for focusing on survival rights of the child is that factors such as poverty, malnutrition, impact lives of many children in Kenya, South Africa and the DRC. Finding to what extent these countries realise children's survival rights will be in line with the Millennium Development Goals (MDGs)<sup>47</sup> and

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<sup>40</sup> Art 6 of the CRC states that '1.States Parties recognize that every child has the inherent right to life.

2.States Parties shall ensure to the maximum extent possible the survival and development of the child'.

<sup>41</sup> WHO, UNICEF, UNDP and the World Bank.

<sup>42</sup> M McClellan & C Smith 'Child Survival Project' Children's Institute 2006.

<sup>43</sup> Ibid.

<sup>44</sup> Art 6 of the CRC.

<sup>45</sup> Arts 6, 18, 24, 27, 39 of CRC. These include the right to life, parental responsibilities, health and health services, social security, standard of living, rehabilitative care.

<sup>46</sup> Art 6 (2) of the CRC

<sup>47</sup> The MDGs goals are:

1. Eradicate extreme poverty and hunger;
2. Achieve universal primary education;
3. Promote gender equality and empower women;
4. Reduce child mortality;
5. Improve maternal health;
6. Combat HIV/AIDS, malaria and other diseases;
7. Ensure environmental sustainability;
8. Develop a global partnership for development.

the United Nations transformation of the world 2030 agenda for sustainable development (SDGs)<sup>48</sup>.

The second aspect of this literature review is related to the implementation of children's rights. As indicated above this study will critically analyse and compare to what extent the children's rights are fulfilled in these three countries. The next section reviews how far scholars have analysed children's rights implementation in each country. Where applicable the writer pinpoints the gaps or silences identified.

Firstly in South Africa, scholars such as Bennett, Becker, Bonthuyus, Nicholson, and Songca emphasize that the best interest criterion should be taken into consideration in every matter pertaining to a child.<sup>49</sup> These writers focus more on parental responsibilities and rights and the manner in which African cultures find expression in the Children's Act.<sup>50</sup> The best interest of the child is also one of the CRC criteria informing children's rights.<sup>51</sup> Songca raises a pertinent point that previously in South Africa, there was no comprehensive legislation dealing with children.<sup>52</sup> That being said, the current position is that children's claims, duties and responsibilities are incorporated in the Constitution and various statutes, including the Children's Act.<sup>53</sup> Sloth-Nielsen supports the view that the South African Constitution's entrenchment of a clause pertaining to children's rights, adopted a decade ago is the most extensive constitutional protection for children anywhere, specifically since the

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<sup>48</sup> In 2015, the UN states parties adopted a new global development agenda named 'transforming our world'. This 2030 global agenda establishes 17 goals to be met by 2030 specifically no poverty, zero hunger, quality education, gender equality, clean water and sanitation, affordable and clean energy, decent work and economic growth, industry, innovation and infrastructure, reduced inequality, sustainable cities and community, responsible consumption and production, climate action, life below water, peace, justice and strong institution, partnerships for the goals.

<sup>49</sup> R Songca 'Evaluation of the Children's Rights in South African Law: The Dawn of an Emerging Approach to Children's Rights' (2011) XLIV *CILSA* 340.343; T W Bennet 'The Best Interests of the Child in an African Context' (1999) *Obiter* 145. JC Becker 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) *Obiter* 395; E Bonthuyus 'The Best Interest of Children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23.

<sup>50</sup> Ibid. CMA Nicholson '*LB v YD* 2009 5 SA 463 (T) / *YD v LB (A)* 2009 5 SA 479 (NGP) Disputed paternity, blood tests; court as upper guardian, compel blood tests for DNA testing; best interests of the child' (2010) *De jure* 410.

<sup>51</sup> Art 3 of the CRC.

<sup>52</sup> Songca (note 49 above).

<sup>53</sup> Ibid. The author mentions numerous statutes as SA recent legal provisions on the protection of the children's rights these includes the Children's Act 38 of 2005, the Criminal Law (Sexual Offences and Related Matters) amendment Act 32 of 2007 and the Child Justice Act 75 of 2008. See also A Skelton and M Courtenay 'The Impact of Children's Rights on Criminal Justice' (2012) *SACJ* 180.

socio-economic rights accorded to children enumerated therein and justiciable.<sup>54</sup> The justiciability of children's rights has not only enriched jurisprudence but has also earned international recognition.<sup>55</sup>

South Africa has made good progress in fulfilling the rights of children.<sup>56</sup> For example, millions of children are benefiting from the child support grant through the extension of the age of eligibility and from an extensive outreach programme by the State.<sup>57</sup> Through its progressive Constitution South Africa has put in place a system of laws and programmes to ensure basic support for children.<sup>58</sup> The 1996 Constitution,<sup>59</sup> the Children's Act<sup>60</sup> and the Child Justice Act<sup>61</sup> provide a solid foundation for advancing child protection in South Africa. However, inequalities in access to the essentials of life still exist, affecting in very strong ways how children access the opportunities that the country should avail for the fulfillment of their rights.<sup>62</sup>

Research has shown that several factors impact on the welfare of the South African child.<sup>63</sup> These factors range from poverty, inequality, preventable diseases including HIV/ AIDS, nutrition, non-citizenship, education, healthcare, to family fragmentation and abuse.<sup>64</sup> It is in light of the above experience that this study was conceived. Notably, despite progress made in South Africa in the area of the enactment of the provisions and implementation of children's rights provisions, outright challenges still beg to be addressed. Current research done by Proudlock and others is relevant to this study because it provides a conceptual bridge upon which to ground

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<sup>54</sup> See s 28 of the 1996 South African Constitution. J Sloth -Nielsen *Children rights in Africa: A legal perspective* (2008) 4.

<sup>55</sup> Sloth-Nielsen (note 45 above) 4.

<sup>56</sup> South Africa Government Information 'Executive Summary' (2011). Available at <http://www.info.gov.za/aboutsa/index.htm>. Accessed on 21 January 2015.

<sup>57</sup> Ibid.

<sup>58</sup> Songca (note 49 above).

<sup>59</sup> Constitution of the Republic of South Africa 1996.

<sup>60</sup> Act 38 of 2005.

<sup>61</sup> Act 75 of 2008.

<sup>62</sup> South Africa Government Information (note 56 above).

<sup>63</sup> Schafer (note 2 above); See also D.J McQuoid-Mason 'The Teddy Bear Clinic Constitutional Court case: Sexual conduct between adolescent consenting children aged under 16 years decriminalised and a moratorium on the reporting duties of doctors and others' (2014) 104 *South African Medical Journal* 275.

<sup>64</sup> Schafer (note 2 above). See also South African Law Commission 'The Review of the Child Care Act' (Discussion paper 103, project110, 2001)13.2.1.

this thesis in terms of the implementation of children's rights in South Africa.<sup>65</sup> The study done by Proudlock and others evaluates the progress South Africa has made in realising children's rights within twenty years of democracy.<sup>66</sup> These authors emphasize that the fulfillment of children's rights requires a broad strategy involving the promulgation of relevant laws, the design and implementation of suitable programmes and policies, and provision of services. More so, the 2017 South African Child Gauge provides a further valuable document to ground this thesis given the fact that it elaborates on the SDGs to create an enabling environment in which South African children not only survive, but also develop and reach their full potential.<sup>67</sup> The South African Child Gauge discusses recent policy and legislative development affecting children in South Africa.<sup>68</sup> Accordingly the 2017 South African Child Gauge will be useful as it provides child centred data to monitor progress and track progress made towards the realisation of children's socio-economic rights.<sup>69</sup> The value of this study is therefore to compare the progress in realising children's survival rights in two other African countries and to consider whether South Africa can learn from their jurisdictions.

This study also focuses on Kenya. Sloth-Nielsen observed that Kenya was the first African country to develop child law in the new millennium.<sup>70</sup> South Africa even proposed adopting provisions similar to those of Kenya dealing with parental responsibilities and rights.<sup>71</sup> However, the issue of parental responsibilities and rights falls outside the scope of this study. Suffice it to say that this point is raised to emphasise the seriousness of children's rights implementation in Kenya.

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<sup>65</sup> P Proudlock *South Africa Progress in Realising Children's Rights: A law Review* (2014)251.

<sup>66</sup> Ibid. This includes the contribution of authors such as L Berry, L Jameson, S Mathews, P Martin, M Courtenay, Z Hansungule.

<sup>67</sup> L Jameson & others *South African Child Gauge* (2017)18.

<sup>68</sup> Ibid, 10.

<sup>69</sup> Ibid,94.

<sup>70</sup> J Sloth-Nielsen & others 'Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries' (2011) *Journal of African Law* 203.

<sup>71</sup> Ibid. Kenya enacted the Children' Act in 2001; While South Africa passed its Children's Act in 2005.

Onyango and Lynch indicate that Kenya made efforts to improve legislation and her policy framework to protect children.<sup>72</sup> However the resources needed to make a real difference are inadequate and unpredictable.<sup>73</sup> They conclude that the Kenyan government must be encouraged to control the process of children's rights implementation. This requires commitment to long term planning on the part of both government and its international partners.<sup>74</sup> According to Odongo, the enactment of the Children's Act is not sufficient by itself in order to make Kenya compliant with international child rights norms.<sup>75</sup> In addition there still remains a need for a comprehensive audit of existing laws and policies.<sup>76</sup> The writer states that an important development in Kenya was the passage of the 2010 Constitution.<sup>77</sup> He recommends a review of all laws as well as administrative and practical measures in place to ensure that children's rights are realised.<sup>78</sup> Odongo concludes that the success of children's rights implementation requires a political commitment from government.<sup>79</sup>

Notwithstanding, Onyango and Lynch insist that to fulfill the rights of the child is the responsibility of government.<sup>80</sup> They point out that notwithstanding the fact that resources for fulfillment of children's rights mostly depend on international donor-driven agendas and demands<sup>81</sup> scarcity of resources still remains a problem for Kenya.<sup>82</sup>

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<sup>72</sup> P Onyango & M A Lynch 'Implementing the right to child protection: a challenge for developing countries' (2006) *Essay Focus* (367) 693. Available at [www.thelancet.com](http://www.thelancet.com). Accessed on 12 December 2014. These authors mention that Kenya enacted a comprehensive Children's Act. This led to the creation of a National Council for the Children Services and the Children's Court country wide in addition there has been the formulation of National Policies on child labour 2002, Education 2005, and orphans and vulnerable children 2005.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> G Odongo 'Caught Between Progress, Stagnation and Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' (2012) *AHRLJ* 112,141.

<sup>76</sup> Odongo (note 75 above).

<sup>77</sup> Ibid.

<sup>78</sup> Ibid. Laws such as Sexual Offences Act, 2006; the Prohibition of Female Genital Mutilation Act, 2011.

<sup>79</sup> Ibid.

<sup>80</sup> Onyango & Lynch (note 72 above).

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.



On the other hand, Kiprotich and Charles focus on the assessment of the level of awareness about children's rights in Kenya.<sup>83</sup> They insist on the enhancement of access by children to programmes which address issues affecting them.<sup>84</sup> This view is significant because it gives an idea of the extent to which children's rights are being fulfilled in Kenya.

Further relevant point is that the Kenyan Constitution includes protection of rights of children in Chapter four of the Kenya Bill of Rights. However, it remains a challenge that there is no legislation to ensure the implementation of the same rights.<sup>85</sup> Despite efforts made to implement children's rights, the challenge still remains. The point to bear in mind is that poverty remains an aggravating factor in children's rights violation.<sup>86</sup> In addition to poverty, a further major inhibitor of children's rights implementation in Kenya is the phenomenon of internal and cross border trafficking in children.<sup>87</sup>

The DRC faces numerous challenges in terms of children's rights implementation.<sup>88</sup> On January 10, 2009 the Congolese government adopted the Law 09/001 of 2009 on the Protection of the Child. This legislation builds on previous commitments to comply with international conventions.<sup>89</sup> However, the Congolese legal framework and judicial institutions remain powerless to protect children's rights and have become completely dysfunctional as protective organs of the rights of children throughout the country.<sup>90</sup> Currently in the DRC children are victims of abuse, deprivation and exploitation reflecting the social and economic dysfunctionality in

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<sup>83</sup> Kiprotich & Charles (note 22 above) 279.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Odongo (note 75 above) 138.

<sup>87</sup> ANPPCAN (note 18 above). The phenomenon of internal and cross border trafficking is not discussed in more details in this study as it is related to protection rights.

<sup>88</sup> For the purpose of this research the word implementation will be used interchangeably with the word fulfilment as they are synonyms.

<sup>89</sup> Art 1 of the Child Protection Law 09/001 of 2002. World Vision 'Children's Rights in the Democratic Republic of Congo' Stakeholder Report on DRC –Submission by for Universal Periodic Review, Sixth Cycle, November 2009. Available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session\\_6/cd/WV\\_COD\\_UPR\\_S06\\_2009.Pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session_6/cd/WV_COD_UPR_S06_2009.Pdf). Accessed 7 February 2014.

<sup>90</sup> M A Mangu 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under African Charter' (2003) *AHRLJ* 235, 236.

the country.<sup>91</sup> Literature on the implementation of children's rights in the DRC context is limited, and most of the scholars have focused on armed conflict in DRC and its impact on civilians with only a few researchers mentioning implications of armed conflict on children's rights.<sup>92</sup> For example in 2003, the Human Rights Watch emphasised that all parties involved in conflict in DRC should immediately halt abuses against children and uphold all international obligations to protect children's security and rights.<sup>93</sup> In 2009, World Vision recommended that the DRC government should fully support an inclusive peace process that guarantees core human rights provisions, especially those affecting children women and displaced persons.<sup>94</sup> Similarly, Mobekk confirms that the DRC has been troubled by continued conflict and violence.<sup>95</sup> In 2010, Afriyie emphasises that individuals operating in the DRC should commit themselves to processes laid down to end the conflict in the DRC in order to create a safe environment for children.<sup>96</sup> Kjeksrud and Ravndal also focus on armed conflict.<sup>97</sup> They elaborate on the problem of protection, the conflicts in the DRC and the UN peacekeeping mission in the country.<sup>98</sup> These authors only discuss the three dimensions along which UN military units can be expected to contribute to the protection of civilians in general.<sup>99</sup> It is clear that little attention is paid to children. With the same idea of civilian protection, Neethling points out that the DRC's government needs to ensure that it creates a

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<sup>91</sup> S Cadogan-Poole 'Exorcising Spirit instead of Exercising Rights? The Recent Phenomenon of Child witch Accusation in the DRC'. Available at [http://Congochildrentrust.org/wp\\_content/upload2013/06/exorcising/E2%80%A6Rights-2013.pdf](http://Congochildrentrust.org/wp_content/upload2013/06/exorcising/E2%80%A6Rights-2013.pdf). Accessed on 1 February 2014. See also D Zongwe, F Butedi & P Mavungu 'The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview'. Available at <http://www.nyulawglobal.org/globalex/DemocraticRepublicCongo1.htm>. Accessed on 07 February 2014.

<sup>92</sup> G Machel 'The Impact of Armed Conflict on Children : Note by the Secretary-General' A/51/306 (1996) A/51/306.

<sup>93</sup> See Watch list on children and armed conflict 'The impact of Armed Conflict on children in the Democratic Republic of Congo (DRC)'. Available at [www.Watchlist.org](http://www.Watchlist.org). Accessed 05 February 2014.

<sup>94</sup> World Vision (note 89 above) 4.

<sup>95</sup> E Mobekk 'Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting civilians in the East'(2009) 16(2)*International Peacekeeping* 273

<sup>96</sup> A Afriyie 'Children and Armed Conflict: The case in the Democratic Republic of Congo' (2010). [http://politicsandgovernment.illinoisstate.edu/current/conferences/documents/Afriyie\\_2010.doc](http://politicsandgovernment.illinoisstate.edu/current/conferences/documents/Afriyie_2010.doc) 115 Collier. Accessed 10 February 2013.

<sup>97</sup> S Kjeksrud & JA Ravndal 'Emerging lessons from the United Nations Mission in the Democratic Republic of Congo : military contributions to the protection of civilian '(2011) *African Security Review*

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

secure and peaceful environment especially for civilians.<sup>100</sup> It is clear again that children's rights are not receiving the attention they deserve.<sup>101</sup> Whitman focuses on the use of child soldiers and asserts that

Children that are vulnerable to recruitment into armed groups are often those that come from the poorest sections of the society. Children have been used as soldiers by both rebel groups and government forces in many conflicts; this is particularly evident in Sierra Leone and the DRC conflict.<sup>102</sup>

He concludes that the fact that the International Criminal Court investigated the DRC case sets an important precedent with respect to the criminality of the use of child soldiers. At the same time it sends a strong message to military and political leaders against the illegal nature of children involvement in conflict.<sup>103</sup> Whitman's insightful point is that in order to ensure peace and stability; there is a need to improve children protection, security and well-being.<sup>104</sup>

It is in light of this gap that this study identifies poverty, non-enforcement of the law and armed conflicts as posing major impediments to the protection of children's rights across the DRC.<sup>105</sup> In addition, the DRC is one of the poorest countries in the world with an estimated forty-seven per cent of the population living in severe poverty while the average citizen earns less than two dollars a day.<sup>106</sup>

What emerges from the above discussion is that the three selected countries all face challenges with regard to the fulfillment of children's rights. This study seeks to explore possible strategies and policies that can be employed to overcome identified challenges and thus contribute to improved implementation of children's rights, especially in view of the fact that Kenya, the DRC as well as South Africa are developing countries.

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<sup>100</sup> T Neethling 'From MONUC to MONUSCO and beyond: prospects for reconstruction, State-building and security governance in the DRC' (2011)18(1) *South African Journal of International Affairs* 23.

<sup>101</sup> Ibid.

<sup>102</sup> S Whitman 'Preventing the use of child soldiers: The role of international criminal court'. Available at <http://www.childsoldiers.org/>. Accessed 10 October 2013.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> M Mulinge 'Implementing the 1989 United Nations Convention on the Rights of the child in Sub-Saharan Africa: the overlooked socio-economic and political dilemmas'26(2002) *Child abuse & neglect* 17.

<sup>106</sup> C Conradie & S Whitman (note 16 above).

#### 1.4. Problem statement

Through the ratification of the CRC, South Africa, Kenya and the DRC committed themselves to the implementation of children's rights. Notably, commitment requires State Parties to take all appropriate legislative, administrative and other measures to effect the implementation of rights contained in these Conventions.<sup>107</sup> However, for many years realising this commitment with regard to children's rights still presents a challenge for each of these countries.<sup>108</sup> Currently the DRC is recovering from a protracted armed conflict. In light of this there is a need for appropriate preventive measures towards avoiding atrocities and violations committed against children.<sup>109</sup> With specific reference to the DRC case, in 2013, the UN Secretary General reported that as a direct result of conflict and unleashing of related violence, one hundred and fifty-four children were killed and one hundred and thirteen injured during 2012 alone.<sup>110</sup>

Notably, Kenya is faring better in the process of implementing children's rights.<sup>111</sup> A significant development in that country is the passing of a new Constitution, 2010 with a progressive Bill of Rights.<sup>112</sup> Nevertheless, poverty still stands out as a major cause of children's rights violations in Kenya and needs to be eradicated.<sup>113</sup>

Although South Africa is more progressive in the implementation and observance of children's statutes, it stills needs appropriate intervention programmes and strategies that address the needs and rights of children, especially those who are vulnerable.<sup>114</sup> This research is based on the imperatives raised by the situations enumerated above.

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<sup>107</sup> UNICEF 'General Comments of the Committee on the Rights of the Child: A Compendium for child rights advocates, scholars and policy makers' (January 2014). Available at <http://www.Unicef.org> Accessed on 05 February 2014; see also M Santos 'Monitoring Children's Rights: A View From within' in E Verhellen (ed) *Monitoring children's Rights* (1996) 139.

<sup>108</sup> UNICEF (note 107 above) 38.

<sup>109</sup> Mangu (note 90 above).

<sup>110</sup> 2013 Report of the Secretary General of the Security Council (A/67/845-S/2013/245) 15 May 2014. Available at <http://reliefweb.int/report/world/children-and-armed-conflict-report-secretary-general-a67845%E2%80%93s2013245>. Accessed on 15 May 2014.

<sup>111</sup> Odongo (note 75 above).

<sup>112</sup> Kenya's new Constitution, came in force in 27 August 2010, it introduced a Bill of Rights (chapter 4).

<sup>113</sup> African Network for the Prevention and Protection against Child Abuse and Neglect (note 18 above).

<sup>114</sup> Skelton & Courtenay (note 53 above) 180.

In summary, the problem is that the governments of these three countries have committed themselves to implement children's rights yet fulfilling them remains a challenge. This study seeks to explore the extent to which children's survival rights can be fulfilled in these countries, and to identify ways to overcome the challenges that the countries face.

### **1.5. Aims, objectives, and purpose of the study**

The most pertinent issues that this study seeks to address is the extent to which the children's survival rights are being fulfilled in the afore-mentioned countries. The investigation includes challenges relating to the implementation of those rights as well as the lessons that can be learnt from the different countries. The researcher aims to produce a model guideline for effective realisation and observance of the specified children's rights in the countries under investigation.

It appears that strategies and programmes applied in South Africa are more advanced than the other two countries.<sup>115</sup> Strategies such as justiciability of children's rights,<sup>116</sup> co-operation with various institutions involved in child rights for example Centre for Child Law, Children's Institute and Children's NGOs seek to enforce children's rights.<sup>117</sup> In addition, South Africa caters for programmes such as child support grants, child protection programmes, and a National Plan of Action.<sup>118</sup> For the purpose of this investigation, the study will focus more on the child support grant and determine whether this programme and strategy may be applicable to the DRC and Kenya as crucial lessons from South Africa.

#### **The objectives of the study are as follows:**

- a) To identify laws; strategies and programmes recently applied in South Africa in the implementation of child survival rights.

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<sup>115</sup> FN Zaal 'Fostering by caregivers with no common law duty of support: At last, some clarity in the law – *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ)' (2013) 34(3) *Obiter* 590.

<sup>116</sup> See S 28 of the South African Constitution, 1996.

<sup>117</sup> SAHRC'S Work on Children's Rights 12 November 2014. Available at [www.sahrc.org.za](http://www.sahrc.org.za). Accessed on 03 February 2015.

<sup>118</sup> Department of Women, Children and People with Disabilities 'National Plan of Action for children in South Africa'. Available at [www.pmg.org.za/files/doc/121129\\_national\\_plan.pdf](http://www.pmg.org.za/files/doc/121129_national_plan.pdf). Accessed on 04 February 2015.

- b) To highlight the challenges faced in the realisation and observance of these rights and to find alternative preventive measures.
- c) To scrutinize the current situation of child survival rights in Kenya and DRC.
- d) To compare and establish whether programmes applied in South Africa might be applicable in Kenya as well as the Democratic Republic of Congo.
- e) To produce a model guideline for effective child survival rights realisation.

### **1.6. Research Questions**

To achieve the objectives stated above, a number of research questions are raised. They are as follows:

- a) What are the current laws, policies and programmes on child survival rights applied in South Africa?
- b) How are they being applied? What challenges are experienced?
- c) What is the current situation of child survival rights in Kenya and DRC?
- d) Are South African approaches suitable for application in Kenya and DRC?
- e) What needs to be done for effective implementation of children's survival rights in the three jurisdictions?

### **1.7. Motivation of the study**

The realisation of children's rights is not a new topic. As indicated above, numerous studies have been conducted since the promulgation of the CRC to date. However, there is an apparent lack of progress regarding the implementation of children's rights in the respective countries under investigation. It is worth emphasising that the implementation and observance of the survival rights of children is still inadequate in countries such as Kenya and the DRC. It is envisaged that the findings of this research with respect to the realisation of children's survival rights and strategies used in South Africa will be recommended for adoption by the other African countries and then used in their respective jurisdictions.

## 1.8. Research Methodology

According to Bertram data collection methods fall into two broad categories, namely, quantitative and qualitative.<sup>119</sup> Quantitative methods, on the one hand, involve collecting numerical data which can be counted<sup>120</sup> and then used to answer questions of prevalence.<sup>121</sup> In addition, researchers use quantitative methods to establish correlational or casual relationships.

Qualitative methods, on the other hand, involve collecting textual or verbal data, or graphic data such as pictures or photographs.<sup>122</sup> Qualitative methods are used when an in-depth enquiry is made.<sup>123</sup> In this study the researcher will employ the qualitative method of research to analyze and interpret textual data. Neuman identifies four types of research design, namely, exploratory, descriptive, explanatory and evaluative research.<sup>124</sup>

Exploratory research is research conducted on a new topic to develop a general understanding and clarification of ideas for the future.<sup>125</sup> Descriptive research highlights the specific details of a situation with its attendant social setting.<sup>126</sup> Explanatory research intends to test a theory or develop a new account of why activities, events or relations occur as they do.<sup>127</sup> Finally, evaluative research is applied research that is designed to establish whether a programme, product or policy achieves what it claims it is achieving.<sup>128</sup>

This research will be an evaluative qualitative type of research as it will identify laws, policies, strategies and programmes to evaluate effectiveness and draw conclusions. This research falls within the interpretative paradigm as the

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<sup>119</sup> C Bertram *Understanding Research: Learning Guide and Reader* 2nd ed (2003) School of Education and Development, Faculty of Education, University of Kwazulu Natal 59.

<sup>120</sup> Ibid.

<sup>121</sup> Bertram (note 119 above).

<sup>122</sup> E Babbie & J Mouton *the Practice of Social Research* (eds) (2001) 30. See also J Mouton *How to succeed in your Masters' and Doctoral Studies* (2001).

<sup>123</sup> Ibid.

<sup>124</sup> W L Neuman *Understanding Research* (2009)13. See also R Gomm *Social Research Methodology a Critical Introduction* ed (2004)7. M David & CD Sutton *Social Research: The Basics* (eds) (2004)35.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Neuman (note 124 above).

researcher aims to understand the extent to which children survival rights are being fulfilled and what can be done for better their realisation. As such, the research will be a desktop and library-based study that relies on primary and secondary sources of data for contextual insight as well as critical commentary. As far as primary sources are concerned, this study will include references to conventions, treaties, the Constitution of the Republic of South Africa 1996(the 1996 Constitution), the Constitution of Kenya 2010 and the DRC Constitution 2006. Relevant legislation and judicial decisions related to children's survival rights in the three countries will be read, analysed and compared. Secondary sources will include academic commentary in text books, journals articles, policy documents, strategies in use in existing programmes as well as internet resources. The internet was used to supply information from electronic journals and other scholarly articles online. The internet also was helpful in terms of using websites of international organisations such as the UN, UNICEF, CRIN and many other organisations which yielded invaluable and up to date information.

As far as the comparative analysis is concerned, it is considered relevant to this study as the lessons learnt from each jurisdiction can be expected to contribute to their national systems.<sup>129</sup> As a result this research will use a comparative analysis.<sup>130</sup>

### **1.9 Limitations of study**

The first issue to emphasise in this study is that children's survival rights are subject to a narrowly defined interpretation to include the biomedical framework; this study has however taken a human-right based approach.<sup>131</sup> This approach considers children as the holders of their own rights. The study attempts to understand who the duty bearers are and their obligations in terms of the realisation of children's survival rights. The constraint encountered in this study is the scarcity of research

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<sup>129</sup> M McConville & W Hong Chui *Research Methods for Law* (eds) (2007)87.

<sup>130</sup> J Bell *Judiciaries within Europe: A Comparative Review* (2006); see also D Bradley 'A note on Comparative Family Law: Problems, Perspectives, issues and Politics' (2005) *Oxford University Comparative Law Forum* 4; W Mensi *Comparative Law in a Global Context: The legal Systems of Asia and Africa* 2ed (2006).

<sup>131</sup> See 1.3 preliminary literature review.



sources in relation to a number of specific children's survival rights issues. This thesis makes an attempt to remedy the problem of the dearth of literature by placing more reliance on the emerging CRC jurisprudence, international and human rights bodies and domestic courts.

The additional challenge is that the comparative analysis requires substantial uniformity in the discussion of the three countries under study namely Kenya, DRC and South Africa. While an attempt is made to ensure uniformity in respect of the practical situations in the three, obvious discrepancies could not be avoided due to the fact that in certain respects there were more resource materials in relation to some countries than was available for others. Of specific significance is the fact that discussions on South African children's rights have been far more detailed and dealt with through past law reforms, judicial decisions, academic articles and books than in Kenya and the DRC. This obviously resulted in an imbalance in the sense that in many respects, the South African position is scrutinised in more detail in the thesis with the use of primary sources, specifically judicial decisions. In addition, finding domestic judicial decisions on children's rights and academic opinions in respect of the DRC presented a particular challenge. However the thesis attempts to limit this imbalance by taking into account information drawn from resource materials such as policies and reports from government and NGOs that was accessible in dealing with Kenya and the DRC.

### **1.10 Ethical Considerations**

David and Sutton state that research involving human subjects should be ethical in its selection, conduct and distribution of findings.<sup>132</sup> They emphasize how ethical approaches connect with fundamental understandings of society and individuals.<sup>133</sup> The following are the keywords that cover ethical considerations, namely, advocacy, anonymity, codes, confidentiality, informed consent, value freedom, value neutrality and trustworthiness.<sup>134</sup> Therefore, ethical measures become relevant in qualitative research as they are in quantitative research and include conduct towards participants' information as well as honest reporting of the results. As far as this

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<sup>132</sup> David & Sutton (note 124 above) 21.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

study is concerned no human subject interaction such as interviews or face to face discussions will be involved. As this research is a desktop analysis it complies with the basic requirements of ethical research.

### **1.11 Demarcation of the study**

**Chapter one** gives an overview of the study which encompasses the background of the study, preliminary literature review, problem statement, aims, objectives and purpose of the study. The research questions, motivation of the study, research methodology, ethical consideration and demarcation of the study are also included.

The remainder of the study is subdivided into five other chapters, focusing on the following relevant issues:

**Chapter two** contextualises the study by providing the conceptual and theoretical framework underpinning the survival rights of children. The chapter elaborates the concept of children's rights and development to universally accepted human rights. The exploration of liberalists and protectionist theory is also covered in this part of the study. In addition a survival right is elaborated from the human rights perspective.

**Chapter three** introduces the current position relating to children's rights in South Africa. The goal of the chapter is to explore laws, policies and programmes applied in South Africa in terms of children's survival rights.

**Chapter four** focuses on the current status of children's survival rights in Kenya and the DRC. The chapter is organised in three main parts. The first part concentrates on the analysis of children's survival rights laws in Kenya dealing with children as well as available programmes and policies. The second part highlights the status of DRC laws, policies and programmes available for the realisation of children's survival rights. The third part explores the concluding observations made by the Committee on rights of the child on the current report by the three countries under study.

**Chapter five** encompasses a comparative analysis of South Africa, Kenya and the DRC. The chapter focuses on the legal position of the countries under study,

pointing out the shortcomings and identifying the best practices positions and lessons to be learnt.

**Chapter six** entails the conclusion of the study. The chapter goes back to the research objectives, preparatory to setting out the findings and recommendations of the study as well guidelines for effective realisation of children's survival rights in the three countries. The chapter concludes by outlining the limitations of the study as well as pointing out the areas for further research.

### **1.12 Definition of key terms**

The definition of terms will give a reader an understanding of the purpose of this study. It is relevant to identify and define the meaning of the key terms used so as to place their meaning within the context of the investigation.

#### **1.12.1 Child**

Article 1 of the CRC defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

#### **1.12.2 Convention**

'Standard term for multilateral agreements concluded as a rule in the framework of international organisation, and which regulate issues concerning international relation and international law'.<sup>135</sup>

#### **1.12.3. Cash Transfer**

A cash transfer is a direct transfer of assistance, usually transmitted by the state, in the form of money, to a targeted or specified beneficiary, usually an individual, a household or community.<sup>136</sup>

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<sup>135</sup> FDFA 'ABC of International Law'. Available at <https://www.eda.admin>. Accessed on 19 October 2017.

<sup>136</sup> Glossary of cash transfer terminology. Available at [www.cashlearning.org](http://www.cashlearning.org). Accessed on 14 October 2017.

#### **1.12.4 Dualism**

Is a principle to which international law norms and standards are incorporated into the body of national laws in order to effect within a country. This process is contrary to the monism principle.<sup>137</sup>

#### **1.12.5 Fulfilment**

The quality of being fulfilled, completion, realisation.<sup>138</sup>

#### **1.12. 6 Implementation**

Is the process of putting a decision or a plan into effect, execution.<sup>139</sup>

#### **1.12.7 Health**

‘The condition of the body and the degree to which it is free from illness or state of well-being’.<sup>140</sup>

#### **1.12.8 Legislation**

‘It is written law enacted by a body or person with the authority to do so by the Constitution or other legislation’.<sup>141</sup>

#### **1.12.9 Monism**

This principle in which international law norms and standards automatically obtain validity at the national level contrary to the dualism system.<sup>142</sup>

#### **1.12.10 Nutrition**

‘Nutrition is the intake of food, considered in relation to the body’s dietary needs. Good nutrition – an adequate, well balanced diet combined with regular physical activity – is a cornerstone of good health. Poor nutrition can lead to reduced immunity, increased’.<sup>143</sup>

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<sup>137</sup> Ibid 14.

<sup>138</sup> [www.dictionary.com](http://www.dictionary.com). Accessed on 19 October 2017.

<sup>139</sup> Ibid.

<sup>140</sup> Dictionary.cambridge.org/dictionary/English/health. Accessed on 19 October 2017.

<sup>141</sup> C. Botha *Statutory Interpretation: an introduction for students* (2012)15.

<sup>142</sup> FDFA (note 135 above) 26.

<sup>143</sup> Available at [www.WHO.int](http://www.WHO.int). Accessed on 19 October 2017.

### **1.12.11 Obligation**

‘An act or course of action to which a person is morally or legally bound; a duty or commitment’.<sup>144</sup>

### **1.12.12 Ratification**

Ratification, distinguished from accession, signifies an act of approving or giving consent to an agreement. Ratification takes place at the participating state’s national parliament and indicates the participating state’s commitment to be legally bound by the terms of the agreement at an international level. The participating state usually signs the protocol or treaty and then goes back to its national parliament to approve it as binding on it through an act of ratification.<sup>145</sup>

### **1.12.13 Right**

Legal entitlement that someone has to claim for him or herself, or on behalf of someone else, and this may have the constitution, the legislation or the common law as the basis.<sup>146</sup>

### **1.12.14 Realisation**

‘An act of becoming fully aware of something as a fact, the achievement of something desired or anticipated’.<sup>147</sup>

### **1.12.15 Signature**

In international law signature or signing denotes a preliminary approval of a convention by a participating state’s representative. It does not create a binding legal obligation but merely demonstrates a country’s willingness to consider the treaty domestically before deciding to domesticate it. Signature does not force the participating state to bind itself to the treaty through ratification. It merely indicates its promise that it will refrain from any acts that will tend to undermine the spirit, terms or objectives of the international agreement.<sup>148</sup>

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<sup>144</sup> Available at <https://en.oxforddictionaries.com>. Accessed on 19 October 2017.

<sup>145</sup> Available at <https://www.unicef.org>. Accessed on 19 October 2017.

<sup>146</sup> Humby & others *Introduction to law and legal skills: in South Africa* (2012) 400.

<sup>147</sup> Available at <https://en.oxforddictionaries.com>. Accessed on 19 October 2017.

<sup>148</sup> Ibid.

#### **1.12.16 State party**

‘State party to a treaty refers to a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument’.<sup>149</sup>

#### **1.12.17 Strategy**

Is related to the way in which human and physical resources will be deployed and applied in order to maximize the chance of achieving a selected objective in the face of hurdles.<sup>150</sup>

#### **1.12.18 Policy**

‘A course or principle of action adopted or proposed by an organization or individual’.<sup>151</sup>

#### **1.12.19 Programme**

‘Programmes are short-term interventions that create temporary improvements in the wake of challenges’.<sup>152</sup>

### **1.13 Conclusion**

This chapter has introduced the research topic by giving an overview of the study. It outlined the preliminary literature review. The problem statement specified the gap in the literature. The aims of the study, research questions, motivation of the study, research methodology clearly mentioned the importance of this study; limitations of the study, ethical considerations and the demarcation of the study, definition of key terms are also included.

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<sup>149</sup> Available at [www.unicef.org](http://www.unicef.org). Accessed on 19 October 2017

<sup>150</sup> Available at <https://www.scribd.com>. Accessed on 19 October 2017.

<sup>151</sup> Available at <https://en.oxforddictionaries.com>. Accessed on 19 October 2017.

<sup>152</sup> Available at <http://www.governing.com>. Accessed on 19 October 2017.

## **CHAPTER TWO**

### **CONCEPTUAL AND THEORETICAL PERSPECTIVE UNDERPINNING THE SURVIVAL RIGHTS OF CHILDREN**

#### **2.1 Introduction**

This chapter discusses the conceptual and theoretical framework underpinning the survival rights of children. It traces the concept of children's rights and development to universally accepted human rights. This chapter also explores different theories of children's rights. In this regard the chapter presents the liberationist and the protectionist theories. In addition the chapter also discusses a mixed theory and elaborates on the survival rights of children from a human rights perspective.

#### **2.2 Conceptual framework**

##### **2.2.1 Understanding child, childhood, and rights**

The concept of children's rights is not easy to define, due to the existence of numerous diverse and contradictory understandings of what constitutes children's rights.<sup>153</sup> However a meaning can be given to children's rights only if attempts are made to expand on the concepts of child, childhood and rights. In terms of article 1 of the CRC 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. The convention mentions eighteen as the maximum age limit for childhood; however State Parties are given permission to use a lower age for the enjoyment of most rights.<sup>154</sup> The ACRWC however defines a child as 'every human being below the age of 18 years'<sup>155</sup> and therefore does not provide for '...unless under the law applicable to the child...' as in the case of the CRC. This African treaty therefore

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<sup>153</sup> P Alderson *Children's rights: Exploring beliefs, principles and practices* (2000).

<sup>154</sup> Art 1 of the CRC.

<sup>155</sup> Art 2 of the ACRWC which reads 'A child means every human being below the age of 18 years'.

specifies a fixed age as far as childhood is concerned.<sup>156</sup> Some scholars also attempt to supply a definition of child. For example Saunders and Goddard argue that a child is a recently born human being or young person either male or female between infancy and youth.<sup>157</sup> Wesley clarifies different categories of a child.<sup>158</sup> A very young child under the age of about eighteen months is a baby or infant.<sup>159</sup> A child who has just learnt to walk is a toddler. A child up to the age of nine or ten is usually a little girl or little boy; and a girl or a boy can refer to anyone up to the age about twenty.<sup>160</sup> However, a person aged between thirteen or nineteen may prefer to be addressed as a teenager or a young woman or man.<sup>161</sup> Considering this category it can be argued that the definition of a child includes infant, toddler, boy and girl, young man and woman. Consequently, the general conception of a child seems to limit it below the age of eighteen. However, it appears that the Human Rights Committee afforded States Parties discretion to use their own definition except where treaties provide for a specific age.<sup>162</sup> By the same token, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)<sup>163</sup> and the African Charter on Human and Peoples' Rights 1981(ACHPR)<sup>164</sup> both protect children's rights without providing a definition of a 'child'.

As far as childhood is concerned, this concept relates to the age between birth and attainment of adulthood.<sup>165</sup> It is also a complex concept to define.<sup>166</sup> This concept began to emerge in the late seventeenth century when the first historical study of childhood was done by Ariès. He argues that

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<sup>156</sup> Ibid.

<sup>157</sup> Saunders & Goddard 'the role of mass media in facilitating community education and child abuse prevention strategies' (2002) (16) *Child Abuse Prevention Issues* 388.

<sup>158</sup> Wesley Longman *dictionary of English language and culture*(1993).

<sup>159</sup> Ibid.

<sup>160</sup> Wesley(note 158 above).

<sup>161</sup> Ibid.

<sup>162</sup> Human Rights Committee, General Comments No 17, Rights of the child (HRI/GEN/1/Rev, 9(Vol), 1989) para 4. For example art 6(5) prohibits the imposition of the death penalty on any person under eighteen, regardless of majority or minority status. The United States faced several interesting children's rights issues in the contemporary period. For example in 2005 the Supreme Court ruled that children under eighteen could not be executed for a crime, citing international as one reason for the change see the case of *Roper v Simmons* ,2005.

<sup>163</sup> Arts 10,12 and 13.

<sup>164</sup> Art 18(3).

<sup>165</sup> UNICEF 'state of the world children'(2006)

<sup>166</sup> Alderson(note 153 above).



In medieval society the idea of childhood did not exist, this not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult even the young adult. In medieval society, this awareness was lacking.<sup>167</sup>

According to Ariès children were considered as adult in miniature, with no representative appreciation of their particular and distinctive attribute.<sup>168</sup> In other words this author emphasises that children simply do not count as adults. There was no awareness in the society that children differ from adults. However, this conception of childhood differs from the modern conception of childhood. Modern childhood recognises that children differ interestingly from adults in respect of a set of attributes.<sup>169</sup> Rousseau, who is the pioneer of the modern concept of childhood, upheld the intelligibility and the value of having a concept of childhood that recognises that the child is a child.<sup>170</sup> He criticised those 'seeking to find a man in a child without thinking of what he is before being a man'.<sup>171</sup> Childhood may be understood as the particular nature of the child.<sup>172</sup> It should be noted that human existence is mainly divided into two parts, namely childhood and adulthood. In this regard Archard argues that:-

'children are younger than adults is not all that separates them. This much is clear from the fact that we do customarily also make distinctions with adulthood between for instance, 'middle age' and old age'. But these distinctions have none of the force of that between 'childhood' and 'adulthood' being young is associated with, indeed may well be held responsible for other distinguishing attributes'.<sup>173</sup>

It can therefore be inferred that children are young human beings. The concept of childhood is not separate but is linked to that of adulthood. 'Being a child is the opposite of being an adult'. Both concepts are a state of human being and it does not mean to imply that one state is better than the other. UNICEF describes childhood as 'the state and condition of a child's life'.<sup>174</sup> This implies for example

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<sup>167</sup> P Ariès *L'enfant et la vie familiale sous l'ancien regime* (1960) translated from the French by Baldick as *Centuries of Childhood* (1962).

<sup>168</sup> Ibid.

<sup>169</sup> D Archard *Children rights and childhood* (1993)22.

<sup>170</sup> J Rousseau *The Emile of Jean-Jacques Rousseau*. Translated by William Boyd. York: Columbia UP,(1965)

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Archard(note 169 above)23.

<sup>174</sup> UNICEF (note 165 above) 3.

that a child living in poverty without adequate food, access to education, safe water, sanitation facilities and shelter are also deprived of childhood.

Another concept is 'rights'. Freeman indicate that rights are 'just claims or entitlements that derive from moral and /legal rules'.<sup>175</sup> Furthermore, Freeman argues that anyone who has rights is also entitled to respect and dignity.<sup>176</sup> According to Ladd 'rights are often defined as justified claims'.<sup>177</sup> This author distinguishes between 'welfare rights or positive rights' and 'liberty rights or negative rights'.<sup>178</sup> Positive rights are claims to be given something, for example a right to food and shelter. Negative rights are the claim not to be interfered with. This is the kind of claims that citizens in secular liberalism state can claim for example freedom of expression or freedom of religion.<sup>179</sup> In view of the liberal tradition this rights may only be limited when a person's activities pose harm to others.<sup>180</sup> The concept of children's rights leads to a central controversy between protectionists and liberationists. Protectionists indicate that rights must be exercised on behalf of children; liberationists in contrast insist that rights should be exercised by children themselves. Distinguishing protectionists' rights and libertarian rights brings clarity to the vagueness or ambiguity of the concept children's rights. The theoretical perspectives of the protectionists and liberationists will be discussed in more detail in paragraph 2.3 hereunder.

### **2.2.2 The evolution of children's rights**

Children's rights date back to the eighteenth century when child rights began to demand attention.<sup>181</sup> The involvement of children in the labour sector and their utility in sex relationships for monetary gain drew public demand for the need for legislation to prohibit the premature introduction of children to the labour market as

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<sup>175</sup> M Freeman 'The limits of Children's Rights' in M. Freeman & P. Veerma (eds.) *The ideologies of children's rights* (1992)29.

<sup>176</sup> M Freeman *Human Rights* (2002)6.

<sup>177</sup> R E Ladd 'Philosophical Perspectives on Children's Rights' in M Ruck & others (eds) *Handbook of Children's rights : global and Multidisciplinary Perspectives*(2017)149.

<sup>178</sup> Ibid.

<sup>179</sup> Humby (note 146 above).

<sup>180</sup> Ladd (note 177 above).

<sup>181</sup> P N Stearns 'The history of Children's Rights' in in Ruck M & others (eds) *Handbook of Children's rights : global and Multidisciplinary Perspectives*(2017)3.

well as sexual exploitation of children.<sup>182</sup> This development of children's rights tends to look at two aspects: the first aspect refers to a child's right to education where child labour was outlawed. The second aspect was more of a protective side where children began to be seen as autonomous individuals entitled to their own rights as equal citizens of the world.<sup>183</sup> Gradually children's rights began to be considered as the first phase of the children's rights movement.<sup>184</sup> Key, a Swedish former teacher, appeals that government has the obligation to support the mother and the child at the same time; she was a women's rights activists and pointed out the rights of the child.<sup>185</sup> Key furthermore opposes the use of physical discipline in respect of children or even more reliance on obedience.<sup>186</sup> At the beginning of the twentieth century many people died in the First World War. Most of them became orphaned by the war. Many groups resolved to offer assistance to children being affected by brutal conflict. As a result the League of Nations was formed.<sup>187</sup> The aim of inter-governmental organisations was to try to protect basic human rights standards. The primary target was to secure the rights of women and the special rights of children who had been orphaned by the hostilities of World War I.<sup>188</sup> The primary activities of the League of Nations were supported by the International Labour office which also encouraged more formal thinking about children. The International Labour office focused on a campaign to win global agreement on a ban on the labour of children under the age of fifteen.<sup>189</sup> Around the same time Enlanyne Jebb, a motivated English woman took action.<sup>190</sup> Jebb founded the Save the Children movement.<sup>191</sup>

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<sup>182</sup> Stearns (note 181 above) 3.

<sup>183</sup> Stearns (note 181 above) 12.

<sup>184</sup> Landsdown 'Children Rights' in B Mayall (ed) *Children's childhoods: observed and experienced* (1994) 33. See also O Olusola Samuel. 'A comparative study of child rights coverage in selected Nigerian and Ghanaian newspapers (1999-2003)'.

<sup>185</sup> E Key *The century of the Child* (1909)8.

<sup>186</sup> Ibid 8. With regard to parents and teachers being banned to practice corporal punishment, see the case of *Williamson v Secretary of state for Education and Employment* [2005] 2FLR 374. The case was fought right up to the highest court in the land, the House of Lords. And throughout it was conceived as a dispute between the State with its rights to ban corporal punishment from schools and parents and teachers. Another case is *Wisconsin v Yoder* 406 US 205(1972).

<sup>187</sup> The League of Nations was created in 10January1920.

<sup>188</sup> S Mahkonen 'Children's rights and the media' Malaysia: AIBD. Available at [http://download.aibd.org.my/books/Childrens\\_Rights\\_and\\_the\\_Media.pdf](http://download.aibd.org.my/books/Childrens_Rights_and_the_Media.pdf). Accessed on 17 March 2018.

<sup>189</sup> This was later enforced by Principle 9 of the United Nations.

<sup>190</sup> Stearns(note 181 above)13.

<sup>191</sup> Ibid.

She promoted the Declaration of the Rights of the Child in 1923, the initial document which emphasised the following criteria:

Children must be provided with conditions for normal development, both physically and spiritually. Sick children must be nursed, the hungry fed, the delinquent reclaimed, the homeless sheltered, the backward helped. Children should have first claim on relief in times of distress. Children must learn how to earn a livelihood but must be protected against every form of exploitation.<sup>192</sup>

Looking at the criteria of this declaration, it can be argued that this document gave great consideration to children who did not enjoy the protection of a traditional family. Jebb's principles were adopted by the International Save the Children Union and thereafter were endorsed by the General Assembly of the League, in Geneva, on 26 September 1924.<sup>193</sup> The preamble of the Geneva Declaration of the Rights of the Child 1924 (GDRC) states that 'men and women of all nations, recognising that mankind owes to the child the best it have to give'.<sup>194</sup>

The GDRC encompasses five articles which are referred to as principles. The following are the content of this Declaration given the fact that it has a limited number of principles:

**Principle 1**

The child must be given the means requisite for its normal development, both materially and spiritually.

**Principle 2**

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.

**Principle 3**

The child must be the first to receive relief in times of distress.

**Principle 4**

The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

**Principle 5**

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<sup>192</sup> Stearns (note 181 above)13.

<sup>193</sup> Leagues of the Nations.

<sup>194</sup> Geneva Declaration of the Rights of the Child 1924.

The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

Looking at the GDRC, it can be argued that this declaration protects vulnerable children specifically those who have been deprived of many opportunities.<sup>195</sup> This international document referred to a child as 'it' as if children were objects.<sup>196</sup> It is however relevant to indicate that this Declaration was the first instrument related to children's rights. It should also be noted that the GDRC only provided guidelines though did not have force of law.<sup>197</sup>

The international advocacy movement pursued the work of the GDRC for wider approbation up until the World War Two and then restarted immediately afterwards.<sup>198</sup> The support emerged for example after the government of Belgium opted for greater engagement. Some states such as Britain were reluctant as they worried about interference in their internal affairs.<sup>199</sup> Another activist Janusz Korczak who was the first Polish advocate for children's rights in Europe advanced children's rights in several ways.<sup>200</sup> He was not only interested in protecting children but also appealed that children have the right to speak out.<sup>201</sup> In the United States (US) women movements worked to expand educational opportunities to include pre-schools for immigrant's families and the poor.<sup>202</sup> Another activist Florence Kelley campaigned against child labour. She attempted to get the support for schools directed mostly toward African American children.<sup>203</sup> Moreover, during the same period with the beginning of communist influence Russia's government took drastic

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<sup>195</sup> See Principle 2

<sup>196</sup> See Principle 1 and principle 5.

<sup>197</sup> Stearns (note 181 above) 13.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid. Korczak built an orphanage for Jewish children in 1911-1912 allowing the orphans involved to set up their own parliament and courts for more details see B *Lifton the King of Children: the life and death of Janusz Korczak* (2006).

<sup>201</sup> With regard to free speech a famous court case in 1965 involved three Quaker children who had been suspended from school for protesting the Vietnam War. The Supreme Court ruled that free speech applied to children as well. See also *Tinker v Des Moines Independent Community School District*, 1969; *Re Gault* 387 US1, 1967; *New Jersey v TLO*, 1985.

<sup>202</sup> Stearn (note 181 above) 13.

<sup>203</sup> Ibid.

measures to promote health and expand education.<sup>204</sup> Although the ulterior motive was to score propaganda points, there were important substantive efforts.<sup>205</sup> Contrary to the Western governments, the communist regimes went further in proclaiming that the child is the object of the state upbringing.<sup>206</sup> The government's objective<sup>207</sup> was to protect children and at the same time brainwash children with new ideologies of communism. However this approach in return offered nothing to protect children against the state.<sup>208</sup> The Soviet Union's approach stimulated competition from other countries to induce other children's rights statements.<sup>209</sup> In the US Roosevelt included the term education for the first time when defining human rights seeking to set an agenda for an attractive post World War II society.<sup>210</sup> What transpires from this discussion is that the idea of children's rights was spreading from the protection of the most vulnerable children, to their right to freedom of expression, right to education and the right to medical care.

Similarly after World War II international commitment to developing children's rights continued with the establishment of the United Nations (UN) and the Charter of the UN that was authorized on June 1945 in San Francisco. It was on December 10 1948 that the Universal Declaration of Human Rights (UDHR) was adopted and proclaimed by the UN General Assembly Resolution 217 A/III. The UN's preamble is wide and comprehensive, emphasising that in contrast to the human rights of men and women, children's rights were given little attention until after the rights of all human beings had been established.<sup>211</sup> Article 25(2) of UDHR provides that all

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<sup>204</sup> C Kelly *Children's World: Growing Up in Russia, 1890-1991* (2007).

<sup>205</sup> Ibid.

<sup>206</sup> Kelley (note 204 above)

<sup>207</sup> Ibid.

<sup>208</sup> Ibid. See the 1924, 1936, 1977 Soviet Constitutions.

<sup>209</sup> Stearns (note 181 above) 14.

<sup>210</sup> Ibid.

<sup>211</sup> The UDRH preamble reads as follow: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of 4 all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts 5 which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, 6 to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, Whereas it is essential to promote the development of friendly relations between nations Whereas the peoples of the United Nations have in the Charter reaffirmed their faith 8 in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social

children must receive special care and assistance regardless of whether they were born in or out of wedlock. In view of this perspective it can be argued that the concept of children's rights emerged out of the broader concept of fundamental rights for all people. However many argued that the special needs of children justify an additional separate document.<sup>212</sup> By the same token, in 1946 the Save the Children Organisation of the interwar years became the International Union of Child Welfare.<sup>213</sup> This organisation pressurised the UN to provide a greater relief for children affected by the World War II as well as the adoption of a World Child Welfare Charter. As a result on November 20, 1959 the General Assembly of the UN adopted a better version of the 1924 GDRC which is the 1959 Declaration of the Rights of the Child (UNDRC).<sup>214</sup> The UNDRC added several principles. Compared to the GDRC, the principles of the latter declaration were doubled and extended by including that children need special safeguards and care. Furthermore children needed appropriate legal protection, before and after their birth.<sup>215</sup> The principles of the UNDRC can be summarised as follows:

Principle 1: the child has a right to equality without any kind of discrimination.

Principle 2: the child's best interest shall be the paramount consideration.

Principle 3: the child shall have right to a name and nationality.

Principle 4: the child shall enjoy the benefits of social security.

Principle 5: a special treatment was to be given to a child with a handicap.

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progress and better standards of life in larger freedom, Whereas Member States have pledged themselves to achieve, in co-operation with the 9 United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

<sup>212</sup> W Koop & M Zukerman. *Beyond the Century of the Child* (2003).

<sup>213</sup> Stearns (note 181 above) 14.

<sup>214</sup> The UNDRC was proclaimed by Resolution 1386/XIV of the United Nations General Assembly on the 20th November, 1959

<sup>215</sup> Stearns (note 181 above) 14.

Principle 6: the child shall enjoy the right to full development of personality, love and understanding.

Principle 7: the child shall have the right to free and compulsory education.

Principle 8: the child has a right to first protection.

Principle 9: the child has the right to be protected against neglect, cruelty and exploitation.

Principle 10: the child right to upbringing in a spirit of understanding, tolerance and peace.

As mentioned above, the UNDRC regulated the children's rights more extensively than the 1924 GDRC. The UNDRC included issues such as, happy childhood, name and nationality, benefits of social security, the right to free education; also the best interest of the child concept was new in this declaration.<sup>216</sup> This analysis is supported by Stearns who indicates that:

The new document was both ambitious and somewhat modest. It was ambitious in that the idea of children's happiness was a fairly new concept, though gaining ground particularly in the United States and Western Europe. The linkage of familial and maternal love with children's rights was also an important step. On the other hand the document was quite cautious on the subject of child labour, offering an encouraging formula but no real specifics. As in all major postwar rights conventions, children's rights were assured regardless of race or gender, another significant move.<sup>217</sup>

Furthermore, an improved conception took place where despite the protection of children, a participatory right became of paramount importance. Many leaders such as Farson sought to include children to some basic rights claims arguing that children should be fully free to express themselves.<sup>218</sup> Another Youth Liberation took place in Ann Arbor Michigan around 1970 promoting that children should have the right to decide on matters affecting them directly.<sup>219</sup> Archard raises the point that children's rights should be recognised and accorded equal status rights.<sup>220</sup> The

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<sup>216</sup> See the preamble of UNDHR.

<sup>217</sup> Stearns (note 181 above) 14.

<sup>218</sup> Ibid 15. R Farson *Birth rights* (1974), see also D Gottlieb *Children's Liberation* (1973).

<sup>219</sup> Stearns (note 181 above) 15.

<sup>220</sup> Archard (note 169 above) 45.



movement supporting child participation started around 1960s and 1970s.<sup>221</sup> Meanwhile the United Nations Human Rights Commission group started to work on the draft of the Convention on the Rights of the Child (CRC).<sup>222</sup> It was nearly thirty years later in 1989 that the work on the CRC was completed and the Convention was adopted by the UN General Assembly.

The CRC has the status of a treaty seeing as, it is an international agreement that countries sign and once ratified, they became legally obliged to fulfil it.<sup>223</sup> The CRC became the first legally binding international instrument to incorporate the full range of children's rights.<sup>224</sup> All the countries of the world have ratified the CRC. By 2015 only the US had refrained from signing the treaty. Somalia was the last to sign and ratified the convention on 20 January 2015. It is submitted that compared to its predecessors the CRC has extended children's rights.<sup>225</sup> The CRC is made up of fifty-four articles which all compelled State Parties to focus on the consideration of issues affecting the child from the perspective of the best interest of the child, the child's right to parental care, the child's evolving capabilities and the child's right to be consulted.<sup>226</sup> This legal instrument recognised that children might have different interests than those of their parents.<sup>227</sup> The principle of the best interest of the child was also emphasised.<sup>228</sup> The CRC also acknowledges that children have the right to express their opinions and to have those opinions heard and acted upon when appropriate.<sup>229</sup> In line with the CRC's approach to children's rights the family's responsibility to nurture and raise the child is emphasised whereas the state's responsibility binds it to provide services which protect and enhance the lives of children.<sup>230</sup> More so children should be protected from abuse and exploitation, to

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<sup>221</sup> For example the civil rights movements in the US. It should be noted that although the US has not yet ratified the Convention it was one of approximately eighty states that played a significant role in the drafting of the convention

<sup>222</sup> See comments in UN Economic and Social Council: Commission on Human Rights 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' Thirty fifth Session E/CN.4/1324 27 December 1978.

<sup>223</sup> The CRC was adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989. It entered in force on 2 September 1990

<sup>224</sup> The preamble of the CRC.

<sup>225</sup> Sterns (note 181 above) 15.

<sup>226</sup> J Ritchie & J Ritchie *The next generation: Child rearing in New Zealand* (1997).

<sup>227</sup> Ibid. Art 12 of the CRC. See annexure.

<sup>228</sup> Art 21 of the CRC. See annexure

<sup>229</sup> Art 12 of the CRC. See annexure

<sup>230</sup> Ibid, 151.

have their privacy protected and their lives should not be subject to excessive exploitation.<sup>231</sup> According to Stearns the CRC defines the child as ‘a person with evolving capacities; while children’s rights of self-determination were not articulated as fully as those of adults, because of their immaturity and dependency, they did warrant recognition’.<sup>232</sup> Against this backdrop, it can be argued that the most important contribution of the CRC was the inclusion of article 12 that relates to child participation.<sup>233</sup> In addition, the convention emphasised that children should not be subjected to torture, capital punishment or life imprisonment.<sup>234</sup>

The discussion above was related to the historical evolution of children’s rights. What transpires from the aforesaid is that the idea of children’s rights now forms part of international law and therefore reached new levels. The implementation of the CRC led to a new perspective of children’s rights where children ceased to be seen as objects of protection but rather began to be perceived as holders of rights predicated on their own status as children.<sup>235</sup> It should also be noted that the CRC has two optional protocols adopted by the UN General Assembly in May 2000.<sup>236</sup> The focus of this study is however on the realisation of children’s survival rights. Accordingly the next part of the thesis relates to the substantive part of the CRC in general and in particular children’s right to survival.

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<sup>231</sup> Art 13,14,15,16 of the CRC. See annexure.

<sup>232</sup> Ibid.

<sup>233</sup> This article reads:

1.States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2.For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>234</sup> Art 37 of the CRC. See annexure.

<sup>235</sup> M Mauras ‘Public Policies and the Child Rights: entering the Third decade of the Convention on the Right of the Child’ (2011) 52 In *the Annales of the American Academy of Political and Social Science* 633. See also the history of children’s rights: whose story?’ Cultural survival Magazine (June 2000) in <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/history-child> Accessed 13 December 2016. See [1986] A.C 112. *Gillick v West Norfolk and Wisbeck Area Health Authority*

<sup>236</sup> The Optional Protocol on the Sale of children, child prostitution and child pornography, adopted 25 May 2000. The Optional Protocol on the involvement of children in armed conflict adopted 25 May 2000.

### 2.2.3 Substantive rights in the CRC

In light of the above discussion, it is submitted that the CRC encompasses fifty-four articles, with each article focusing on a different right.<sup>237</sup> These rights are divided into four groups, namely survival rights, protection rights, development rights and participation rights.<sup>238</sup>

**Survival rights** acknowledge the child rights to life and the basic need to existence. These include nutrition, shelter, an adequate standard of living and access to medical service.<sup>239</sup>

**Development rights outline** what children need to reach their full potential; these rights guarantee the right to education, play, leisure, cultural activities and access to information, freedom of thought, conscience and religion.<sup>240</sup>

**Protection rights** ensure that children are safeguarded against any form of abuse, neglect and exploitation. Furthermore protection rights extend rights to special care for refugee children as well as the safeguarding of children in the criminal justice system, prohibition of the employment of children including the protection and rehabilitation of children who have suffered exploitation or abuse of any kind.<sup>241</sup>

**Participation rights** include children's right to freedom of expression, the right to have a say in matters affecting their lives, to join associations and to assemble peacefully.<sup>242</sup>

It bears repeating that though CRC encompasses four categories of children's rights,<sup>243</sup> there is a further subdivision whereby survival and development rights are

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<sup>237</sup> Part 1 of the CRC is related to substantive provisions it includes 41 articles, part 2 outlines the implementation and monitoring it encompasses 4 articles, part 3 has the final clauses 9 articles.

<sup>238</sup> See the Committee on the Rights of the child which is a monitoring body of the Convention established in terms of art 43 of the CRC.

<sup>239</sup> Arts 16, 18, 23, 27, and 39 of the CRC. See annexure.

<sup>240</sup> Arts 17, 28, 29, and 31 of the CRC. See annexure.

<sup>241</sup> Arts 11, 16, 19-22, 32-34, 37-38 of the CRC. See annexure.

<sup>242</sup> Arts 12,13,14,15 of the CRC. See annexure.

<sup>243</sup> For the purpose of this study the focus is on children's rights categories not on the general principles in CRC.

viewed as combined rights which thus become referred to as provision rights.<sup>244</sup> It is therefore important to note that the three categories of children's rights - provision rights, protection rights and participation rights - laid down by this subdivision become critical in the protection of children's rights.<sup>245</sup> As a result State Parties have the obligation to fulfil these rights.<sup>246</sup>

In addition, it should be noted that among the substantive provisions of the CRC four articles have been given special consideration given the fact that they are basic to the implementation of all rights contained in the convention. These articles are known as the CRC 'general principles'.<sup>247</sup> These principles are non-discrimination,<sup>248</sup> the best interests of the child,<sup>249</sup> the right to life survival and development,<sup>250</sup> and respect for the view of the child.<sup>251</sup> For ease of reference it is necessary to reiterate these provisions

**Article 2 states that**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

**Article 3 reads**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 6 provides that**

1. States Parties recognize that every child has the inherent right to life.

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<sup>244</sup> United Nations World Summit for Children (1990) *World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s* New York: United Nations.

<sup>245</sup> Below are more details. See G Van Bueren *The International Law on the Rights of the Child* (1995).

<sup>246</sup> Alliance for child rights (2006). Available on <http://kids-alliance.org>. Accessed on 13 June 2017.

<sup>247</sup> Art 43 of the CRC. The Committee on the Rights of the Child. See M S Pais 'Monitoring Children's Rights a View from Within' in E Verhellen (ed) *Monitoring Children's Rights* (1996)129.

<sup>248</sup> Art 2 of the CRC. See annexure.

<sup>249</sup> Art 3(1) of the CRC. See annexure.

<sup>250</sup> Art 6 of the CRC. See annexure.

<sup>251</sup> Art 12 of the CRC. See annexure.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

**Article 12 stipulates that**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the child applies these general principles in different context in its General Comments.<sup>252</sup> This is part of the CRC developing jurisprudence given the fact that the General Comments made by the committee mainly serve as a guide to the interpretation of the CRC as a whole and also provide the committee's interpretation of specific articles in the Convention.<sup>253</sup>

What transpires from the above discussion is that the CRC portrays a new perspective on the child and childhood. Children are neither the property of parents nor merely helpless objects. They are now considered as human beings and subject of their own rights. The child is pictured as a competent individual and a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development.

It is notable, however, that comprehending children's rights from a philosophical, moral, legal and social perspective presents complexity and controversy.<sup>254</sup> As a result several scholars have expressed disagreements on children's rights. Some scholars argue that children are duty holders whilst others are of the view that children should be treated as the sole responsibility of their parents.<sup>255</sup> It is against

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<sup>252</sup> For example General Comment 4 the principles applied in the context of adolescent health. See General Comment 4 *Adolescent Health and Development in the Context of the Convention on the Right of the Child* CRC/GC/2003/4.

<sup>253</sup> P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in T Boezart (ed) *Child Law in South Africa* (2009).

<sup>254</sup> Human (note 2 above) 243.

<sup>255</sup> Ibid. See also Alston 'The best interest principle: Towards a reconciliation of culture of human rights' in P Alston (ed) *The best interest of the child: Reconciling culture and Human Rights* (1994). Children's rights have been conceptualised as freedoms, powers, values. The following authors discussed about it in more details B Franklin 'the case for children's rights: A progress report' In B. Franklin *The handbook of children's rights: Comparative policy and practice* (1995); B Mayall 'The

this background, therefore, that this study extensively drew insights from the theories of children's rights which several scholars advocate in their theories.<sup>256</sup> This extensive drawing of insights from scholars will contribute to understanding the model developed to evaluate children's rights in practice.<sup>257</sup> The following is a discussion of these theories and the rationale for embarking on this discussion is that there is a link between these theories and the categories of children's rights.

### 2.3. Theoretical framework of children's rights

As mentioned above children's rights lead to a central controversy between protectionists and liberationists.<sup>258</sup> It is submitted that the protection and the liberation of children should be considered as the two main theories of children's rights movements. The first group is referred to as the 'child savers' and the latter as 'the kiddie libbers'.<sup>259</sup> Protectionists argue that children's rights are welfare rights which consist of care and protection of the child.<sup>260</sup> According to the exponents of this theory children need to be protected given the fact that they lack abilities and experience that is linked to adulthood.<sup>261</sup>

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sociology of childhood: Children's autonomy and participation rights' in A. B Smith & others (eds.) *Advocating for children: International perspectives on children's rights* (2000)126.

<sup>256</sup> S Te One 'Perceptions of Children's rights in three early childhood settings' Unpublished PHD thesis, Victoria University of Wellington (2008).

<sup>257</sup> S Te One 'Defining rights: Children's rights in theory and in practice' *He Kupu the world*.41.

<sup>258</sup> Ladd (note 177 above) 149.

<sup>259</sup> R H Mnookin 'thinking about children's rights-Beyond Kiddies libbers and child savers'(1981) Stanford Lawyer 24.

<sup>260</sup> Ladd (note 177 above) 149.

<sup>261</sup> Ibid.

On the contrary, liberationists point out that specifically older children should have liberty rights, including the right to make decisions themselves. While protectionists emphasise that rights need to be exercised on behalf of children, liberationists state that children should exercise their rights themselves. For protectionists, children's welfare rights should be the duty and obligation of someone else. By contrast liberationists indicate that liberty requires one to refrain from interfering but must allow someone to freely exercise his or her rights.<sup>262</sup> This is substantiated by Franklin when explaining that:-

The possession of welfare rights –to education, health, to a minimum standard of living – require only that right holder possesses *interests* which can be preserved, protected and promoted. But claims for liberty rights –to participate in decision making to vote –require that the right holder 'must be capable of making and exercising choices'.<sup>263</sup>

The distinction between libertarian rights and protectionist rights originated from the work of Rogers and Wrightsman.<sup>264</sup> These scholars differentiate between nurturance orientation and self-determination orientation.<sup>265</sup> Nurturance orientation can be understood as 'the provision by the society of supposedly beneficial objects, environments, services, experiences, etc..., for the child'.<sup>266</sup> Meanwhile self-determination is related to

Those potential rights which allow children to exercise control over their environments, to make decisions about what they want, to have autonomous control over various facet of their lives.<sup>267</sup>

In light of the above discussion it appears that there is an inverse relationship between these two kinds of rights 'the more protection given children the less liberty they have and the more liberty they have, the less protection'.<sup>268</sup> The discussion below firstly attempts to elaborate the protectionists' perspective, its proponents and criticisms and secondly the liberalism discourse, its exponents and criticisms. Lastly the model chosen for this study will be mentioned.

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<sup>262</sup> Ibid.

<sup>263</sup> B Franklin, 'The case for children's rights: A progress report' in Franklin, B.(ed) *The handbook of children's rights: Comparative policy and practice* (1995)3-22.

<sup>264</sup> CM Rogers & LS Wrightsman 'Attitudes towards children's rights: Nurturance or self-determination?'(1978) *Journal of Social Issue* 59

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> Ladd (note 177 above)150.

### 2.3.1 Protectionists theory

Basically the idea that children do not have rights has its basis in Roman law, which attributed to the father the natural rights to the children.<sup>269</sup> Fathers had complete control over the children; the latter were treated as property or chattel.<sup>270</sup> John Locke the English philosopher also supports the idea of children being protected and being denied liberty rights.<sup>271</sup> He argues that if children have to make decisions for themselves this liberty will put them in a great danger.<sup>272</sup> Another proponent of welfare rights is another English philosopher Jeremy Bentham who justifies the restriction of children's rights by stating that 'the feebleness of infants demands a continual protection'.<sup>273</sup> This statement implies that children are too vulnerable to take their own decisions even in future they need assistance.

In some cases the protectionist theory is also considered as a paternalistic doctrine or caretaker thesis.<sup>274</sup> However for the purpose of this study the word 'caregiver' will preferably be used *in lieu* of 'caretaker'. Ideally proponents of this doctrine support the view that children have limited range of rights as far as they are concerned.<sup>275</sup> Goldstein, Freud and Solnit single out three rights which they believe children should have, namely right to autonomous parents, to be represented by parents and to parents who care.<sup>276</sup> Guggenheim points out that those children should only have one right which is 'to be raised by parents who are minimally fit and who are unlikely to make significant mistakes in judgement in childrearing'.<sup>277</sup> These authors tend to defend parents' rights rather than children's rights. As a result this conception of limiting the right of a child appears erroneous. Furthermore Guggenheim, being a defender of parents' rights stresses that parents rights are 'sacred'.<sup>278</sup> Freeman

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<sup>269</sup> Stearns (note 181 above) 16.

<sup>270</sup> M A Mason *From father's property to children's rights* (1994).

<sup>271</sup> Locke *The second Treaties of Government* (1952) 242.

<sup>272</sup> Ibid..

<sup>273</sup> J Bentham *Theory of Legislation* (1840).

<sup>274</sup> Caretaker is a concept applied by Archard (note 169 above) 55.

<sup>275</sup> M Freeman 'Why it Remains Important to Take Children's Rights Seriously' (2008) 15 (1) *International Journal of children's rights* 5.

<sup>276</sup> Goldstein & Others *The best interest of the child* (1996) 90.

<sup>277</sup> M Guggenheim *What's wrong with children's rights* (2005) 71.

<sup>278</sup> Ibid.



holds the view that 'it hardly needs to be asked whose freedom and what dignity this is thought to uphold'. It is difficult to see how the creation of a private space in this way can be said to protect the humanity of the child'.<sup>279</sup> Moreso, paternalism can be understood as the doctrine where an adult person finds himself in a better position not only to take care of the interests of the child but also to act on behalf of the child in ways that serve the child's interest.<sup>280</sup> This doctrine thus focuses on the question of what the child should want once he or she is mature enough to decide independently.<sup>281</sup> More often than not, the caregiver theory espouses the protection of children on the basis that they are not yet competent to claim rights themselves.<sup>282</sup> As a result of dependence on adults, the latter have to exercise or claim these rights on their behalf. Mostly supporters of this theory are parents who argue that they are well placed to judge what is in the best interest of the child.<sup>283</sup> Thus, to this effect, Archard states explicitly that:

On the standard liberal analysis children are in a state where adults may paternalistically choose for them. Children are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in the light of relevant information about themselves and the world, and because they are prone to emotional inconsistency such that their decisions are likely to be wild and variable.<sup>284</sup>

According to the protectionists' thesis, what a child prefers to do affects both his and his immediate and future adult self.<sup>285</sup> Consequently, the paternalist caregiver will choose what the child would have chosen had he or she been capable of making a choice.<sup>286</sup> As a result, the basic justification of the caregiver approach is to protect or safeguard the future adult interest which the child is unable to protect as a child.

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<sup>279</sup> Freeman (note 275 above) 13.

<sup>280</sup> This doctrine was developed by Philosophers such as T Hobbes *Leviathan* (1651); J Locke *Second treatise of civil government* (1689).

<sup>281</sup> Te One (note 256 above) 45.

<sup>282</sup> D Archard *Children: Rights and Childhood* ed (1993).

<sup>283</sup> See Bainham *Children – the modern Law* (2013).

<sup>284</sup> Archard (note 169 above) 53.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.* Archard further gives an example of 'trust' where he emphasises that: 'one way in which this line of thought has been expressed is by means of the notion of a 'trust'. In legal terms a trust is an arrangement made for a particular purpose whereby the owner of the property, the trustor, vests the rights of its administration in another, the trustee. The trustee must administer the property to the benefit of the trustor. So the adult caretaker might be described as the trustee of the child's interests who acts to promote them until such time as the child itself becomes an adult and marks the termination of the trust.' See also K H Federle 'Rights flow downhill (1994) 2 *The International Journal of Children's Rights* 343-368; M Freeman; M. (2007). Why it remains important to take children's rights seriously (2007) 15 *International Journal of Children's Rights* 5-23.

As can be seen, this approach denies the child the right to self-determination which is a right which the child should exercise himself on his or her way to becoming adult.<sup>287</sup>

Furthermore, it is noted that nurturing and training a child to achieve self-determination requires two fold scaffolding: first the child needs not only to develop certain basic cognitive skills, such as the capacity to reproduce and express independent thought, but also to argue and thus develop the ability to acquire knowledge about the world.<sup>288</sup> The second scaffolding relates to the child's autonomy which the child has as an entitlement tied to his or her right to an open future.<sup>289</sup> Thus, Archard emphasises that a good protector should endeavour not only to realise the child's particular nature but also to safeguard the child's open possibilities in the future.<sup>290</sup> Purdy, a proponent of the protectionist approach indicates the need of children being taught self-control and morality as this is for him the only possible under adult guidance.<sup>291</sup> Ross' emphasis on a 'protected period' is based on the view that children's decisions are based on limited experience and are not yet ready for life, the protected period will facilitate their long-term autonomy.<sup>292</sup> Hughes argues that exercising liberty rights proves to be a burden that protectionists carry to save children from the burden of taking responsibility for their decisions.<sup>293</sup>

In light of the above conception of the protectionists' theory, several criticisms were levelled. The criticism advanced towards the paternalism approach is that if adults and experts avoid considering a child's view then it becomes difficult to establish what is of most concern to the child in relation to his or her rights.<sup>294</sup> Barford and Wattam are of the view that this theory marginalises or at worst excludes children

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<sup>287</sup> Archard (note 169 above) 55.

<sup>288</sup> Ibid.

<sup>289</sup> J Feinberg 'The Child's Rights to an Open Future' in W Aiken & H La Folette (eds) *whose Child?, Children's Right, Parental Authority and State power* (1980) 124.

<sup>290</sup> Archard (note 169 above).

<sup>291</sup> L Purdy *In their best interest?*(1992).

<sup>292</sup> L Ross *Children, families, and healthcare decision-making* (1998).

<sup>293</sup> J Hughes The philosopher's child in M Griffiths & M Withford (eds) *Feminism perspectives in Philosophy* (1988).

<sup>294</sup> N Taylor & A Smith 'Rights important to young people: Secondary Students and Staff perspectives' (2001)9 *International journal of Children's rights*137-156.

and young people, who by all means need to interrogate and confront 'adulthood'.<sup>295</sup> Furthermore paternalism does not give the child the right to self-determination which is considered fundamental to the rights which children in general are entitled to.<sup>296</sup> Archard is of the view that denying rights of self-determination to children as a group is a cause for concern; the paternalistic approach should consider each case individually.<sup>297</sup> While paternalism claims to protect children from making mistakes, it does not take into account that adults too in turn do sometimes make grave and irremediably harmful decisions affecting children's welfare.<sup>298</sup> The protectionists' argument of child incompetency is mostly challenged by several writers.<sup>299</sup> Weithorn and Campbell tested the decision-making competency on children of four different age groups in medical treatment. They discovered that all the children even the youngest made the same choices that doctors chose as the most suitable.<sup>300</sup> Ladd indicates that:-

A child may be quite competent in one area but incompetent in another. For example, a child brought up in the country may not be able to take care of himself if left in the middle of a big city and a city child will not know how to behave himself if left in a field of cows. Similarly, children who have had experience of serious illness or cancer may be quite sophisticated in the understanding of their situation.<sup>301</sup>

In light of Ladd's statement it can be argued that a child's competency depends on specific circumstances. Beauchamp & Childress indicate seven levels of incompetence:

- i. the inability to evidence a preference or a choice;
- ii. the inability to understand one's situation or relevantly similar situations;
- iii. the inability to understand disclosed information;
- iv. the inability to give a reason;
- v. the inability to give a rational reason;
- vi. the inability to give reasons where risk and benefit have been weighed;
- vii. the inability to reach a reasonable decision, as judged, for example by a reasonable

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<sup>295</sup> Barford & Wattam 'Children participation in decision making' (1991) 5/2 *Practise*, 99.

<sup>296</sup> R Farson *Birtherights*. Ed (1974).

<sup>297</sup> Archard (note 169 above) 53.

<sup>298</sup> Ibid 55.

<sup>299</sup> Ladd (note 177 above) 152. See also *Gillick v Norfolk* [1986] 1 AC (HL) 112,184. Held that children under age of 16 could consent to medical treatment including contraceptive advice and treatment, if they had sufficient understanding and intelligent to comprehend what was proposed as well as the emotional capacity to make mature decision.

<sup>300</sup> L Weithorn & S B Campbell 'The competency of children and adolescents to make informed decisions' (1982) *Child development* 1589.

<sup>301</sup> Ladd (note 177 above) 152.

attached person.<sup>302</sup>

It is arguable that even small children can make choices. Some children can even understand a situation while many children can even disclose information and give reasons.<sup>303</sup> As Cohen points out children could exercise their rights through 'borrowed capacities'.<sup>304</sup> Basically children can be 'highly competent, technically, cognitively, socially and morally'.<sup>305</sup> As a result depriving children their right to self-determination on the competence criterion can always be subject to a discourse.

In the following paragraph the liberalists' theory will be discussed.

### 2.3.2. Liberalists theory

In the early 1970s the urgent need for children to be liberated arose.<sup>306</sup> Farson<sup>307</sup> and Holt<sup>308</sup> are considered as the earliest and extreme liberationists. Their general argument is that children are oppressed and so they need to be liberated from legal institutions that support oppression of various groups.<sup>309</sup> The major oppressed groups in Western society were children, blacks, women and the proletariat.<sup>310</sup> Firestone insists that children should be left alone and that they should be given all the rights that adults possess.<sup>311</sup> Liberationists claim that childishness is a false ideology and that children are entitled to rights and privileges possessed by adults.<sup>312</sup> Farson and Holt distinguish between the kinds of rights that can be accorded to children.<sup>313</sup> For instance the rights to a minimum standard of health care, education and freedom from violence and cruelty are the kind of rights that do not require children to act alone rather it require others to act in order to provide appropriate conditions for children to thrive.<sup>314</sup> However, there are other

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<sup>302</sup> T Beauchamp & J Childress *Principles of Biomedical Ethics* (Oxford, Oxford University Press, 2001).

<sup>303</sup> Freeman (note 274 above) 14.

<sup>304</sup> H Cohen *Equal rights for children* (1980)

<sup>305</sup> Freeman (note 275 above) 14.

<sup>306</sup> Archard (note 169 above) 45.

<sup>307</sup> Farson *Birthrights* (1974) 172.

<sup>308</sup> Holt *Escape from childhood* (1975) 18; See also H L Hart *Essay on Bentham* (1982).

<sup>309</sup> Ladd (note 177 above) 151.

<sup>310</sup> Archard (note 169 above) 45.

<sup>311</sup> S Firestone *The Dialectic of Sex, the case of Feminist Revolution* (1971) 81.

<sup>312</sup> Archard (note 169 above) 46.

<sup>313</sup> Farson (note 307 above), Holt (note 306 above).

<sup>314</sup> Ibid.

rights which require non-interference; children themselves will have to exercise them if they choose to.<sup>315</sup> For example the right to vote, work or travel, own property, choose one's guardian and make sexual choices.<sup>316</sup> According to the liberationists children who possess these kinds of rights must be able to choose for themselves how to lead their own lives.<sup>317</sup> Furthermore, Farson supports this view in pointing out that this is a way of protecting children not their rights.<sup>318</sup> The paternalist on the contrary will emphasise that children need adult to secure their welfare.

Mill argues that no one should interfere with another person's decision because each person has his own interests and knows what is best for him.<sup>319</sup> Indeed children should have those rights that adult possess. However there is a danger of a complete liberation because children need to be protected against their own irrational decisions.<sup>320</sup> It submitted that the concept evolving capacities of the child was introduced in article 5 of the CRC.<sup>321</sup> Ideally, the extreme liberationists did not attract many followers; the discourse remains the balance between welfare rights and liberty rights for children and adolescents.<sup>322</sup> Houlgate for example argues that moral rights are infringed when a person who capable of taking a decision himself is not allowed to do so.<sup>323</sup> Cohen considered children as 'agents'. He indicates that the role of the child's agent would be to provide information age-appropriate language, explain the various options and consequences and then carry out the child decision.<sup>324</sup>

Against this backdrop, several opponents of the liberationist theory criticised it. The first criticism is that for a child to be recognised as a rights' holder, he or she should

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<sup>315</sup> Ibid .

<sup>316</sup> Ibid.

<sup>317</sup> Farson (note 307 above)172.

<sup>318</sup> Ibid.

<sup>319</sup> J S Mill *On Liberty* (1956) 13.

<sup>320</sup> Freeman (note 175 above) 52.

<sup>321</sup> Art 5 states that: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'.

<sup>322</sup> Ladd (note 177 above) 153.

<sup>323</sup> L D Houlgate *Child and the state : A normative Theory of juvenile rights* (1988)103.

<sup>324</sup> Cohen (note 304 above)56.

be able to make and exercise choices.<sup>325</sup> This theory has been criticised especially because it is difficult to apply it to young children who are least competent to make those choices. A further criticism is that a child's right to choose can undermine parental authority and threaten long established family values.<sup>326</sup> Archard points out that

It is simply inconsistent to see self-determination as the fundamental right of all children and yet in the case of very young, to speak of rights which are possessed but not exercised by their holders and which must thus be upheld by adult protectors. Obviously very young children are less equal than others in their right to self-determination.<sup>327</sup>

What transpires from Archard's statement is that young children will not be able to exercise their right to self-determination. Another criticism against the liberationists is that children are vulnerable; they possess fewer resources material, psychological, relational- upon which to control in situations of adversity.<sup>328</sup> Woodhouse argues that 'it is not in a child's interest to be raised in an environment in which parents' rights are being wrongly ignored'.<sup>329</sup> Purdy holds the view that 'an acceptance of liberationist demand would resign us to a world where many people function worse, and take less account of the needs of others'.<sup>330</sup>

As was seen above both theories are subject to criticism. Instead of opting for or against one theory, what is needed is a balance between welfare rights and liberty rights given the fact that there are certain rights that the child obviously cannot exercise until he has developed capacities.<sup>331</sup> The following paragraph discusses authors with mixed or different approaches to children's rights.

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<sup>325</sup> K Haar 'A fight to the death? The needs, rights and welfare of child in need of life saving medical treatment' in C Breen (ed) *Children's needs, rights and welfare: developing strategies for the Whole child in the 21 st century* (2004) 15-40.

<sup>326</sup> Te One (note 256 above).

<sup>327</sup> Archard (note 169 above)50.

<sup>328</sup> Guggenheim(note 277 above)

<sup>329</sup> B B Woodhouse 'Hatching the Egg: A child-centered Perspective parents' rights' (1993)*Cardozo Law Review* 1747.

<sup>330</sup> Purdy (note 291 above).

<sup>331</sup> Feinberg(note 289 above).

### 2.3.3 Different approaches

Scholars such as Eekelaar, Freeman, Wald and Hafen have attempted to provide a practical framework for children's rights.

The interest theory was developed by Eekelaar.<sup>332</sup> In this theory, Eekelaar emphasises that the child is a holder of rights and that the adult's role should be the execution of these rights.<sup>333</sup> Eekelaar thus differentiates between interests that are not only basic and developmental but also autonomous.<sup>334</sup> According to Eekelaar, the basic interests operate at two levels.<sup>335</sup> Firstly, the interests operate at home where parents have the duty to provide for their children within their social capacities; secondly, the interests operate at the national level where the state plays a role in enforcing these rights.

It is argued that developmental interests can be enhanced by affording children equal opportunities to maximise the alternatives available to them during childhood for their capacities to be developed to their best advantage.<sup>336</sup> Arguably again, the responsibility lies within the family to achieve this despite the wider socio-economic and political environment directly impacting on success rates.<sup>337</sup> The autonomy interest approach can be construed as the child's freedom to choose his or her own lifestyle without the control of parents and other adults.<sup>338</sup> According to Eekelaar, the autonomy interest perspective might be understood as the developmental interest. Thus, it can be noted that the autonomy interest cannot be treated in isolation as a stand-alone category without regard to the other two interests which call it into question. This conflict necessitates that the autonomy interest then be downgraded to a subordinate status in relation to the other interests.<sup>339</sup> This theory advocates that as human subjects children should enjoy rights which are dependent on their being considered and respected.<sup>340</sup> It should be noted that the existence of

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<sup>332</sup> Eekelaar (note 25 above) 37.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Eekelaar (note 25 above) 170.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Human (note 2 above) 244.

such rights requires the imposition of duties on parents.<sup>341</sup> The imposition of duties on parents derives from the fact that children have a right to be cared for and nurtured by the parents.<sup>342</sup> Notwithstanding, the attractiveness and usefulness of the interest theory can be challenged on the basis that it leaves unanswered the basis for determining which interests can be converted to rights.<sup>343</sup>

On the other hand, Freeman, Wald and Hafen approaches to children's rights are also noted.<sup>344</sup> Freeman concentrates on the children's rights to welfare, children's rights to protection, and rights their right to be treated as an adult.<sup>345</sup> The approach adopted by Freeman also embraces the caregiver theory as well as the choice theory.<sup>346</sup> Wald identifies children's right against the world, their protection from inadequate care, adult legal status and rights versus parents. Notably, this approach aligns with both the interest theory and the choice theory.<sup>347</sup> Similarly, the two models of children's rights become evident in Hafen's approach.<sup>348</sup> In these two models Hafen gives an exposition of the caregiver theory by asserting that parents have duty to develop their children's minimum capacities and thus prepare them for the individual tradition.<sup>349</sup> From the perspective choice theory Hafen argues that a child's right to choice purports to protect him or her against the long term implications of a possible wrong decision made by his or her own parents.<sup>350</sup> Therefore, it should be borne in mind that some rights, such as the right to health care education and the right to freedom from violence and cruelty, are intended to guarantee the protection of children against certain forms of bad treatment.<sup>351</sup> Notably, this category of rights does not require children to do anything.<sup>352</sup> However, there are other rights which children themselves could exercise if they choose to. A typical example in this regard is the right to vote, work or travel.<sup>353</sup> Thus, the

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<sup>341</sup> P Alston *children, rights, and the law* ed (2010).

<sup>342</sup> Ibid.

<sup>343</sup> J Fortin *Children's Rights and the Developing Law* 2ed (2005)17.

<sup>344</sup> See Chapter One.

<sup>345</sup> Freeman (note 24 above).

<sup>346</sup> Ibid.

<sup>347</sup> Wald (note 27 above).

<sup>348</sup> Ibid.

<sup>349</sup> Hafen (note 30 above).

<sup>350</sup> Ibid.

<sup>351</sup> Archard (note 169 above) 47.

<sup>352</sup> Farson (note 307 above) 172.

<sup>353</sup> Archard (note 169 above) 47.



children enjoying such rights must be able to elect for themselves how they want to conduct their right to vote, work and travel.<sup>354</sup>

It becomes clear from the above discussion that there should be a distinction between the kinds of rights which can be accorded to children and those rights which can be exercised effectively on their behalf of children only under the supervision of adults.

It is on the basis of this view that the writer conceptualised this investigation. The approach taken in this thesis is the liberal paternalism approach which consists of both elements of protection and elements of liberation.<sup>355</sup> In terms of the scope of this study for example survival rights of children become more related to welfare rights where adults and the state need to assist children to realise their rights. However with the same survival rights young children may be able to claim their rights against the state themselves if they are mature enough to do so. It is also stated that parents' rights over children evolve from their parental responsibilities and rights and thus will decrease as the child gets older.<sup>356</sup> As a result, the writer agrees with Freeman that the protection and liberation of a child should not be seen as opposites, but rather as stages in single continuum in the child's development.<sup>357</sup>

This view is even evidenced in the CRC in which different children's rights are incorporated, such as survival rights,<sup>358</sup> development rights,<sup>359</sup> protection rights<sup>360</sup> and participation rights<sup>361</sup>. As mentioned already, the theory of children's rights is complex as it involves philosophical, moral, legal and social dimensions. The aim of this section was to position our investigation in a framework that foregrounds the objectives of the study.

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<sup>354</sup> Ibid.

<sup>355</sup> Freeman( note 24 above).

<sup>356</sup> A Skelton 'Children' in I Currie & J De Waal (eds) *The Bill of rights handbook* (2013) 598. Skelton mentions the case of *Gillick v Norfolk* [1986] 1 AC (HL) 112, 184 which states that 'parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person property of the child.' See also S Human (note 2 above) 243.

<sup>357</sup> Freeman (note 275 above) 15.

<sup>358</sup> See note 239 above.

<sup>359</sup> See note 240 above.

<sup>360</sup> See note 241 above.

<sup>361</sup> See note 242 above.

The following discussion examines survival rights because a range of key children's socio-economic rights derive from them.<sup>362</sup> Thus, for the purpose of this study survival rights are also referred to as socio-economic rights.

## **2.4 Children's survival rights**

Child survival rights need to be analysed from a human rights perspective.<sup>363</sup> Doing so will enable us to identify the rights-holders and the duty-bearers.<sup>364</sup> In light of the foregoing, a descriptive overview of human rights, characteristics and classification are pertinent.

### **2.4.1. Overview of human rights**

#### **2.4.1.1 Philosophical background**

The philosophical basis of human rights is often found in natural law.<sup>365</sup> In natural law thinking, these fundamental rights are considered as a set of norms, on which the validity of man-made laws depend.<sup>366</sup> Mostly, the basis of human rights is found in Christian religion.<sup>367</sup> For instance the statement 'man is made in the image of God and must do unto others as he would like them to do unto him'.<sup>368</sup> After the Middle Ages the source of the rights was found in human rationality.<sup>369</sup>

Initially, Locke was the founder of modern human-rights philosophy.<sup>370</sup> Locke contributes to older ideas of natural law. He espoused on the equality of all human beings and argued that their liberty should be preserved in any valid political system.<sup>371</sup> His ideas contributed to the adoption of the Bill of Rights in England in the seventeenth century.<sup>372</sup> In the English Bill of Rights governmental power was restricted constitutionally for the first time. Locke's work was characterized by its

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<sup>362</sup> DM Chirwa 'Combatting child poverty: the Role of economic, social and cultural Rights' in Sloth Nielson (ed) *Children's rights in Africa: a legal perspective* (2008)93.

<sup>363</sup> M Dutschke & K Abrahams 'Rights in brief: Children's Right to maximum survival and Development'in *child survival project Children's Institute* (2006).

<sup>364</sup> Human (note 2 above) 261.

<sup>365</sup> D Klyen & F Viljoen *Beginner's guide for law students* (2010).

<sup>366</sup> Klyen & F Viljoen (note 365 above).

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

<sup>370</sup> J Locke An essay Concerning the true original extent and end of civil government 'in Hutchins RM (ed) *Great Books of Western World* (1952)25.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

opposition to authoritarianism.<sup>373</sup> According to this English philosopher the individual should use reason to search after the truth rather than simply accept the opinion of authorities.<sup>374</sup> Locke also states that in a natural state all people were equal and independent. In this ideal state everyone had a natural right to defend his life, health, liberty or possessions.<sup>375</sup> These arguments of natural rights form the basis or framework of human rights. Another philosopher is Rousseau, a French social theorist. He argued that 'equality of rights and the idea of justice which this equality creates originate...in the very nature of man'.<sup>376</sup> His thoughts found concrete form in the American Declaration of Independence and the Declaration of the Rights of Man and Citizen in France during the eighteenth century.<sup>377</sup> He claimed that man while solitary was happy good and free.<sup>378</sup> A man has been corrupted by society and civilisation.<sup>379</sup> After the French revolution, France codified human rights law.<sup>380</sup> In the late eighteenth century the German Philosopher Kant also argued that 'humans have rights because unlike animals, they possess an inherent dignity as rational individuals'.<sup>381</sup> He further elaborates that individuals are not just a means for satisfying each other's desire but are also independent, self-ruling ends in themselves.<sup>382</sup> Kant's ideas laid the foundation of the current understanding of human rights. Later, with the enlightenment of these philosophical ideas induced many countries to decide to codify these legal rules.

#### **2.4.1.2. Internationalisation background**

The atrocities committed during the Second World War led to the necessity for the protection of individual rights against state power.<sup>383</sup> As a result modern human-rights protection was initiated on an international level. The UN was founded in 1945. Its purpose was to promote international peace and the protection of human

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<sup>373</sup> This document received the royal assent on 16 December 1689

<sup>374</sup> Locke (note 370 above) 27.

<sup>375</sup> Ibid.

<sup>376</sup> Rousseau (note 170 above) 7.

<sup>377</sup> Ibid

<sup>378</sup> Ibid.

<sup>379</sup> Rousseau (note 170 above) 7.

<sup>380</sup> The French revolution began in 1789 and ended in late 1790s.

<sup>381</sup> I Kant *The Science of right, trans.* (1990).

<sup>382</sup> Ibid.

<sup>383</sup> See the preamble of UDHR.

rights.<sup>384</sup> The General Assembly of the UN adopted the Universal Declaration of Human Rights in 1948.<sup>385</sup> The UDHR lists the basic rights of every individual throughout the world. The Universal Declaration was later supplemented by two covenants.<sup>386</sup> One on political rights and the other on economic, social and cultural rights, namely the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). These documents now form part of public international law. States now show an increasing concern for the destiny of people in other states which has led to an increased internationalisation of standards relating to human rights.<sup>387</sup> Some subject-bound or group-based human-rights protection is also afforded on the international level. An example is the protection of women and children in the later part of the twentieth century.<sup>388</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDW) was adopted by UN in 1979. The Convention on the Rights of the Child (CRC) was approved as an instrument of the UN in 1989. At the regional level mechanisms and organisations also work to protect human rights. The oldest and most successful regional system is the European.<sup>389</sup> Almost all European states are party to the European Convention on Human Rights (ECHR).<sup>390</sup> The European Court of Human Rights enforces the Convention effectively and has already decided numerous cases.<sup>391</sup> The

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<sup>384</sup> Klyen & F Viljoen (note 365 above) 230.

<sup>385</sup> See also chapter two.

<sup>386</sup> Klyen & F Viljoen (note 365 above) 230.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid

<sup>389</sup> As of 1950, the European Coal and Steel Community begun to unite European countries economically and politically in order to secure lasting peace. The six founding countries are Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

<sup>390</sup> This document came into force in 1954. Klyen & F Viljoen (note 365 above) 230.

<sup>391</sup> The following are examples of cases Plattform "Ärzte für das Leben" v. Austria, 21 June 1988, § 31, Series A no. 139; see *Delta v. France* (Article 50), 30 January 1990, § 38, Series A no. 191-A; *Allenet de Ribemont v. France* (interpretation), 7 August 1996, § 17, Reports of Judgments and Decisions 1996-III; see National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, 23 October 1997, § 118, Reports 1997-VII; *Gautrin and Others v. France* (friendly settlement), 20 May 1998, § 57, Reports 1998-III; *Gustafsson v. Sweden* (revision – merits), 30 July 1998, § 28, Reports 1998-V; see *Moreira de Azevedo v Portugal*, no. 11296/84, Commission decision of 14 April 1988, Decisions and Reports 56, p. 126; *Garnieri v Italy*, no. 22256/88, Commission decision of 18 May 1992, unreported

Organisation of African Unity (OAU) in 1981 adopted the African Charter on Human and the People Rights (ACHPR).<sup>392</sup>

The OAU was replaced by the African Union (AU) in 2001.<sup>393</sup> International and regional protection of human rights is only subsidiary. An infringement of rights can be addressed in the most direct way with the least delay internally in the court of each country. The United States was one of the first countries in which a Constitution with the Bill of Rights was adopted. After the Second World War many states for example Germany, India, Canada, Brazil and Namibia decided to drastically include fundamental rights in their constitutions. Individuals within a particular state may approach an international forum such as the African Commission for protection only if they have first exhausted domestic remedies.<sup>394</sup>

#### **2.4.1.3 Understanding human rights**

Every person has an inborn desire to enjoy certain basic needs.<sup>395</sup> The UN describes human rights as those rights that are inherent in our nature as human beings and without which we cannot survive.<sup>396</sup> These rights allow us to develop fully and to use our intelligence, to assist us to satisfy all our needs.<sup>397</sup> The UN emphasizes that these rights are humankind's demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.<sup>398</sup> Denying people these rights creates not only political and social disturbances but also enhances the potential of violence and conflict between the communities.<sup>399</sup> Mubangizi asserts that human rights are not owned by select people or given as a gift.<sup>400</sup> It is thus notable that these rights belong to everybody,

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<sup>392</sup> The OUA was founded on 25 May 1963 in Addis Ababa Ethiopia.

<sup>393</sup> The AU was founded on 26 May 2001 in Addis Ababa Ethiopia.

<sup>394</sup> See the ACHPR.

<sup>395</sup> EM Patel & C Watters *Human rights: Fundamental instruments and documents* (1994) v.

<sup>396</sup> United Nations *Human Rights: Questions and Answers* (1987). See also T Humby (note 146 above); D Klyen & F Viljoen (note 365 above) 229; L Meintjes –Van der Walt & others *Introduction to South African Law : Fresh perspectives* (2012) 191. A Parkes, *Children and international Human Rights Law: The Right of the child to be heard*. (2013).

<sup>397</sup> Humby & others (note 146 above) 285.

<sup>398</sup> United Nations (note 396 above).

<sup>399</sup> Ibid.

<sup>400</sup> JC Mubangizi *The Protection of Human Rights in South Africa* (2004).

irrespective of who they are or what they have done.<sup>401</sup> This is why they are referred to as human rights.

Characteristically, human rights are said to be indivisible, interdependent, inalienable and universal.<sup>402</sup> With regard to their classification, one may distinguish the rights protected in the ICCPR and the ICESCR.<sup>403</sup> The specific rights that are guaranteed in the ICCPR are the civil and political rights which safeguard people against unlawful interference by the state and as such they capacitate people to participate in the civil and political life of the state.<sup>404</sup> Among other things, these rights include the right to freedom of expression, the right to a fair trial, the right to freedom of assembly, the right to elections and to vote.

The socio-economic rights are specific rights guaranteed in the ICESCR. They obligate the state to take positive steps to provide beneficiaries with resources and the services they need to live a decent and meaningful life.<sup>405</sup> Among other rights, socio-economic rights include the right to education, the right to housing, the right to health and the right to social security.

Notably, a common classification of human rights distinguishes first, second and third generation rights. This classification emerged from and reflects the historical development of the general concept of human rights.<sup>406</sup>

First generation rights, on the one hand, are the oldest types of rights and were recognised around the eighteenth century.<sup>407</sup> Given their civil and political nature these first generation rights are sometimes referred to as blue rights.

On the other hand, second generation rights are economic and social rights. Historically, these rights became important after World War Two, when the world

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<sup>401</sup> Ibid.

<sup>402</sup> Indivisible because they all have the same goals, interdependent because full enjoyment of one right depends on the possession of all other rights, universal because they apply uniformly and with equal force throughout the world, Inalienable because they cannot be taken away (UNDH Art 2)

<sup>403</sup> Humby & others (note 146 above) 287. See also A Eide & others (eds) *Economic, social and Cultural rights* (2001)9.

<sup>404</sup> Humby & others (note 146 above).

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

<sup>407</sup> Meintjes & others (note 396 above) 191.

economy and infrastructures needed to be rebuilt after the destruction caused by the war.<sup>408</sup> These second generation rights are also referred to as red rights.<sup>409</sup>

It is also notable that historically, third generation rights came into existence in the 1980s as pollution and wars highlighted the need to protect the environment.<sup>410</sup> These third generation rights include, among other rights, the right to self-determination, right to development and the right to a healthy environment conducive to human well-being.<sup>411</sup>

What transpires from the above classification is that children's survival rights belong to the category of socio-economic rights which is considered as the second generation rights. Arguably, second generation rights are necessary for human survival. Typical examples in this regard are food, shelter and health.<sup>412</sup> Furthermore, human rights are for the benefit of everyone including children.<sup>413</sup> The latter are entitled to fundamental human rights too. As such their entitlement extends to rights holders in their own right. This fact notwithstanding, it is worth reiterating that a distinction of rights should always be made to differentiate the rights which children may exercise alone without any assistance.<sup>414</sup> Thus, in the context of this study, the duty-bearers of survival rights are parents as well as the state which is required by law to fulfil children's rights.<sup>415</sup>

Notably, survival rights are guaranteed by the CRC.<sup>416</sup> More often than not, child survival rights are linked to the development of the child because the child has the

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<sup>408</sup> Ibid.

<sup>409</sup> Humby & others (note 146 above) 288.

<sup>410</sup> Meintjes & others (note 396 above).

<sup>411</sup> Humby & others (note 146 above).

<sup>412</sup> Mubangizi (note 5 above) suggests a new classification of human rights; he argued the African perspective should have four categories, civil and political rights, social and survival rights, economic, developmental and environmental rights, cultural and spiritual rights. Additionally, he raises that social rights should be separated from economic and cultural rights because there is no logical reason why they should be combined. Although this topic is open for discussion it's not the focus of this study.

<sup>413</sup> Archard (note 169 above).

<sup>414</sup> Ibid.

<sup>415</sup> Deutschke & Abrahams (note 363 above).

<sup>416</sup> Arts 6, 24, 26, 27, and 28 of the CRC.

right to survive under conditions that empower him/her to develop his/her full potential.<sup>417</sup>

It should be noted that survival rights are given a narrow interpretation to include the right of a child under the age of five in line with the main focus of most international organizations and agencies.<sup>418</sup> In addition, child survival rights are commonly understood within the bio-medical aspect which includes mortality and morbidity.<sup>419</sup> However, in order to meaningfully realise children's rights, the interpretation of child survival rights should not be restricted to health issues but should also include social security as well as an adequate standard of living which includes respect for the child's human dignity.<sup>420</sup> Furthermore, all children younger than eighteen years are entitled to these survival rights inclusive of children under the age of five.<sup>421</sup> Thus, it is worth emphasising that children's survival rights are not confined to medical care and services but extends to the social domain. .

As a result, it bears noting that survival rights in the form of socio-economic rights include the right to health care, primary education, food, water, social security and housing. Individuals, including children, may not be deprived of such rights.

The following section comprises a discussion of the rights-holders and duty bearers.

#### **2.4.1.4 The rights-holders and duty bearers**

From the perspective of who are beneficiaries of rights and who are duty bearers, children can be considered as the beneficiaries of these rights whereas the family and the State Parties are required to respect, protect and fulfill these rights. By international norms Government as the duty bearer should take measures within its available resources to make sure that children's rights are respected, protected and fulfilled.<sup>422</sup> When ratifying the CRC, member states agreed to periodically review

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<sup>417</sup> Dutschke & Abrahams (note 363 above).

<sup>418</sup> Such as the World Health Organization (WHO), the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP).

<sup>419</sup> Dutschke & Abrahams (note 363 above).

<sup>420</sup> Pais (note 247 above) 138.

<sup>421</sup> UNICEF: A Lake *The state of the world's children: a fair chance to everyone* (2016). Available at <http://unicef.org>. Accessed on 15 December 2017.

<sup>422</sup> Ibid.



laws relating to children's rights.<sup>423</sup> This included the assessment of their social services, legal, health and educational systems as well as the levels of funding for these services.<sup>424</sup> The State Parties also have the duty to help families protect children's rights so as to create an environment where their children can grow and reach their full potential and the following are the guidelines for better implementation of children's survival rights

## 2.5 Guidelines for effective realisation of children's rights

Article 4 of the CRC insists that the State Parties need to take appropriate measures designed to implement the children's rights. Looking at the *case of Social and Economic Rights Action Center and Another v Nigeria (Ogoni's case)*,<sup>425</sup> the African commission indicated four layers of duties which every state party has a duty to carry out. The Commission clearly pinpoints that 'these obligations are universally applied to all rights and entail a combination of negative and positive duties.'<sup>426</sup> Firstly, the Commission explained that the duty to respect obliges the State party not to interfere with the beneficiary's enjoyment of a fundamental right.<sup>427</sup> The state needs to respect the right-holders, their freedoms, resources and liberties in all their actions.<sup>428</sup> With regard to socio-economic rights the commission ruled that the state has an obligation to afford the individual access to the right even if it involves taking legislative and other measures within its available resources.<sup>429</sup>

Second, the Commission further elucidated that the duty to protect requires State Parties to ensure an effective interaction of laws and regulations to enable full realisation of the rights.<sup>430</sup> The laws should enable individuals to freely exercise their rights.<sup>431</sup> Third, with respect to the duty to promote the duty relates more to 'promoting tolerance, raising awareness and even building infrastructures'.<sup>432</sup> Lastly,

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<sup>423</sup> UNICEF 'The Convention on the Rights of the Child' (December 2016).

<sup>424</sup> Ibid.

<sup>425</sup> Communication N<sup>o</sup> 155/96. This case dealt with the Military government of Nigeria which was involved in oil production through the state oil company, these operations have violated the right to healthy environment of the Ogoni people.

<sup>426</sup> *Ogoni's case* (note 425 above) para 44.

<sup>427</sup> Ibid, para 45.

<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid, para 46

<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

the duty to fulfil implies that the State has to move its mechanisms close to the people in order to facilitate realisation of the rights.<sup>433</sup> 'This could comprise the direct provision of basic needs such as foods or resources that can be used for food (direct food or social security)'.<sup>434</sup>

Ideally, it is with reference to the four duties highlighted by the African commission that this study establishes the guidelines. As a result all the African State Parties to the CRC need to respect, protect, promote and fulfil children's survival rights according to the *Ogoni's* case. Moreover from the study it emerged that the following are key principles that have to be followed for effective realisation of the children's survival rights.

### **2.5.1 Non-discrimination**

Non-discrimination is extremely important in the realisation of children's survival rights due to the fact non-discrimination embodies one of the key principles of the CRC.<sup>435</sup> The best approach in realising children's survival rights is not to single out a particular group of children, but instead the state must target all children are vulnerable without distinction of race, sex, language, religion, social or ethnic origin, birth or other status. Basically, in most cases children living in rural areas, children with disabilities and unaccompanied children are vulnerable to marginalisation.<sup>436</sup> Therefore countries have to take the principle of non-discrimination into serious consideration especially when legislatures pass legislation affecting the welfare and wellbeing of children.

### **2.5.2. Human-rights based**

When designing a policy and promulgating laws, as mentioned above the law should protect individuals.<sup>437</sup> In children's matters any law, policy or programmes should be developed in line with the provisions in the CRC.<sup>438</sup> The law should

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<sup>433</sup> Ibid, para 47.

<sup>434</sup> Ibid.

<sup>435</sup> Art 2 of the CRC.

<sup>436</sup> Pais (note 247 above) 136.

<sup>437</sup> *Ogoni's* case (note 425 above) para 46.

<sup>438</sup> Art 18 of the CRC.

promote, protect and support the rights and freedoms of children.<sup>439</sup> In light of the fact that nowadays the law changes with the advances in technology, there is also a need to review and amend law periodically after every three years to ensure that it is still in line with the needs of children.

### **2.5.3 Culture-sensitive**

As this guideline concerns the African context, programmes and policies should be community oriented.<sup>440</sup> As a result local realities should be taken into consideration. Legislations, policies and programmes should be sensitive to local cultures. The CRC encourages the rights and responsibilities of the family to care, socialise and develop their children in accordance with local values, customs and traditions.<sup>441</sup> In the same vein, policies encouraging and supporting families through the fulfilment of children's rights should be developed.

### **2.5.4 Availability of resources**

As mentioned in the *Ogoni* case Government must improve policy and legislation to respect children and their families.<sup>442</sup> Government needs to channel resources for the benefit of families. The state must always budget to provide material assistance and support programmes to beneficiary communities.<sup>443</sup>

### **2.5.5 Public awareness**

Awareness on children's rights means enforcement of legal mechanisms at all levels, through advocacy and social mobilisation.<sup>444</sup> In order to create supportive environments for children, people need to be able to approach the court to enforce their rights. The community at large needs to be educated and empowered to protect children's rights against infringement. As a result the media such as

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<sup>439</sup> *Ogoni's case* (note 425 above) para 44.

<sup>440</sup> T Kaime 'the Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: reflection' (2005) 5 *African Human Rights Law Journal* 225.

<sup>441</sup> Art 30 of the CRC.

<sup>442</sup> *Ogoni's case* (note 425 above) para 47.

<sup>443</sup> Art 27 (3) of the CRC.

<sup>444</sup> Art 17 of the CRC.

television and radio should be utilised to enhance awareness of societal issues in a balanced way so that issues related to children's rights receive wide publicity.<sup>445</sup>

### **2.5.6 Law enforcement**

Government should be held accountable for the fulfilment of its responsibilities to support children's rights.<sup>446</sup> Governments should always monitor their own performance in the realisation of children's rights.<sup>447</sup> While reporting in line with the CRC norms, government are now compelled to make their reports available to the public in their specific countries.<sup>448</sup>

It is in light of this statement that the discussion can move to the following chapter. The question is whether South Africa, Kenya and DRC have the capacity and will to respect, protect, promote and fulfil the children's survival rights as expected of them.

## **2.6 Conclusion**

This chapter endeavoured to elaborate the conceptual and theoretical framework underpinning children's survival rights. Basically, a substantial exploration sought to cover the concepts dealing with child, childhood, rights. In particular the chapter expanded on the evolution of children's rights. The study covered the children's rights movements from the agreement of the Declaration of the Rights of the Child in 1924, Universal Declaration of Human Rights 1948, the 1959 Declaration of the Rights of the Child to the Convention on the Rights of the Child in 1989. It was submitted that the CRC became a legally binding international treaty for all the State Parties and encompassed four categories of rights namely survival rights, development rights, protection rights and participation rights.

From the perspective of a theoretical framework, this chapter analysed two theories namely liberationists (kiddie libbers) and protectionists (child savers). With regard to the liberationist approach it argued that children should exercise their rights themselves without interference. However the latter approach emphasised that

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<sup>445</sup> Kiprotich & Charles (note 22 above) 279.

<sup>446</sup> Art 44 of the CRC.

<sup>447</sup> Pais (note 247 above) 141.

<sup>448</sup> Ibid.

children need to be protected given the fact that they lack the requisite thinking abilities and experience to make critical judgements like adults. This study has adopted a mixed approach. This study adopted a mixed approach. The mixed approach likes the view that in every matter concerning children both the liberationist approach and protectionist approach should be taken. The protection and liberation elements should not be seen as opposed rather as a phase contributing to the child's development.

Looking at the human rights' perspective, the study elaborated on the foundational background of human rights. It becomes clear that survival rights are inconceivable without asking the question who are benefit from survival rights as well as who become bound. In addition the guidelines for effective realisation were also considered in this chapter.

The next chapter analyses children's survival rights within the South African jurisdiction.

## **CHAPTER THREE**

### **CHILDREN'S SURVIVAL RIGHTS IN SOUTH AFRICA**

#### **3.1 Introduction**

The previous chapter discussed the conceptual and the theoretical framework on children's survival rights. The former chapter traced the concept of children's rights and the manner in which these rights developed to universally accept human norms. This chapter evaluates the South African legislative framework pertaining to children's survival rights. The chapter will therefore evaluate the different strategies and programmes available for the realisation of children's survival rights in South Africa.

#### **3.2 Survival right analysis**

##### **3.2.1 International legal framework**

The CRC is regarded as a children's rights landscape.<sup>449</sup> Every state party should abide by rules, after ratification.<sup>450</sup> South Africa has committed itself to the realisation of children's rights.<sup>451</sup> In addition, it also ratified the ACRWC.<sup>452</sup> However, for the purpose of this study, the focus falls more on the CRC since the DRC neither signed nor and ratified the ACRWC.<sup>453</sup>

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<sup>449</sup> Te One (note 257 above).

<sup>450</sup> Mauras (note 235 above)<sup>52</sup>

<sup>451</sup> South Africa signed the CRC on 29 January 1993 and it ratified it in 16 June 1995.

<sup>452</sup> South Africa ratified the ACRWC in 7 June 2000.

<sup>453</sup> Kenya ratified the ACRWC on 25 July 2000. Therefore the DRC is not bound by the ACRWC. For more information see: Ratification Table/ African Charter on the Rights and Welfare of the Child /legal institute Available at [Http:// WWW.achpr.org/instruments/child](http://WWW.achpr.org/instruments/child) ratification. Accessed on 24 May 2017. If the DRC at least signed the ACRWC it would have been bound by it, contrary to the dualist system mostly adopted in Anglo-American systems. The DRC has adopted a monist system. In the monist's view, treaties and conventions do not need to be domesticated a mere ratification leads to

Therefore as a state party, South Africa has a duty to take appropriate measures to achieve improved implementation of children's rights. Appropriate measures in this context should include legislative or administrative measures.<sup>454</sup> The South African government will have to ensure that it respects, protects and fulfils children's rights.<sup>455</sup> As stated above, survival rights are considered as an umbrella from which many socio-economic rights derive.<sup>456</sup> In respect of socio-economic rights, government can only fulfil its duty to the maximum extent out of their available resources and where possible within the framework of international co-operation.<sup>457</sup> Considering that survival rights are in connection with the right to life, basic nutrition, shelter adequate living standards and access to medical service, the state will have to fulfil these rights within its available resources.<sup>458</sup>

The section below attempts to discuss the historical background and then gives a summary of the current domestic legal framework.

### **3.2.2. Historical background of children's rights in South Africa**

The apartheid system had a negative impact on children's rights.<sup>459</sup> In many ways children were victimised by numerous discriminatory practices.<sup>460</sup> Under the system of apartheid service delivery was organised and run on racial lines.<sup>461</sup> Certain services were reserved for racially defined groups.<sup>462</sup> Fighting this segregationist plight was as much about civil and political rights as well as socio-economic rights.<sup>463</sup> During apartheid, children faced ill-treatment through abuse, neglect,

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law enforcement in the State. For more information see M Mangu 'Law, religion and human rights in the Democratic Republic of Congo (2008) *African Human Rights Law Journal* (8) 517.

<sup>454</sup> Art 4 of the CRC.

<sup>455</sup> S 7 of the 1996 Constitution.

<sup>456</sup> Chirwa (note 362 above).

<sup>457</sup> Art 4 of the CRC. It should be noted that South Africa signed the ICESCR. Art 8 of the 1968 Vienna Convention on the Law of Treaties mentions that when a state signs a treaty in the first place, it means that such state has an intention to become party to the treaty. As a result signature does not legally bind the state however states need to refrain from any actions that would jeopardise the object and the purpose of such a treaty.

<sup>458</sup> D Horsten 'Socio-economic rights of Children in South Africa' (2004) *Word and Action* 20.

<sup>459</sup> J A Robinson 'Children's Rights in the South African Constitution' (2003) (1) *PER* 1.

<sup>460</sup> *Ibid.*

<sup>461</sup> S Rosa & M Dutschke 'Child Rights at the Core : The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) *SAJHR* (22)225. See also L Berry & T Guthrie *Rapid Assessment: The Situation of Children in South Africa* (2003) Children's Institute.

<sup>462</sup> M Dutschke & J O Monson 'Children's constitutional Right to social services' *Children's Gauge* (2008) Children's Institute .

<sup>463</sup> *Ibid.*

subjection to child labour on farms coupled with ever escalating infant mortality rates.<sup>464</sup> In addition, for taking part in political activity many children were arrested, imprisoned and detained in custody without trial and whilst in custody they were often tortured and assaulted.<sup>465</sup> Needless to mention such children also faced discrimination in the provision of healthcare and education.<sup>466</sup>

Consequently, during the late 1980s to early 1990s, there have been massive children's rights campaigns launched by non-governmental organisations (NGOs) and community-based organisations (CBOs).<sup>467</sup> The aim was to protect the interests of socially disadvantaged children within the country in an apartheid context.<sup>468</sup> However, it should be noted that these NGOs and CBOs were not well co-ordinated given the fact that they worked for the communities, for instance this was the case in the Western Cape, Natal, and Johannesburg.<sup>469</sup> Furthermore during late 1980s several conferences and events took place focusing on the impact of apartheid on the lives of children, women and families.<sup>470</sup> A typical example is that in September 1987 Radda Barnen funded a conference with a topic entitled 'Children Repression and the Law in Apartheid South Africa'.<sup>471</sup> This conference was held in Harare, Zimbabwe. This conference enabled delegates from NGOs and the Mass Democratic Movement (MDM)<sup>472</sup> to raise legitimate concerns about the impact of apartheid on children.<sup>473</sup> This fruitful conference contributed to the international mobilisation around the worsening plight of South African children.<sup>474</sup> As a result

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<sup>464</sup> G O Odongo 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', Unpublished Thesis, University of the Western Cape, 2005 18.

<sup>465</sup> K Abrahams & T Matthews 'Promoting Children's Rights in South Africa: A handbook for members of Parliament (2011) Parliament of South Africa. Available at [www.parliament.gov.za](http://www.parliament.gov.za). Accessed 25 January 2017. See also A Skelton 'Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control' in Davel, C. J. (eds) *Children's Rights in a Transitional Society* (1999).

<sup>466</sup> Skelton (note 465 above).

<sup>467</sup> Abrahams & Matthews (note 465 above).

<sup>468</sup> Abrahams & Matthews (note 465 above).

<sup>469</sup> S Mabusela Written comments on draft copy of this paper by Ms. Shirley Mabusela, former Executive Director of the NCRC (2000).

<sup>470</sup> S Rama & S Bah 'Monitoring Child Rights in a Society in Transition: The Opportunities Afforded by a Transformed Statistical Agency and the Culture of Child Rights Activism' (2000, Discussion document). Available at: <http://www.statssa.gov.za>. Accessed on 23 March 2018.

<sup>471</sup> Rama & Bah (note 470 above).

<sup>472</sup> This was an anti-apartheid movement in South-Africa

<sup>473</sup> Rama & Bah (note 470 above).

<sup>474</sup> Rama & Bah (note 470 above).



child rights activism started to expand within South Africa. The 1987 conference held in Harare in collaboration with other international conferences created an opportunity and invited the African Nation Congress (ANC) in exile, and the MDM to firmly advocate for the protection, survival and development of children's rights in South Africa.<sup>475</sup> In addition the UNICEF's publication<sup>476</sup> inspired organisations to lobby and campaign more ardently for the protection of children's rights in South Africa.<sup>477</sup>

In 1990, following several meetings between MDM members, NGOs and UNICEF, the National Committee on the Rights of the Child (NCRC) was formed in Botswana.<sup>478</sup> The NCRC was an umbrella body of more than two hundred NGOs and CBOs working with children issues in South Africa.<sup>479</sup> There was an agreement that all the various child rights structures operating in the provinces must unite and become one national structure. Although faced with the challenges faced, most of the organisations agreed in the best interest of child rights, to become part of the national structure.<sup>480</sup> As a result the NCRC became the first national organisation in South Africa to support children's rights.<sup>481</sup> In collaboration with UNICEF, the NCRC acknowledged the need to analyse the situation of women and children in South Africa.<sup>482</sup> In 1992, the NCRC insisted that dominant political parties should prioritise children's rights.<sup>483</sup> Children activists who participated in the summit introduced the South African children's charter to participants at the Convention for a Democratic South Africa (CODESA).<sup>484</sup> This summit was organised by Molo Songololo in support of the NCRC social motivation efforts.<sup>485</sup> In June 1992 a further international conference was held in Cape Town where the children's charter was also

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<sup>475</sup> Ibid

<sup>476</sup> The publication was on 'Children on the Frontline: The impact of Apartheid, Destabilisation and Warfare on Children in Southern and South Africa' published in 1987 and 1989.

<sup>477</sup> K Knutsson & P O' Dea *Supporting the Movement for Children's Rights and Development in South Africa: A Reflective Essay on the Contributions and Experiences of UNICEF 1974-1997* (1998).

<sup>478</sup> Rama & Bah (note 470 above)

<sup>479</sup> Abrahams & Matthews (note 465 above) 12.

<sup>480</sup> Mabusela (note 469 above).

<sup>481</sup> Rama & Bah (note 470 above)

<sup>482</sup> Ibid.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid

presented. During that conference it was submitted that children's rights could only be realised on the condition on the ending of apartheid, the election of a democratic government and the drafting of a new constitution for the country.<sup>486</sup> It should also be noted that the NCRC played a significant role in getting children's rights entrenched in the Constitution. Radda Barnen in conjunction with NCRC invited experts from all the provinces in South Africa to submit child right input for the Human Rights Committee of the Constituent Assembly.<sup>487</sup>

In 1993, with the adoption of the Interim Constitution, the protection of children's rights was entrenched in the Constitution. The current s 28 of the 1996 Constitution is the result of several efforts.<sup>488</sup> On 16 June 1993, the NCRC in collaboration with UNICEF published 'Children and women in South Africa: A situation Analysis'.<sup>489</sup> This document was significant as it emphasised the situation of children and women with regard to education, health, nutrition, violence and abuse.<sup>490</sup> This objective of this report was to provide a data baseline of the plight of children in South Africa.<sup>491</sup> As a result the report indicated that there were challenges as far as data is concerned.<sup>492</sup> Explicitly as a result of poor data collection there was an under-enumeration in national statistics of the black population, specifically those communities residing in independent homelands.<sup>493</sup> The report recommended that in future in order to consolidate information systems for data, racial, geographical, gender and urban or rural disparities should be taken into account.<sup>494</sup> UNICEF and NCRC used the launch of the publication to call for a National Programme of Action (NPA). This call was based on the agenda for action of the 1990 Declaration and Plan of Action of the world Summit of children and the Convention on the Right of the Child.<sup>495</sup> The launch of this publication was followed by a two-day conference

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<sup>486</sup> Knutsson & P O'Dea (note 477 above).

<sup>487</sup> Rama & Bah (note 470 above); Radda Barnen is Sweden organisation, founded in 1919 it is part of save the Children it's a NGO working for children's rights. It also has impacted the CRC.

<sup>488</sup> Ibid. see also Rosa & Dutschke (note 461 above) 225.

<sup>489</sup> UNICEF (United Nations Children's Fund)/ NCRC *National Children's Rights Committee Children and Women in South Africa: A Situational Analysis* (1993).

<sup>490</sup> UNICEF & NCRC (note 489 above) 1.

<sup>491</sup> Ibid.

<sup>492</sup> Ibid,13

<sup>493</sup> Ibid.

<sup>494</sup> Abrahams & Matthews (note 465 above) 12.

<sup>495</sup> UNICEF & NCRC (note 489 above).

held in Tembisa.<sup>496</sup> During this conference the formation of the NPA was proposed. UNICEF and NCRC were mandated to do the follow up on the recommendations suggested from the Tembisa Declaration<sup>497</sup> for the establishment of the National Forum for children and the NPA for children. In December 1993, the former president F.W de Klerk and Nelson Mandela jointly signed the 1990 Declaration and Plan of Action of the World summit for children and CRC in Sweden.<sup>498</sup>

In February 1994, a conference was held to discuss the draft of a NPA layout. NGOs, CBOs, trade unions and political organisations attended this conference.<sup>499</sup> The conference was significant for a number of reasons. First it enabled the establishment of the NPA structures and processes as well as the consultative mechanisms and technical resources that were needed.<sup>500</sup> Secondly, the conference established an elected NPA Task Team.<sup>501</sup> This elected team prepared the NPA outline for presentation to the Government to be. The NPA was developed after the ratification of the CRC. The NPA role was to ensure that government developed policies that were child friendly. On June 1994, the former president Mandela was presented with the outline of the NPA. Mandela assured participants that in future children rights would be given priority. As a result he established an inter-ministerial Cabinet Committee on the Rights of the Child to control the development of government led NPA process.

The Reconstruction and the Development Programme (RDP) office ordered the National Institute of Economic Policy (NIEP) to conduct a second situation analysis of children in South Africa. In 1996 the report was published.<sup>502</sup> This report comprehensively elaborated on the situation of children and poverty and deprivation under apartheid. It indicated that the issues access to health services, education,

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<sup>496</sup> The title of the conference was 'the state of the African Child: an agenda for Action'.

<sup>497</sup> This declaration was adopted on 19 June 1993.

<sup>498</sup> Abrahams & Matthews (note 465 above) 14.

<sup>499</sup> Ibid.

<sup>500</sup> Ibid.

<sup>501</sup> Ibid.

<sup>502</sup> Entitled 'Children, poverty and Disparity Reduction: towards fulfilling the Rights of South Africa Children'.

housing, water, food security were key factors.<sup>503</sup> As the previous report from UNICEF and NRCR, the latter also acknowledged lack of reliable empirical data.

In 1997, South Africa submitted its first country report to the UN Committee on the Rights of Child. In 1998 the co-ordination of the NPA was moved from the Department of health to the office of the deputy president. It was submitted that each government department should prioritise the welfare children in its budget.<sup>504</sup> In 1999, after the second democratic elections, the Children's desk relocated to the office of the president and was then renamed the Office on the Rights of the Child (ORC).<sup>505</sup> The ORC's task was to work in conjunction with stakeholders and NGOs for the improvement of children's well-being and the promotion of children's rights.<sup>506</sup> Then in 2000, South Africa presented its initial report as well as the country's supplementary report to the Committee.<sup>507</sup> Finally, in 2009 the ORC relocated to a new department named the Department of Women, children and persons with disabilities.<sup>508</sup> This Department's purpose is to ensure the realisation of children's rights and responsibilities.<sup>509</sup>

In essence, it should be noted that South African NGOs, CBOs, UNICEF, other children's activists and the government itself played a huge role in respect of children rights protection, promotion, and ratification of the CRC. Despite the 1996 Constitution being the supreme law of the country, children's rights have found expression in different pieces of legislation and policy.

However before proceeding to the next section, it is important to note that the figure below (table 1) adapted from Abrahams and Matthews summarises the key

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<sup>503</sup> National Institute for Economic Policy 'a report commissioned by the Reconstruction and Development Office Children, Poverty and Disparity Reduction: Towards Fulfilling the Rights of South Africa's Children' (1996).

<sup>504</sup> Abrahams & Matthews (note 465 above) 16.

<sup>505</sup> Ibid, 16.

<sup>506</sup> Ibid

<sup>507</sup> Ibid.

<sup>508</sup> Ibid.

<sup>509</sup> The department functions are to: Provide leadership and support for planning, coordination, oversight and comprehensive reporting in the national Children's Rights and Responsibilities Programme.

- Develop and maintaining a child rights and responsibilities monitoring and evaluation framework.
- Develop and managing catalytic projects for children's rights and responsibilities.
- Facilitate public-private partnerships in the interests of children.
- Participate in sectorial coordination and in national children's rights forums.

moments in the history of South African children's rights since the 1980s as referenced in the discussion preceding the table.

**Table 1: Key events in the South African children's rights movement.**<sup>510</sup>

YEAR	KEY EVENTS
1980-1987	<p>Rädda Barnen funded a conference, entitled 'Children, Repression and the Law in Apartheid South Africa' held in Harare, Zimbabwe.</p> <p>UNICEF's publication 'Children on the Frontline: The Impact of Apartheid, Destabilisation and Warfare on Children in Southern and South Africa'(updated in 1989 to include a section on Namibia) stimulates organisations to lobby and campaign more ardently for the protection of children's rights in South Africa</p>
1990	<p>National Committee on the Rights of the Child (NCRC) was founded in Botswana, after numerous meetings between members of the Mass Democratic Movement, NGOs from South Africa and UNICEF.</p>
1992	<p>Children's Summit was organised by Molo Songololo,</p> <p>The adoption of the Children's Charter.</p> <p>International Conference on Child Rights held in Cape Town.</p>
1993	<p>Adoption of Interim Constitution - provisions made for the inclusion of the protection of children's rights in the country.</p> <p>NCRC and UNICEF published 'Children and Women in South Africa: A Situation Analysis'.</p> <p>F.W. de Klerk and Nelson Mandela concurrently sign the 1990 Declaration and Plan of Action of the World Summit for Children and the Convention on the Rights of the Child.</p>

<sup>510</sup> Adapted from Abrahams & Matthews (note 465 above).

1994	The National Programme of Action Task Team presented an outline of their plan of action for children to President Mandela
1995	South Africa has ratified the United Nations Convention on the Rights of the Child
1996	Cabinet approves the formation of the National Programme of Action for Children. "Children, Poverty and Disparity Reduction: Towards Fulfilling the Rights of South Africa's Children" was released by the National Institute for Economic Policy /Reconstruction and Development Programme
1997	South Africa submits its first country report to the United Nations Committee on the Rights of the Child.
1998	The co-ordination of the National Programme of Action for Children is moved from the Department of Health to the Office of the Deputy President.
2000	South Africa presents its primary and supplementary country reports to the United Nations Committee on the Rights of the Child.
2009	the Ministry for Women, Children and People with Disabilities was established

Subsequently, interest in children's rights became a focal point which led these rights to form part of the national framework. As a result, several pieces of

legislation dealing with children were enacted. Following the 1996 Constitution which is the supreme law of the country, further pieces of legislation dealing with children in South Africa were enacted namely, the National Health Act 3 of 2003, the Children's Act 38 of 2005, Sexual Offences and Related Matters Act 32 of 2007, Child Justice Act 75 of 2008 and the Social Assistance Amendment Act 5 of 2010.<sup>511</sup> It is worth noting that though this study focuses on all these pieces of legislation; yet it places emphasis only on those statutes that concern the survival rights of children to the exclusion of all the other pieces of legislation.<sup>512</sup> Below is a discussion of the relevant pieces of legislation.

### **3.2.3 Domestic laws**

#### **3.2.3.1 The 1996 Constitution**

Internationally, survival rights encompass 'an adequate standard of living in the expectation of complete respect for the child's human dignity, the right to the highest attainable standard of health, to information and education in the basic knowledge of preventive health care, nutrition and environmental sanitation'.<sup>513</sup> Considering its obligation to realise children's rights domestically, s 28 of the 1996 Constitution provides that 'every child has a right to basic nutrition, shelter, basic health care and social services'.<sup>514</sup> In addition to the above, s 27 (1) (b) of the 1996

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<sup>511</sup> It should be noted that other legislations as well protect children under certain circumstances however this study will not focus on them namely the Basic Conditions of Employment Act 1997, which states that employing a child under 18 years is illegal; the Domestic Violence Act 116 of 1998 which indicates several forms of domestic violence and explain how to protect a child from against any abuse; the Film and Publications Act of 2008 which prohibits the creation, possession and distribution of child pornography. National Education Policy Act 27 of 1996 and South African Schools Act 84 of 1996 which are related to the child education.

<sup>512</sup> Ibid.

<sup>513</sup> Pais (note 247 above) 138. Art 6 of the CRC.

<sup>514</sup> It is relevant to quote the entire s 28 since the inclusion of this provision in the Bill of rights was an important achievement for South African children mostly for those who suffered for so long under apartheid. See Children's Rights – Constitutional Court of South Africa. Available at <http://WWW.constitutionalcourt.org.za/text/rights/know/children.html> accessed on 24 January 2017.

S28 states that '(1) Every child has the right:

- (a) To a name and a nationality from birth;
- (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) To basic nutrition, shelter, basic healthcare service and social services;
- (d) To be protected from maltreatment, neglect, abuse or degradation;
- (e) To be protected from exploitative Labour practices;
- (f) Not to be required or permitted to perform work or provide services that:

Constitution states that 'everyone has the right to have access to sufficient food and water'. Moreover, s 27 (1) (c) indicates that 'everyone has the right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.

Taking into consideration the human rights' perspective, the rights in s 28 (1) (c), s 26 and s 27, are known as socio-economic rights and are of extreme importance in this study.<sup>515</sup> The survival rights mentioned above are pivotal rights from which socio-economic rights derive. It must be noted that for purposes of this study when children's socio-economic rights are mentioned, such reference is confined only to children's survival rights.

The introduction of these socio-economic rights in the Constitution shows the extent to which the state prioritised children's rights.<sup>516</sup> As a result, an obligation is imposed on parents as well as the state to provide for the interests and social needs of children in South Africa.<sup>517</sup> S 28 (2) emphasises that the best interest of the child becomes of paramount importance when it comes to any matter dealing with the child. In addition to the sections specified above, other sections indicated by the term 'everyone' for instance the right to life,<sup>518</sup> right to human dignity,<sup>519</sup> equality,<sup>520</sup> privacy,<sup>521</sup> freedoms<sup>522</sup> also protect children.<sup>523</sup> Every child enjoys the same protection through the Bill of rights as does his or her adult fellow.<sup>524</sup>

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(i) Are inappropriate for a person of that child's age; or (ii) Place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development;  
(g) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:

(i) Kept separately from detained persons over the age of 18 years; and

(ii) Treated in a manner, and kept in conditions that take account of the child's age.

(h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

<sup>515</sup> T Manamela 'Children of poverty and child benefits in South Africa' *SAPR/PL* (2004) 164.

<sup>516</sup> S 28 of the 1996 Constitution.

<sup>517</sup> Manamela (note 515 above) 167.

<sup>518</sup> S 11.

<sup>519</sup> S 10.

<sup>520</sup> S 9.

<sup>521</sup> S 14. See also *Christian lawyers' Association of South Africa v Minister of Health* 2005 (1) SA 509 (T); *Johncom Media Investments v M* 2009(4) SA 7 (CC).



In essence, the Constitutional Court is the guardian of the 1996 Constitution. Therefore this highest court in the country has also applied other constitutional rights to children for example the right to make choices regarding reproduction, to reproductive healthcare and to dignity and privacy.<sup>525</sup> Another example is the right not to be discriminated against on the grounds of religion,<sup>526</sup> sex or birth,<sup>527</sup> or of their parents' nationality<sup>528</sup> and their right of access to courts.<sup>529</sup> In a capsule, the entrenchment of s 28 in the Constitution has been clearly seen by the Constitutional Court as responding in an 'expansive way'<sup>530</sup> to South Africa's international obligations as a state party to the CRC, and that the latter has become the international standard against which to measure legislation and policies.<sup>531</sup>

The 1996 Constitution is not the only legal instrument that safeguards and protects children's rights. A further piece of national legislation that gives specific attention to children is the National Health Act 3 of 2003

### 3.2.3.2 The National Health Act 3 of 2003

In addition to the 1996 Constitution that accords children the right to basic health care services,<sup>532</sup> the National Health Act provides for children's constitutional right to health care.<sup>533</sup> This Act purports to fulfill the realisation of the rights entrenched in

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<sup>522</sup> Ss12, 15, 16, 18.

<sup>523</sup> See for example the case of *Le Roux v Dey* 2011(3) SA 274(CC) where it was concluded that children have to be consulted, and to express their opinions and preferences in decisions that affect them flow from their evolving rights to autonomy. The Constitutional Court has on two occasions expressed an interest in the participation of children, in *Christian Education South Africa v Minister of Education* 2000 (4)SA757 (CC)787 which dealt with the constitutionality of corporal punishment in schools, the court expressed disappointment that the court a quo had decided not to appoint a curator ad litem for the children at the centre of dispute. O Oke –Samuel on his thesis discusses the Constitution and some substantive rights. For more information see O Oke- Samuel 'A Comparative Study of South African and Nigerian legislation relating to control of gas Emission' (2013) Unpublished thesis, Unizulu 173.

<sup>524</sup> *Bhe v Magistrate, Khayelisha* 2005(1)SA 580(CC)[52].

<sup>525</sup> *Christian lawyers' Association of South Africa v Minister of Health* (note 520 above).

<sup>526</sup> *MEC for education v Pillay* 2008 (1) SA 474(CC).

<sup>527</sup> *Bhe* (note 524 above)

<sup>528</sup> *Khoza v Minister of Social Development ; Mahaule v Minister of Social Development* 2004 (6)SA 505(CC)

<sup>529</sup> *C v Development of Health and social development Gauteng* ,2012 (2) SA 208 (CC)

<sup>530</sup> *Sonderup v Tondell* 2001 (1) SA 232 (cc) [16].

<sup>531</sup> *S v M* 2008 (3) SA 1171(CC)[29].

<sup>532</sup> S 28 (1) (C) of the Constitution.

<sup>533</sup> S 2 (c) (iii) & (v) of the National Health Act 3 of 2003. It should also be noted that this is not the only legislation which provides for children's right to health care. Other pieces of legislation such as the Mental Health Care Act17 of 2002 provides appropriate care, treatment and rehabilitation

the Constitution by producing a structured and uniform health system in the Republic of South Africa.<sup>534</sup> The Act ensures that everyone has access to equal health services by establishing a national health system which caters for both the public and the private health sectors.<sup>535</sup> Furthermore, the Act does not only indicate the duties and responsibilities of health care practitioners<sup>536</sup> but also endeavours to protect, respect, promote and fulfil the rights of children to basic nutrition and health care including the rights of vulnerable groups namely women, children, elderly persons and people with disabilities.<sup>537</sup> However there is a shortcoming in terms of the definition of 'user'. The Act specifically did not mention children.<sup>538</sup> Precisely, the Act supplies the link with the Child Care Act 74 of 1983 in respect of the term 'user'.<sup>539</sup> Since the Child Care Act has been repealed by the Children's Act, this implies that any reference to the Child Care Act shall be construed as reference to the Children's Act.<sup>540</sup> It is arguable that this would have been comprehensive if the National Health Act adequately clarified whether the health care user includes children.<sup>541</sup> An additional shortcoming is the ambiguous meaning of basic health care services in terms of the National Health Act. For a better realisation of the right to life, a clear definition of 'basic health services' should be provided.

A watershed children's legislation is the Children's Act 38 of 2005.

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services for people with mental health issues including children; the Choice on Termination of Pregnancy Act 92 of 1996 provides safe legal abortion for every woman including adolescent girls; the Sterilisation Act 44 of 1998; the Consumer protection Act 68 of 2008 where there is a duty on the service provider to provide quality and timely service.

<sup>534</sup> See long title of National Health Act 61 of 2003.

<sup>535</sup> S 2 of the National Health Act.

<sup>536</sup> S 2 (c).

<sup>537</sup> Ibid, see also ESST 'summary of the National Health Act n<sup>o</sup> 61 of 2003'. Available at [http://ossafrica.com/esst/index.php?title=summary\\_of\\_the\\_National\\_Act%2C\\_n0.61\\_of\\_2003](http://ossafrica.com/esst/index.php?title=summary_of_the_National_Act%2C_n0.61_of_2003).

<sup>538</sup> Accessed on 07 July 2017. See also the *Treatment Action Campaign v Minister of Health* 2000 BCLR (4) 356 (T) in this case it was held that the Constitutional Court ordered the revision of the National Prevention of Mother to Child Transmission policy to make anti-retroviral drugs available to all pregnant women.

<sup>539</sup> S1(f).

<sup>540</sup> Ibid.

<sup>541</sup> See s12 (1) of the Interpretation Act 33 of 1957.

<sup>541</sup> S1 of the National Health Act.

### 3.2.3.3 The Children's Act 38 of 2005

The preamble to the Children's Act 38 of 2005 indicates that this legislation was passed to reinforce the rights entrenched in s 28 of the 1996 Constitution. The Children's Act 38 of 2005 (Children's Act) became fully operational in April 2010.<sup>542</sup> This legislation insists on the best interests' principle in all matters concerning a child.<sup>543</sup> Moreover, the Children's Act draws on the three theories discussed in chapter two of this study.<sup>544</sup> Firstly, the Children's Act supports the protectionist theory where it mentions the notion of childhood as being predicated on the idea that the child is immature and needs assistance from his or her family environment.<sup>545</sup> Similarly, the Children's Act provides for parental rights and responsibilities to care and maintain contact with the child.<sup>546</sup> Secondly, the liberalist theory provides that the child has the right to express his or her views.<sup>547</sup> Thirdly, the Children's Act caters for the interest theory which espouses that the child may act autonomously and in its own best interest.<sup>548</sup>

In addition, the Children's Act reduces the age of majority from twenty-one to eighteen years old.<sup>549</sup> Most importantly for the purpose of this study this Act encompasses programmes such as Early Childhood Development programmes, partial and foster care services; prevention and early intervention services for vulnerable children, protection services for abused children; support groups for child-headed households, and partial secure care facilities for children and adoption.<sup>550</sup> In addition the Children's Act mentions the concept of 'the best

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<sup>542</sup> Songca (note 49 above) 344; few provisions of the Children's Act partially came into operation in July 2007. For instance matters concerning the best interest principle, children's access to court, child right participation.

<sup>543</sup> See Chapter 2, S 9 of the Children's Act.

<sup>544</sup> See chapter two.

<sup>545</sup> Songca (note 49 above); this is related to the caretaker theory.

<sup>546</sup> See Ss18-21. For in depth discussions on parental responsibilities and rights of married or unmarried parents see T Matadi 'Parental Responsibilities and Rights of Unmarried Fathers under the South African Children's Act 38 of 2005: A critical Analysis of selected recent case law. Unpublished LLM thesis, University of Kwazulu Natal April 2012; See also A S Louw 'Acquisition of Parental Responsibilities and Rights' submitted in fulfilment of the requirement for the degree of Doctor of Legum, Faculty of Law, University of Pretoria, May 2009. Available online at <http://Upetd.UP.ac.za/thesis/submitted/etd-09102009-170707/unrestricted/thesis.pdf>. Accessed on 17 February 2014.

<sup>547</sup> S 10.

<sup>548</sup> S 9.

<sup>549</sup> Chapter 3, s 17 of the Children's Act.

<sup>550</sup> Abrahams & Matthews (note 465 above) 35.

interests of the child' which should be given paramount importance in every matter concerning the child.<sup>551</sup> It is however arguable that the famous best interests principle is a complex term to construct a meaning in a practical situation.<sup>552</sup> As in case of *S v M*<sup>553</sup> the best interests of the child standard was discussed. The court held that best interest standard was considered as inherently indeterminate in that it provides little guidance to those assigned the task of applying it.<sup>554</sup> Sometimes primary caregiver mischaracterise the best interests of the child.<sup>555</sup> The court points out that 'a balancing exercise has to be undertaken on a case-by-case basis.' This recommendation is substantiated by Bosman-Sadie and Corrie's view that:-

The way in which the best interests criterion is interpreted and applied by different countries is influenced to a large extent by the historical background to, and the cultural, social, political and economic conditions of, the country concerned, as well as by the value system of the relevant decision-maker.<sup>556</sup>

In view of the above, it is arguable that when interpreting the best interests' criterion, the court should always consider the case at hand, as each case has its own merits.

Further legislation that protects children is the Sexual Offences and Related Matters Act 32 of 2007.

#### **3.2.3.4 Sexual Offences and Related Matters Act 32 of 2007**

The Sexual Offences and Related Matters Act 32 of 2007 improves the protection of the complainant as well as the victim of sexual abuse when giving evidence. This Act also impacts on the extension of the definition of rape, consensual sexual acts

<sup>551</sup> S7 of the Children's Act provides factors that should be taken into consideration when dealing with the best interest of the child. S 9 emphasises that 'in all matters concerning the care, protection and well-being of a child the standards that the child's best interest is of paramount importance, must be applied.

<sup>552</sup> The following are the cases considered the best interest principle in S 28 (2) of the 1996 Constitution; *Jooste v Botha* 2000 (2) SA 199 (T); *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC).

<sup>553</sup> 2008 (3) SA 232 (CC).

<sup>554</sup> Ibid para 23. The following are cases judicially considered: *S v Zinn* 1969 (2) SA 537 (A); *S v Malgas* 2001 (2) SA 1222 (SCA); *S v Banda and Others* 1991 (2) SA 352 (B); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); *Fletcher v Fletcher* 1948 (1) SA 130 (A); *Brandt v S* [2005] 2 All SA 1 (SCA); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *S v R* 1993 (1) SA 476 (A); *S v Williams and Others* 1995 (3) SA 632 (CC); *S v Schutte* 1995 (1) SACR 344 (C); *Sv E* 1992 (2) SACR 625 (A).

<sup>555</sup> *S v M* (note 530 above) para 34.

<sup>556</sup> H Bosman-Sadie & L Corrie *A practical approach to the Children's Act* (2013) 27.

with certain children and further discusses sexual exploitation of children and places emphasis on the register of sex offenders.<sup>557</sup> The aim of this Act is to suppress all sexual crimes.<sup>558</sup> In particular the Act recognises that women and children are vulnerable, and as a result, are likely to become victims of sexual offences.<sup>559</sup> Specific emphasis is made on adult prostitution and the sexual exploitation of children.<sup>560</sup> A relevant concern of this Act was the declaration of invalidity of ss 15 and 16 of the Act which were punitive on children under the age of sixteen.<sup>561</sup> For the purpose of this study, the sexual offences Act addresses the social problem of increased sexual offences against children. A further legislation which strengthened the Sexual Offences and Related Matters Act is the Child Justice Act 75 of 2008.

### **3.2.3.5 The Child Justice Act 75 of 2008**

The Child Justice Act 75 of 2008 (the Child Justice Act) provides the criminal justice system with legislative provisions relating to the children who are in conflict with the law and are accused of committing offences.<sup>562</sup> Songca avers that 'the Act has humanized the criminal justice system for children by introducing the spirit of *Ubuntu*. As a result the emphasis is on the principles of restorative justice, which provides the context against which this provision must be read'.<sup>563</sup> While within the scope of this study the Child Justice Act is not very helpful. Suffice it to mention that the Child Justice Act follows in the wake of children's rights contained in the

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<sup>557</sup> Abrahams & Matthews (note 465 above) 34.

<sup>558</sup> Songca (note 49 above). Also see the long title of the Child Justice Act.

<sup>559</sup> See the preamble of Sexual Offences and Related Matters Act 32 of 2007.

<sup>560</sup> Ibid.

<sup>561</sup> In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC), ss. 15 and 16 were found to be inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of 16 years. The declaration of invalidity was suspended for a period of 18 months in order to allow Parliament to correct the defects. A moratorium was placed on all investigations into, arrests of, prosecutions of, and criminal and ancillary proceedings against, children under the age of 16 years in relation to these provisions, pending Parliament's correction of the defects. Furthermore, children under the age of 16 years who have been convicted of an offence referred to in s. 15 or 16, or issued a diversion order following a charge under those provisions, are not to appear in the National Register of Sex Offenders, and are to be issued certificates of expungement.

<sup>562</sup> See Preamble of Child Justice Act.

<sup>563</sup> Songca (note 49 above) 345.

CRC.<sup>564</sup> This Act carefully considered a legal system which is not only child centred and individualised, but also mindful of the interest of society and the rule of law.<sup>565</sup>

Below follows another key legislation that impacts on the lives of the children in South Africa and in particular children's right to survival.

### **3.2.3.6 The Social Assistance Act 13 of 2004**

The Social Assistance Act came into operation in 2004. This Act provides 'for social grants, eligibility for social assistance, child support grant, care dependency grant, foster child grant, disability grant, older person's grant, war veteran grant, grant-in-aid and the social relief of distress grant'.<sup>566</sup> The Social Assistance Act 13 of 2004 was amended by the Social Assistance Amendment Act 5 of 2010. The aim of this Act is to impact the social security grant to assist children directly.<sup>567</sup> Furthermore, the social assistance grant 'enables applicants and beneficiaries to apply to the Agency to reconsider its decision in cases where the application did not succeed; to further regulate appeals against decisions of the Agency; to effect certain textual corrections and to provide for matters connected therewith'.<sup>568</sup>

The Social Assistance Act is significant for this study since it provides the requirements for one to be eligible for social assistance as a socio-economic right entrenched in the Constitution.<sup>569</sup> In May 2016, the Department of Social Development promulgated an amendment to Regulation 26A of the Social Assistance Act to clarify the circumstances under which deductions may be made from social grants.<sup>570</sup> Previously, funeral insurance companies were allowed to make one deduction directly from a social grant including the CSG provided that the deduction is less than ten percent.<sup>571</sup> Currently, regulation 26A clearly stipulates that companies are not allowed to make direct deductions from any grant targeting

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<sup>564</sup> See the Preamble of the Child Justice Act and Art 40 of the CRC.

<sup>565</sup> *Centre for child law v Minister of Justice and Constitutional Development* 2009(6) SA.

<sup>566</sup> Chapter 2 of the Social Assistance Act 13 of 2004.

<sup>567</sup> Abrahams & Matthews (note 465 above) 36.

<sup>568</sup> See Long title of the Social Assistance Amendment Act 5 of 2010. Agency in this Act refers to the South African Social Security Agency (SASSA).

<sup>569</sup> S 27(1) (C) of the 1996 Constitution.

<sup>570</sup> S Rohrs & others 'legislative and policy developments 2015/2016' in Delany A & al (eds) *South African Child Gauge* (2016) Children's Institute UCT.

<sup>571</sup> S 26 of the Social Assistance Act.

children namely: the CSG, FCG as well as the Care Dependency Grant. The comprehensive exclusion of deduction from child grants is a commendable step to protect children's right to social assistance.<sup>572</sup>

In essence, in *Coughlan N.O v Road Accident Fund*<sup>573</sup> the court had to decide whether FCGs are deductible from compensation paid out by the Road Accident Fund (RAF). The complainants, three children, were placed in foster care with their grandparents after their mother's death. The father was already deceased. In terms of Social Assistance Act, as foster parents, grandparents were entitled to the FCG. Since the children's mother had been killed in a road accident, the RAF compensated the children for loss of support arising from their mother's death. The RAF submitted that receiving both FCGS and compensation amounted to double compensation.<sup>574</sup> The Constitutional Court disagreed and decided that the FCG was not deductible from the compensation by the RAF because the nature and the purpose of the FCG is substantially different from such compensation.<sup>575</sup> AJ Tshiqi points out that the aim of FCG is to encourage foster parenting which 'extends beyond mere money and encompasses parenting, love, care, nurturing, discipline and the other benefits'.<sup>576</sup> The 'non-monetary dimension of fostering' highlights the incorrectness of equating the FCG with compensation. In addition the compensation by RAF differs from that of CSG in the sense that the former is paid to the child while the latter is paid to the foster parent.<sup>577</sup> Given that the child has no claim to the FCG, there is no double compensation. Adequately, the Constitutional Court also questioned the causal link between the receipt of the FCG and the compensation by the RAF because the FCG is awarded in cases where parents are alive. What matters in FCG is whether the child is in need of care and protection not whether the parents have died<sup>578</sup>. It can be argued that the RAF confusion of the FCG and the compensation for loss of material support is due to the fact that the majority of

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<sup>572</sup> S Rohrs & others (note 570 above) 17.

<sup>573</sup> *Coughlan N.O v Road Accident Fund* 2015 (4) SA. The case referred to is *Makhuvela v Road Accident Fund* [2009]ZAGPJHC 18.

<sup>574</sup> *Coughlan* (note 573 above) para 29.

<sup>575</sup> *Ibid*, para 54.

<sup>576</sup> *Ibid*, para 56.

<sup>577</sup> *Ibid*, para 58

<sup>578</sup> *Coughlan* (note 573 above) para 59.

children under foster care tend to be orphans.<sup>579</sup> However *Coughlan's* case enlightened this situation in terms of the role of the State.<sup>580</sup> Where the Court explicitly points out that:-

‘in cases of child support grants, the State assumes the role of caregiver as enjoined by the Constitution. When it pays compensation for loss of support through the RAF it steps into the shoes of wrongdoer.’<sup>581</sup>

Furthermore in relation to the Social Assistance Act, it should be noted that there are certain shortcomings in the Act in respect of children below the age of sixteen who may be heading a household. These children are disqualified from accessing the CGS on the behalf of their siblings because access to the CGS requires that the caregiver be sixteen years or older. An additional challenge is that children heading households are not able to receive the CSG for themselves since they cannot be both a caregiver and CSG beneficiaries at the same time.<sup>582</sup> As a result the Social Assistance should be amended to allow teen mothers and children heading household to receive the CSG concurrently for themselves and children in their care.

The next section provides an analysis of South African policies and programmes on children's survival rights.

### **3.3 Analysis of South African policies and programmes on children's survival rights**

The realisation of children's rights requires the state to design or formulate and implement a number of responses which are composed of strategic plans, policies, laws and programmes.<sup>583</sup> Since the Constitution is the supreme law of the country, the South African government has the duty to review and amend all its laws in order

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<sup>579</sup> The amendment to s150(1)(a) of the Children's Amendment Bill entrenches the child protection system to facilitate access to the FCG Amendment Bill changes s150(1)A of the Children's Act read 'a child in need of care and protection if such a child has been abandoned or orphaned and does not have the ability to support himself of herself and such inability is ready apparent' the wording of the provision has been adapted from *judgement NM v Presiding officer of the Children's Court: District Krugerdorp* 2013(4)SA376(GSJ).

<sup>580</sup> Ibid, para 57

<sup>581</sup> Ibid .

<sup>582</sup> Community Agency for Social Enquiry & Children's institute , University of Cape Town (2012) *Comprehensive Review of the Provision of Social Assistance to children in Family Care*. Commissioned by the Department of Social Development Pretoria.

<sup>583</sup> Proudlock (note 65 above)



to comply with the Constitution.<sup>584</sup> This section focuses on policies and programmes available for the realisation of children's survival rights or socio-economic rights. When targeting socio-economic rights, the focal point is children's rights to basic nutrition, basic health care services and social services.<sup>585</sup>

### 3.3.1 Children's rights to basic nutrition

Adequate nutritious food is a child's survival and development right because children need healthy food to survive.<sup>586</sup> According to the caretaker thesis discussed above parents are responsible for providing for the needs of their children. However, if parents are not able to do so, the state also has the duty to support underprivileged families by contributing materially or through respective support programmes.<sup>587</sup> The CRC indicates that the state must take all appropriate legislative, administrative and other measures to the largest extent of its available resources.<sup>588</sup> To that effect, South Africa promulgates several laws, develops many policies, strategic plans and programmes.<sup>589</sup> Among these programmes this study focuses on the Early Childhood Development programmes reason being the expansion of research in this particular area.<sup>590</sup>

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<sup>584</sup> S 2 of the Constitution states ' This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

<sup>585</sup> S 27 (1) (b) (c) and s 28 (1) (c) of the Constitution.

<sup>586</sup> L Berry & P Proudlock 'Children's rights to Basic nutrition a Review of South Africa 's Subsidy for ECD programme' in Proudlock (ed) *South Africa's Progress in Realising Children's Rights: A law Review* (2014)38.

<sup>587</sup> Ibid.

<sup>588</sup> Art 4 of the CRC. See Annexure.

<sup>589</sup> The 1994 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, which provides for iodisation of salt; the 2003 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, which provides for the fortification of maize and bread flour with zinc, iron and six vitamins; The 2012 Regulations of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 which regulates foodstuff for infants and young children.

With regard to strategic plans ,campaigns and guidelines to nutrition there are : The 2011 Tshwane Declaration of support for Breastfeeding; A Roadmap for Nutrition in South Africa 2013-2017; Health Systems strengthening and primary health umbrella of the Zero Hunger Campaign launched in 2011; National Integrated Plan for ECD 2005-2010; Clinical Guidelines: prevention of Mother-to-child Transmission 2010.

<sup>590</sup> Berry & Proudlock (note 586 above).

Ideally, to realise children's right to basic nutrition South Africa has adopted the Early Childhood Development (ECD).<sup>591</sup> The next section deals with the impact of the ECD in its effort to realise children's right to basic nutrition.

### **3.3.1.1 The impact of ECD programme on children's rights to basic nutrition**

The department of Social Development set out guidelines to be followed for ECD services.<sup>592</sup> The following are the instructions which address the nutritional demands of young children in ECD programmes:

All meals and snacks should meet the nutritional requirements of children. Children must be provided with at least one meal day by either parents or the centre Menu planning, differentiated for children of different ages, must be done in consultation with expert (clinic sister or dietician) Children younger than one year should be fed on demand. Food (and, in case of babies, milk) must be prepared and cooked in a designated area that is kept safe and clean. When they are eating children must be supervised by an adult. Safe, clean drinking water must be available.<sup>593</sup>

As indicated above, when some underprivileged families are not able to provide for their children the state has an obligation to offer appropriate assistance and support. The state subsidises non-profit organisations and centres that run the ECD programmes.<sup>594</sup> These programmes are conducted in crèches, pre-schools and other care facilities for young children.<sup>595</sup> Children who are not ready for school benefit from ECD projects run in non-profit organisations (NPO) and the private sector.<sup>596</sup> The state provides assistance 'per-child subsidy' furnished to NPOs for poor children attending ECD centres.<sup>597</sup> The centre managers have to generate funds by charging fees to caregivers as the state subsidy becomes insufficient to

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<sup>591</sup> Ibid. It should be noted that there are many other programmes relating to nutrition, namely National School Nutrition Programme, Vitamin A supplementation, parasite control, immunisation, integrated food security and nutrition programme, baby-friendly hospital initiative. However for the purpose of this research, it is preferable to expand the ECD as Berry & Proudlock (note 309 above) clearly mention that 'ECD is fairly under-researched'.

<sup>592</sup> Department of Social development & UNICEF *guidelines for Early Childhood Development Services* (2006).

<sup>593</sup> Ibid.

<sup>594</sup> Berry & Proudlock (note 586 above) 45.

<sup>595</sup> Ibid.

<sup>596</sup> Ibid.

<sup>597</sup> Ibid. The per capita subsidy was introduced by the regulations 38 of the Child Care Act of 1983 (currently repealed by the Children's Act 38 of 2005). The Children's Act has kept the same standard. This subsidy serves the Department of Social Development main investment.

cover the full expenses.<sup>598</sup> It should be noted that, because of the huge demands, the state subsidy scheme becomes unable to reach all the needy cases.<sup>599</sup>

Ideally, the Children's Act emphasises that the state subsidy on ECD programmes needs to cater for underprivileged families who are unable to afford food, shelter and other basic needs for children as well as those with disabilities.<sup>600</sup> Notably, 'the subsidy is means-tested to facilitate the targeting of poor children'.<sup>601</sup> With regards to poverty, the fact is that many people in South Africa especially in rural areas still live in poverty. Manamela distinguishes between poverty in 'absolute terms and poverty in relative terms'.<sup>602</sup> Absolute poverty, on the one hand, is the inability of a family to afford an adequate standard of living, which, in this case, is calibrated by a line reflecting an income level that determines who is poor and who is not.<sup>603</sup> On the other hand, relative poverty concerns the individual or group of individuals who lack resources when compared with members of the same society.<sup>604</sup> The Taylor Committee provides a clear definition of poverty as being 'the inability of individuals, households or entire communities to command sufficient resources to satisfy a socially acceptable minimum standard of living'.<sup>605</sup> However, most children are unable to access the subsidy because of barriers imposed by factors such as age where children are younger than three years and cannot attend crèches.<sup>606</sup> Some children are three years and older but the rural area where they are located is without a registered ECD centre, and also children whose caregivers become unable to pay fees required to attend ECD centres.<sup>607</sup> Despite the centre based ECD programmes, the Children's Act also provides for community- and home-based ECD programmes.<sup>608</sup> Community- and home based programmes are also required to comply with the Children's Act norms and standards which are

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<sup>598</sup> Ibid.

<sup>599</sup> Ibid. See also C Baberton 'Government funding of centre-and community-based early childhood programmes prior to grade R in Berry L & al (eds) *South African Child gauge* (2013) Cape town Children Institute UCT44.

<sup>600</sup> See s 93 (4) of the Children's Act; Berry & Proudlock (note 586 above) 45.

<sup>601</sup> Berry & Proudlock (note 586 above) 45.

<sup>602</sup> Manamela (note 515 above) 161.

<sup>603</sup> Ibid.

<sup>604</sup> Ibid.

<sup>605</sup> The Taylor Committee Report *report of enquiry into a Comprehensive System of Social Security for South Africa* available at [http://www.polity.org.za/govdoc/reports/welfare/finddoc/chapter 2.pdf](http://www.polity.org.za/govdoc/reports/welfare/finddoc/chapter%202.pdf).

<sup>606</sup> See K Hall *Analysis of General Household Survey* (2011) Children's institute UCT.

<sup>607</sup> Berry & Proudlock (note 586 above) 46.

<sup>608</sup> Children's Act Regulations 2010, Annexure B part 1.

concerned with ensuring that children are given a healthy meal.<sup>609</sup> However, the arrangements outside of the centres do not access the per- capita subsidy although the National integrated plan for ECD prioritises them.<sup>610</sup> The National integrated policy is discussed below.

### 3.3.1.2 National Integrated Policy on ECD

The National Integrated Policy (NIP) on ECD was approved by the cabinet on 9 December 2015.<sup>611</sup> This policy applies from the period of conception up until the year before a child starts school.<sup>612</sup> In the case of a child with disability this policy covers a child until he or she reaches seven years old.<sup>613</sup> The NIP's aim is to transform the ECD service delivery in South Africa by addressing the detracting gap and thus ensure that there is an inclusive, convenient and impartial ECD service delivery for needy children.

Furthermore, the purpose of this policy is:

1. To provide an overarching multi-sectorial enabling framework of early childhood development services, inclusive of national, provincial and local spheres of government;
2. To define a national comprehensive early childhood development programme and support, with identified essential components;
3. To identify the relevant role players and their roles and responsibilities for the provision of the various components of early childhood development services; and
4. To establish national early childhood development leadership and coordinating structure.<sup>614</sup>

Chapter Five of the NIP identified the essential elements that are relevant to promote children's survival and development as they constitute some of the requirements towards the realisation of international and constitutional rights.<sup>615</sup> Consequently, for effective implementation of the NIP, government devotes itself to

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<sup>609</sup> Berry & Proudlock (note 586 above) 46.

<sup>610</sup> Ibid.

<sup>611</sup> S Rohrs & others (note 570) The cabinet is that of the Minister of Social Development.

<sup>612</sup> Ibid.

<sup>613</sup> Rohrs & others (note 570 above) 13.

<sup>614</sup> Republic of South Africa National *integrated Early Childhood Development Policy* (2015); See executive summary the NIP.

<sup>615</sup> In realising these objectives, Chapter 5 of the NIP provides for a comprehensive quality Early Childhood Development Programme, which identified essential components that need priority attention as a government obligation. In short, the following are provided for: 'Health care and nutrition programmes; social protection programmes; parent support programmes; opportunities for learning; National public Early Childhood Development communications; water; sanitation; refuse removal and energy sources; food security; play facilities; sport and culture.

the design and implementation of a national monitoring and evaluation framework and to conduct five years interval research to assess the progress and contribute to reformed planning and provisioning of the identified essential component.<sup>616</sup> Consequently, children's right to basic nutrition is progressively being realised in South Africa.<sup>617</sup> In addition to the right to basic nutrition, a programme is in place providing for children's right to basic health.

### 3.3.2 The right to basic health care services

South Africa ratified the CRC and committed itself to the realisation of children's rights.<sup>618</sup> It is argued that each state member should take legislative and other measures to give effect to children's rights.<sup>619</sup> As a result, the 1996 Constitution guarantees children's right to basic healthcare<sup>620</sup>. The status of children's rights obligates the state to respect, promote and fulfill these rights.<sup>621</sup> Essentially, children are vulnerable and in South Africa they constitute thirty four percent of the total population.<sup>622</sup> Therefore, government is seeking means of increasing the economy so as to maximise the base from which to alleviate poverty.<sup>623</sup> A study conducted in 2014, established that sixty three percent of children still live in poverty.<sup>624</sup> The link between poverty and health is evident from the fact that children who tend to face health problems are children who come from poorer families and circumstances.<sup>625</sup> Conversely it becomes an irony that children from poor families are sure to miss access to basic health care services because they are poor.<sup>626</sup>

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<sup>616</sup> Rohrs & others (note 570 above) 15.

<sup>617</sup> Berry & Proudlock (note 586 above) 46.

<sup>618</sup> Art 4 of the CRC. See annexure.

<sup>619</sup> Ibid.

<sup>620</sup> S 28 (1) (c) & S 27 of the Constitution.

<sup>621</sup> S 7 (2) of the Constitution.

<sup>622</sup> M Buchner-Eveleigh 'Children's Rights of Access to health care services and to basic health care services a critical analysis of case law, legislation and policy' (2016) *De Jure* 307. P Mahery *Consent Laws Influencing Children's Access to Health Care Services* (2006) Children Institute UCT167.

<sup>623</sup> Ibid. See also Children Count 'children in South Africa' Available at [www.childrencount.org.za](http://www.childrencount.org.za) Accessed 29 June 2017.

<sup>624</sup> Ibid. See also N Ngokwey 'Children's rights in the Central Africa Sub-Region: Poverty, conflict and HIV/AIDS as context' (2004) (12) *The International Journal of Children's Rights* 183.

<sup>625</sup> Buchner-Eveleigh (note 622 above).

<sup>626</sup> Ibid.

Furthermore, Buchner-Eveleigh highlights the relationship between the right of access to and the basic health care services.<sup>627</sup> This author concentrates on the judicial interpretation of the children's constitutional right to basic health care despite the existence of only few constitutional cases.<sup>628</sup> Buchner-Eveleigh concludes that although the Constitutional Court has considered children's socio-economic rights, this right has not been an unqualified right where the state was obliged to furnish certain amenities on request. This observation does not mean that children's socio-economic rights carry less significance.<sup>629</sup> The learned author strongly states that:

At the very minimum, by recognising their right to basic health care services, the drafters of the Constitution intended to emphasise the need for child-specific measures on basic health services and the fact that general measures on the right to health care services should make adequate provision for children.<sup>630</sup>

The writer Buchner-Eveleigh notes view on the significance of socio-economic rights. Against the background of precedent making judgments of *Grootboom v Oostenberg* and the *Government of Republic of South Africa v Grootboom*, the South African courts have shown the way. *Grootboom v Oostenberg Municipality*<sup>631</sup> provided a landmark decision. In this case the respondents approached the High Court for relief after a land owner had successfully applied for the removal of their informal shack dwellings situated unlawfully on its private land officially reserved for low-cost formal housing development. The respondents argued that the evictions had the effect of leaving them in *dire* circumstances which fell far below the standards envisaged in s 26 of the Bill of Rights. The court stated that the duty imposed upon the state by s 26 of the Constitution was further underlined by the general provision in s 7(2) namely, to respect, protect, promote and to fulfil the right<sup>632</sup>. As a result the state had both a negative and a positive duty. It had a negative duty not to infringe or impair the right of access to adequate housing protected in s 26. It had also an obligation to take positive action to ameliorate the

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<sup>627</sup> Ibid.

<sup>628</sup> *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) this is related to the right to health care in general, *B v Minister of Correctional Services* 1997 (6) BCLR 789 this case is related to HIV positive prisoners claiming the right to proper care.

<sup>629</sup> Buchner-Eveleigh (note 622 above) 324.

<sup>630</sup> Ibid.

<sup>631</sup> Ibid, 2001 (1) SA 46 para 23.

<sup>632</sup> Ibid, para 23.

deplorable conditions of poverty, homelessness or intolerable housing conditions under which hundreds of the respondents had felt compelled to approach the court for relief<sup>633</sup>. In similar vein the court held that the foundational values of human dignity, freedom and equality enshrined in the Constitution were denied to the respondents who had no food, clothing and shelter<sup>634</sup>. In view of the above constitutional imperatives, the Constitutional Court reversed in part the order issued by the court a quo in *Grootboom v Oostenberg Municipality* which dismissed the application for relief in terms of s26<sup>635</sup>.

In *Treatment Action Campaign v Minister of Health*<sup>636</sup> the Constitutional Court ordered the revision of the National Prevention of Mother-to-Child Transmission policy to make anti-retroviral drugs to all pregnant women. Bold court decisions such as the above two and many similar ones indicate the progressive nature of the South African constitution in that its Bill of Rights includes socio-economic rights notwithstanding the fact that the inclusion of socio-economic rights has implications for budgetary arrangements lying in an executive domain removed from the judicial division of government<sup>637</sup>

Despite the judicial precedent on the right to basic health care services, there are available programmes and policies that the state puts in place to realise children's rights to health care namely: free health care to pregnant women and children under six years of age, the primary health care approach; adolescent and youth health policy and the white paper on national health assurance.

### **3.3.2.1 Free Health care to pregnant women and children under six**

This policy was introduced for the first time by President Nelson Mandela in 1994. The policy was important and appropriate due to the fact that it drastically increases access to a particularly vulnerable sector of health users.<sup>638</sup> To ensure greater physical availability of services to everyone, the state considers an extensive clinic

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<sup>633</sup> S 28(1)(c) provides that children have the right to shelter. The writer will deal with s 28(1)(c) in a latter chapter.

<sup>634</sup> 2001 (1) SA 46 par 34.

<sup>635</sup> 2000 (3) BCLR 277 (C).

<sup>636</sup> 2000 BCLR (4) 356 (T).

<sup>637</sup> See *Re Certification of the Constitution of the RSA* (1996) 4 SA 744 (CC) paras 77-76.

<sup>638</sup> Ibid 322. See also K Pillay 'Tracking South Africa's progress on health rights: Are we any closer to achieving the goal' (2003) *Law, Democracy and Development* 73.

building programme.<sup>639</sup> As a result, free health care is available to pregnant women and children under the age of six in the public health facilities.

### **3.3.2.2 Primary Health Care services**

In the primary health care approach the child's health is of paramount importance.<sup>640</sup> Primary health care encompasses the promotion, prevention, treatment and rehabilitation of services coupled with the integrated management of childhood illnesses protocol at all times when the clinic is open.<sup>641</sup> The primary health care approach also provides for the counselling of children and their caregivers.<sup>642</sup>

### **3.3.2.3 Adolescent and youth Health policy**

This policy caters for the improvement of the health status of young people through the prevention of illness, an affordable healthy lifestyle and an improved health care delivery system which focuses 'on accessibility, efficiency, quality and sustainability of the adolescent and friendly health services'.<sup>643</sup> This is in line with the characteristics of health care services as described in the general comment of the CRC that such services should be available, accessible and acceptable as a service of good quality.<sup>644</sup>

### **3.3.2.4 The White paper on National Health Insurance**

The white paper reinforces government's commitment to universal health coverage. It ensures that everyone in South Africa irrespective of their level of financial ability

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<sup>639</sup> Buchner-Eveleigh (note 622 above) 322. It should also be noted that the building of more primary health care facilities has improved access to health care services for many women and children specifically in the rural areas.

<sup>640</sup> Ibid.

<sup>641</sup> Ibid, see also Department of Health 'Primary health care package for South Africa-norms and standards' (2000). Available at [www.hsph.harvard.edu/population/vaccination/southafrica2.doc](http://www.hsph.harvard.edu/population/vaccination/southafrica2.doc). Accessed 07 July 2017.

<sup>642</sup> Buchner-Eveleigh (note 622 above) 322.

<sup>643</sup> Ibid; see also the adolescent and Youth Health Policy Draft 2012 is available from [http://www.youthmetro.org/uploads/4/7/6/5/47654969/adolescent\\_youth\\_health\\_policy\\_draft.pdf](http://www.youthmetro.org/uploads/4/7/6/5/47654969/adolescent_youth_health_policy_draft.pdf). Accessed 12 November 2017.

<sup>644</sup> UN Committee on the Rights of the Child 'General Comment n<sup>o</sup> 15 on the Rights to the enjoyment of the Highest Attainable Standards of Health (art. 24)' (2013). Available at <http://www.refworld.org/docid/51ef9e134.html>. Accessed on 24 December 2017.



is able to access a comprehensive package of health care services and is protected from the commercially induced high cost of medical treatment.<sup>645</sup>

Consequently, the white paper identifies three key components towards strengthening the district health system that should offer direct and indirect benefit to children.<sup>646</sup> The following are the key components in this regard:

Ward-based outreach teams of community health workers who reach out to households and communities to promote health and identify those in need of preventive curative or rehabilitative services. The integrated School Health Programmes which aims to reduce barriers to learning and improve the overall well-being and life chances for young children and adolescents, and District clinical specialist teams who provide clinical support and oversight to improve the quality of maternal and child health services at the district level and strengthen referral system.<sup>647</sup>

However, the impact of the above mentioned interventions on the child health has not yet been adequately checked.<sup>648</sup> In a capsule, Bucher-Eveleigh stresses that there is no clear definition of the right to basic health care services in the respective legislation guaranteeing the said right.<sup>649</sup> For a better understanding of the right to health, it is suggested that the South African legislator and policy makers consider the criteria set out by the General Comment n<sup>o</sup> 14 to the ICESCR that the right to health care should be available, accessible, acceptable and of good quality.<sup>650</sup> Availability is related to the services that attend to people needs for example through adequate and accessible sanitation facilities.<sup>651</sup> Accessibility implies a health service that should be known and easily accessible economically and physically to everyone.<sup>652</sup> Acceptability is related to an inclusive health care service that is respectful of medical ethics and culturally appropriate. With regards to health service provision of good quality this implies the availability of drugs that are scientifically approved and dispensed by a health professional cohort that is trained

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<sup>645</sup> Rohrs & others (note 570 above) 12. Pillay (note 638 above) 66.

<sup>646</sup> Ibid.

<sup>647</sup> Rohrs & others (note 570 above) 12.

<sup>648</sup> Ibid.

<sup>649</sup> Buchner-Eveleigh (note 622 above) 325.

<sup>650</sup> O Oluduro. & E Durojaye, 'The Normative Framework on the Right to Health under International Human Rights Law' in Durojaye, E. (ed) *Litigating the Right to health in Africa: Challenges and Prospects* 28.

<sup>651</sup> Ibid.

<sup>652</sup> Ibid.

and skilled.<sup>653</sup> What follows is an evaluation of the children's rights to social services. Emphasis is placed on social security.

### **3.3.3 Children's basic rights to social services and social security**

The assumption is that the basic needs of children are met by their parents or caregivers. However this is not always the case.<sup>654</sup> The fact is that in South Africa the majority of children live in poverty.<sup>655</sup> The fact is that many children have to survive despite having to face challenges under conditions in child-headed families where there is no caregiver.<sup>656</sup> It is in response to this reality that the constitution grants children the right to social security, social assistance and social services.<sup>657</sup>

Since the Constitution guarantees every child the right to social services and everyone the right to social security and social assistance it becomes necessary to understand these core terms social services, social security and social assistance. Firstly, it should be noted that social services might have different meanings depending on the context.<sup>658</sup> Usually, the term social services mean 'a group of services including education, health, housing, social security and social welfare.'<sup>659</sup> It is notable though that when it is given its ordinary meaning social service is social work-type. As a result its contents entail social work concepts.<sup>660</sup> The CRC did not use the term social services. Instead the convention used the term family care and appropriate care.<sup>661</sup> Therefore, the right to social services implies the right to care and protection.<sup>662</sup> It is relevant to children's right as it focuses more on the social work aspect.<sup>663</sup> Sloth-Nielsen indicates that social services<sup>664</sup> include the contribution to the welfare and development of people in the community.

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<sup>653</sup> Ibid.

<sup>654</sup> Horsten (note 458 above) 20.

<sup>655</sup> Manamela (note 515 above); Children count (note 623 above).

<sup>656</sup> Horsten (note 458 above) 20.

<sup>657</sup> S 27 (1) (c); s 28 (1) (c) of the 1996 Constitution.

<sup>658</sup> Dutsche & Monson (note 462 above) 23.

<sup>659</sup> Ibid.

<sup>660</sup> Ibid.

<sup>661</sup> Ibid.

<sup>662</sup> Ibid.

<sup>663</sup> Dutsche & Monson (note 462 above) 23.

<sup>664</sup> J Sloth-Nielsen 'the child right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*' (2000) *SAJHR* 210.

Secondly, with regards to social security the term is usually wrongly associated with social services.<sup>665</sup> Social security is considered as primary poverty alleviation.<sup>666</sup> The term social security is used interchangeably with social protection, social assistance, social welfare and safety.<sup>667</sup> Nkosi describes social security as ‘the state-based system of entitlements linked to what are often called contingency “risks”’.<sup>668</sup>

Thirdly, social assistance is considered a form of social protection and is a scheme in terms of which individuals or a group of individuals receive a need-based assistance from public funds without themselves ever having contributed directly to the scheme.<sup>669</sup> It can be argued that social security and social assistance encompass social protection which refers to a specific list of benefits provided in the case of contingencies.<sup>670</sup> In South Africa, government, in terms of the Social Assistance Act, provides, among other things, child support grants (CSG), foster child grants (FCG) and the care dependency grant (CDP).<sup>671</sup> These are the three principal children’s grants. However, for purposes of this study, the CSG becomes of paramount importance. Below is a brief discussion of the FCG and the CDP as well as the evaluation of the impact of CSG.

### **3.3.3.1 The Foster Care Grant (FCG)**

Manamela clearly explains

That FCG is the care of a child of another parent by any other person in whose custody a foster child has been placed. The child can be a relative or a stranger to a foster parent. This child is placed in a foster parent care by the children’s court. A social worker needs to write a report to the commissioner for child welfare. The FCG is payable in order for a foster parent to look after the child.<sup>672</sup>

After the FCG another grant should be considered the care dependency grant.

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<sup>665</sup> Dutschke & Monson (note 462 above) 23.

<sup>666</sup> Ibid.

<sup>667</sup> G Nkosi ‘The International evolution of the Right of Children to Social Security’ (2015) 30 *SAPL*485; see also F Lund ‘Sorting out social security’ (1995) *Indicator SA* 43; M Olivier ‘the right to have access to social security’ (2008) *ESR Review* 26.

<sup>668</sup> Ibid.

<sup>669</sup> L J Van Reinsburg & L Lamarche ‘right to social security and assistance’. Available at <http://www.puk.ac.za>. Accessed on 03 July 2017.

<sup>670</sup> Ibid.

<sup>671</sup> Manamela (note 515 above) 169; other grants are Old age pension, disability grant, war veteran’s grant, grant-in-aid. See Chapter 2 of the Social Assistance Act.

<sup>672</sup> Manamela (note 515 above) 171. See also Social Assistance Act

### 3.3.3.2 The Care- dependency grant

The Social Assistance Act defines a care-dependent as a child between one and eighteen years of age who needs and receives permanent home care due to mental or physical disability.<sup>673</sup> The CDG is paid to the parents or the foster parent of the dependent child all who must reside in the Republic.<sup>674</sup> The aim of this grant is to assist parents or foster parents of the child with a disability to take care of such child.<sup>675</sup> It is notable; therefore, that both FCG and CDG are children grants and are concerned with a specific type of child. As such, the child support grant is accessible to every child provided that the parent qualifies under the means test.

### 3.3.3.3 The Child Support Grant (CSG)

Considering the Lund committee recommendations, Government introduced the CSG in order to curtail the State Maintenance Grant.<sup>676</sup> The CSG is considered, one of the most successful grants in South Africa dealing with poverty alleviation.<sup>677</sup> The CSG involves a cash transfer of three hundred and sixty rand per month per child.<sup>678</sup>

This cash amount is paid to the primary caregivers of the children under the age of eighteen years old. The total income must be below the stipulated means test income threshold.<sup>679</sup> The CSG is related to social protections which encompass free or subsidized health care, water, sanitation and education.<sup>680</sup> The writer argues that most of the households that benefit from this grant are mainly unemployed African women whose households have a lower education base.<sup>681</sup>

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<sup>673</sup> S 1 of the Social Assistance Act.

<sup>674</sup> Manamela (note 515 above).

<sup>675</sup> Ibid.

<sup>676</sup> Report of the Lund Committee on Child and family Support (1996). Available at <http://www.polity.org.za/govdocs/reports/lindhtml>. Accessed on 08 July 2017. With the State Maintenance to be eligible the applicant had to be a single parent, divorced, separated or widow or widower.

<sup>677</sup> P Martin 'Children's rights to social assistance: a review of South Africa child support grant in Proudlock & al (eds) *South Africa Progress in realizing children's rights: a law review*. (2014) Children institute.

<sup>678</sup> As of October 2016.

<sup>679</sup> Martin (note 677 above). The income should be 10 times the value of grant.

<sup>680</sup> Ibid.

<sup>681</sup> Ibid.

With regard to CSG eligibility, the requirements are that an applicant must be a caregiver of the child.<sup>682</sup> The applicant and spouse undergo a means test on condition that the grant receiver will not apply for another grant.<sup>683</sup> The applicant must submit her or his identity document and the child's birth certificate.<sup>684</sup> The child beneficiary of the grant must be under eighteen years old.<sup>685</sup> It is arguable that poverty coupled with social exclusion constitute challenges that hamper children survival rights.<sup>686</sup> Several identifiable groups of children affected by South Africa political and development history are socially excluded thus deepening their social and economic vulnerability.<sup>687</sup> Children falling into this catchment area include children living in rural areas, children from the former apartheid homelands, orphans, refugee children, and children living with elderly grandparents, children affected by HIV / AIDS, children living in child-headed households and children with disabilities.<sup>688</sup> This category of children tends to be neglected victims of abuse, poor health, poor education and either susceptible or vulnerable to economic and sexual exploitation.<sup>689</sup> Although there has been significant progress in decreasing child vulnerabilities, much still needs to be done in providing programme such as social grants to mitigate the plight of child victims.<sup>690</sup> It can be argued again that poverty remains the main challenge compromising the security of child survival rights. It is

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<sup>682</sup> G Mirugi-Mukundi 'Reaffirming the social security rights of children in South Africa with particular reference to the child support grant' (2010) (1) *ESR Review*7. This author specifies that 'primary caregiver includes a biological parent or relative or non-related person primarily responsible for the child'. He further adds that 'CSG was initially available to South African only'. The Constitutional Court jurisprudence has extended this grant to South African permanent resident. See the case of *Scalabani Centre of Cape Town and others v Minister of social development and others* (320)56(2005).

<sup>683</sup> Ibid.

<sup>684</sup> Ibid.

<sup>685</sup> Ibid. As from 2012, the age was extended from sixteen years old to eighteen.

<sup>686</sup> P Martin 'Analysis of the children's sector in South Africa' (2015) Save the children.

<sup>687</sup> Ibid.

<sup>688</sup> Martin (note 677 above) 21.

<sup>689</sup> Ibid.

<sup>690</sup> Ibid.

proud comment that the CSG impacts positively on children and their cash strapped families in South Africa.<sup>691</sup>

Basically, the CSG reduces child poverty.<sup>692</sup> It improves 'food security and by so doing reduces hunger as it improves the frequency and quality of food provision in South African households'.<sup>693</sup> The number of children facing hunger in the households is said to have decreased from thirty one percent to seventeen percent.<sup>694</sup> Furthermore, the CSG positively impacts school-going children by supplying their families with cash and as a result enables them to stay in school longer.<sup>695</sup>

This part of the study concludes by quoting Grinspun on how CSG reduces poverty: To this effect, it is averred that,

There are several ways in which the CSG has led to the decline of poverty among South African children

- First, the progressive extension of age *eligibility* for the grant has enabled more and more children to access it. At present .two in every three children benefit from the CSG, this helps the poorest households, which have a disproportionate share of the country's children
- second ,the upward adjustment of the means test threshold at regular intervals since 2008 has opened access to a high number of poor households previously excluded from CSG receipt on account of their income.
- Third the *grant amount*, though modest, has been revised yearly to prevent the erosion of its real value in the face of inflation.
- Fourth, the CSG has very extensive coverage, reaching sizable number of poor households. Between 70% and 80% of children in the bottom six income declines benefit from the grant
- Fifth, the CSG is very well targeted. The bulk of spending on that grant goes to the poor. This shows the greater impacts the CSG has had on reducing food poverty that overall poverty. If the CSG was less well targeted, then moderately poor would be reaping greater benefits from it than extremely poor.
- Sixth, the grant is *highly progressive*. It redistributes tax revenues from the rich to the poor, who receive a much larger portion of the benefits than their corresponding share of South Africa's population.<sup>696</sup>

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<sup>691</sup> A Grinspun 'no small change: The multiple impacts of the child support grant on child and adolescent well-being' in Delany A & al (eds) *South African Child Gauge* (2016) Children's institute UCT.

<sup>692</sup> Ibid. research has shown that over 11.3 million of children are receiving grant. See South African Social Security Agency statistics.

<sup>693</sup> Martin (note 677 above) 60.

<sup>694</sup> Ibid.

<sup>695</sup> Grinspun (note 691 above) 52.

<sup>696</sup> Grinspun (note 691 above) 52.

Therefore, although poverty is one of the challenges facing South Africa and thus standing on the way of realising children's survival rights, evidence reveals that CSG is currently playing a significant function in alleviating poverty. In addition to poverty, some key barriers that still exist prevent or delay access to the CSG. These include administrative factors as well as challenges in institutional capacity.<sup>697</sup>

### **Confusion around the means test**

The means test poses confusion in respect of the requirement and the income threshold. This means test is only concerned about the overall income of the caregivers. There is a misconception between SASSA officials and the caregivers.<sup>698</sup>

### **Problems with documentation**

Birth certificates and identities are still posing a problem to the applicants. A challenge still persists in accessing documentation. These challenges prevent eligible caregivers from applying for or cause a delay in accessing the grant.<sup>699</sup>

### **Direct costs of applying**

At times some applicants have to travel long distances and make several trips to gain access to the grant.<sup>700</sup> This process can also be costly.<sup>701</sup> More so, applicants have raised a concern that prolonged waits in long queues and also poses a cause for anxiety.

### **Amount of the CSG**

It submitted that the current amount of CSG falls below the national poverty line. As a result it is insufficient to provide food for starving children.<sup>702</sup> Particularly rising

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<sup>697</sup> A Delany & S Jehoma 'Implementation of social grants: improving delivery and increasing Access' in Delany A & al (eds) *South African Child Gauge* (2016) Children's institute UCT.

<sup>698</sup> SASSA & UNICEF Preventing exclusion from the Child support Grant: A study of exclusion Errors in Accessing CSG Benefits Pretoria UNICEF South Africa (2013).

<sup>699</sup> Ibid.

<sup>700</sup> Delany & Jehoma (note 697 above)62.

<sup>701</sup> Ibid.

<sup>702</sup> Delany & Jehoma (note 697 above)62

food prices amid inflation has impacted negatively on a situation that is already dire.<sup>703</sup>

### **Other obstacles**

General lack of awareness among the potential beneficiaries of the process, lack of time or motivation to apply especially for new and young mothers have all made the process too complex. Refugee grantees report that they also experience hostile attitudes from SASSA officials. Their frustration has been worsened by the fact that refugees lack proper documentation to apply for grant due to permit expiration.<sup>704</sup>

Against this backdrop, it should be noted that notwithstanding, significant improvements have been made in terms of delivery and access to the CSG programme.<sup>705</sup> This makes the CSG to be considered a world successful example of a working social grant system.

### **3.4 Conclusion**

The objective of this chapter was threefold. Firstly, the chapter aimed to highlight the human rights framework of survival rights in South Africa by presenting the manner in which this country has incorporated children's rights at the domestic level. It avers that South African NGOs, CBOs, UNICEF, as well as several children's rights activists fought against the plight of apartheid. These organisations played a huge role in respect of the protection, promotion, and ratification of the CRC.

Secondly the chapter highlighted different Acts relevant to the realisation of children's rights in South Africa. Such legislative provisions include the 1996 Constitution which introduces constitutional supremacy and an entrenched justiciable Bill of Rights. The Sexual Offences and Related Matters Acts, the

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<sup>703</sup> W Zembe-Mkabile & others 'Why do families still not receive the Child Support Grant in South Africa? A longitudinal analysis of a cohort of families across South Africa' (2012)*BMC International Health and Human Rights*, 12:24.

<sup>704</sup> Delany & Jehoma (note 697 above)63; DSD, SASSA and UNICEF *Removing the Barriers to Accessing Child Grants: Progress in Reducing Exclusion from South Africa's Child Support Grant*. (2016).

<sup>705</sup> Delany & Jehoma (note 697 above) 65.



Children's Act, the Social Assistance Act and the National Health Act were also covered

Thirdly, the chapter sought to run through the programmes and policies available in South Africa geared towards realising children's socio-economic rights. Such rights include school feeding schemes which ensure that the poorest child can get at least a meal a day. To this facility can be added free medical care for pregnant women and children under six years of age as well as social grants to assist in the maintenance of children. As has been seen among the current programmes discussed already, the CSG is deemed one of the most valuable social assistance programmes available in South Africa. Notwithstanding the aforesaid, the chapter also addressed some shortcomings relating to the CSG.

## **CHAPTER FOUR**

### **THE REALISATION OF CHILDREN'S SURVIVAL RIGHTS IN KENYA AND DRC**

#### **4.1 Introduction**

Chapter three dealt with children's survival rights in South Africa. The previous chapter discussed laws, programmes and strategies available for the realisation of children's survival rights in that specified country. The study analysed survival rights focusing on three aspects namely, the right to basic nutrition, the right to basic health care services and the children's basic right to social services and social security. As was seen the child support grant was a suitable programme contributing not only to child survival rights *per se*, but also to poverty alleviation.

This chapter explores the legal framework and programmes available for the realisation of children's rights, firstly in Kenya and secondly in the DRC. For that reason, this chapter is organised in three main parts. The first part concentrates on the Kenyan analysis of children's survival rights laws dealing with children as well as available programmes. The second part of the study highlights the DRC perspective. In the same vein, the study embarks on the analysis of children's survival rights, available laws as well as programmes on children's rights. The third part concerns the steps and measures taken by the three countries under study in order to comply with their obligations under the CRC.

#### **4.2 Analysis of the Kenyan situation on children's survival rights**

Kenya is situated in East Africa and is encircled by the Indian Ocean, coastal countries and Lake Victoria.<sup>706</sup> According to UNICEF, Kenya socially ranks among

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<sup>706</sup> C Huang & others 'Investments in Children's Health and the Kenyan Cash Transfer for Orphans and vulnerable Children: evidence from an Unconditional Cash Transfer Scheme' (2017) *Health Policy and Planning* (32)944.

the most unequal countries in the sub-region.<sup>707</sup> The Republic of Kenya has a predictable population of thirty nine million people with an annual growth rate of two point eight per cent. It is estimated that the population will exceed fifty million by 2025.<sup>708</sup> Approximately, half of the population in Kenya lives below the poverty datum line.<sup>709</sup> Unfortunately accessing basic quality services such as health care, education, clean water and sanitation, is beyond the reach of many Kenyans.<sup>710</sup> Children in Kenya are not spared. In consequence children are also affected by the same crisis.<sup>711</sup>

Studies reveal that Kenyan children are growing up in a time of serious political, economic and social transformation.<sup>712</sup> The establishment of a decentralised government in 2013,<sup>713</sup> in conjunction with increasing urbanisation and unequal economic growth, combined with the challenges of historical marginalisation of populations and constant internal conflict, cyclical drought and other disasters have resulted in a complex and challenging environment.<sup>714</sup> In Kenya, children below eighteen years old constitute forty-nine percent of the population.<sup>715</sup> As a result it comes as no surprise that many Kenyan children are still deprived of basic socio-economic rights.<sup>716</sup>

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<sup>707</sup> UNICEF 'Overview Kenya at a glance' (June 2014) Available at [http://www.unicef.org/kenya/overview\\_4616.html](http://www.unicef.org/kenya/overview_4616.html). Accessed on 9 August 2017. It is submitted that the population in Kenya is 38.3 million, children: 19.15 million; people living below poverty line: 46%.

<sup>708</sup> RR Ettarch & C Kyobutungi 'Physical access to health facilities and contraceptive use in Kenya: Evidence from the 2008 -2009 Kenya Demographic and Health Survey' (2012)16(3) *African Journal of Reproductive Health* 47.

<sup>709</sup> Huang (note 706 above). Poverty line or poverty threshold is the minimum level of income considered adequate in a specific county. The business dictionary defines poverty line as 'standard family income threshold below which family is officially classified as poor and entitled to welfare assistance'. Available at [www.businessdictionary.com](http://www.businessdictionary.com). Accessed on 9 August 2017.

<sup>710</sup> UNICEF (note 707 above) 2.

<sup>711</sup> Ibid. According to UNICEF 'over 75 per cent of children and adolescents experience one or more deprivations of their rights, including limited access to safe water and improved sanitation, education and health and nutrition services'.

<sup>712</sup> UNICEF (note 707 above).

<sup>713</sup> For more information about Kenya's autocracy background, see R Pagnuco & others 'An overview of the Human Rights movement in Kenya' (2011) *Peace Studies College of Saint Benedict and Saint John's University*. Available at [http://digitalcommons.csbju.edu/peace\\_studies\\_pubs](http://digitalcommons.csbju.edu/peace_studies_pubs). Accessed on 08 August 2017; See also M Mutwa Kenya's quest for Democracy: Taming Leviathan (2008); Nasang'o & S Wanjala *The Human rights Sector in Kenya: Key Issues and challenges*. Kenya Human Rights Institute (2009).

<sup>714</sup> UNICEF (note 707 above) 2.

<sup>715</sup> Ibid

<sup>716</sup> Ibid.

It remains to touch on the children's rights movement in Kenya. Concerted efforts were made when the Kenyan Government recommended the Kenya Law Reform commission to deal with children issues for a better implementation of the CRC.<sup>717</sup> Kenya ratified the CRC on 30 July 1990. Various reasons were given for the reform of laws relating to children in Kenya.<sup>718</sup> The first reason for reform was the need to implement the CRC principles. Those principles are namely the best interests of the child, child survival, development, participation rights and protection rights.<sup>719</sup> The second reason was the pressure to repeal or amend numerous pieces of colonial legislation.<sup>720</sup> The third reason was the desire to place children's rights at the centre of legal reform in Kenya.<sup>721</sup>

Consequently, the Kenya Law Reform Commission (KLRC) elucidates the absence of the provisions in the Constitution.<sup>722</sup> Furthermore, the fundamental rights chapter in the 1969 Constitution was reviewed so as to address the issues in connection with the CRC.<sup>723</sup> Motivated by the need to amend the law, the Kenyan General attorney initiated the KLRC review of existing laws.<sup>724</sup> The KLRC organised a task force to embark on the review process.<sup>725</sup> The task force consisted of thirteen members, namely government officers, children's advocates, experts and representatives of child welfare organisation as well as academics.<sup>726</sup> This initiative was conceived to be an interdisciplinary approach.<sup>727</sup> The team undertook their work in March 1991. Its aim was to make a deep study of all issues relating to children's rights as well as to come up with a single piece of legislation.<sup>728</sup> Bearing

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<sup>717</sup> Kiprotich & Charles (note 22 above) 279. It should be noted that the Kenya Law Commission reform was originally established in 1982 through the enactment of the Law reform Commission Act (Cap 3), S3 of this Act states that the duty of this Commission is 'to keep under review all the law of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactment and generally its simplification and modernisation'.

<sup>718</sup> Odongo (note 75 above) 95. .

<sup>719</sup> Ibid.

<sup>720</sup> Ibid.

<sup>721</sup> Odongo (note 75 above) 94.

<sup>722</sup> Kenya Law Reform *A New Law on Children: Report of the Child Law Task Force* (1993)22. The Kenyan Constitution, Act no5 of 1969 as amended.

<sup>723</sup> Ibid.

<sup>724</sup> Odongo (note 75 above) 95. See also Kenya law Reform report (note 381 above) 47.

<sup>725</sup> Kenya Law Reform Report (note 722 above) 12.

<sup>726</sup> Ibid.

<sup>727</sup> Odongo (note 75 above).

<sup>728</sup> Ibid.

in mind the prevailing circumstances in the country and to comply with the standard requirements of international law on the rights of the child, the KLRC focused their attention on the proposed Bill.<sup>729</sup> The Bill which was later enacted to law in 2002 provides for legal instruments to be used in the development of policies as well as the legal framework for the education and promotion of children's rights.<sup>730</sup> A significant piece of legislation that was enacted was called the Children's Act 8 of 2001 (Children's Act 2001).

The Children's Act 2001 was a great achievement in the promotion of the rights of the child.<sup>731</sup> This relevant legislation stipulates that children have a right to education, parental care, religious education, health care and protection from abuse, harmful cultural practices and exploitation.<sup>732</sup> In addition, it should be noted that previously Kenya had a formal child protection system dating back to independence.<sup>733</sup> Several pieces of legislation such as the Children and Young Person Act,<sup>734</sup> the Adoption Act,<sup>735</sup> as well as the Guardianship and Infants Adoption Act<sup>736</sup> addressed the issues of children. The Children Act 2001 repealed these legal provisions.<sup>737</sup> Basically the Children and Young Person Act aimed to provide for the protection and discipline of children, juveniles and young persons, and for matters incidental thereto and connected therewith.<sup>738</sup> The Act contained three parts, namely proceedings in juvenile courts, protection or discipline of children and juveniles as well as committal to fit persons and to approved schools.

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<sup>729</sup> Kenya Law Reform Report (note 722 above) 14.

<sup>730</sup> Ibid. In other words the following are the reasons for the enactment of the Children's Act 2001: -to gather the provisions of various laws that affected children and to enable the provisions of the CRC and the African Charter on the rights of the child. For more information see Kenyan Laws providing for the child rights and protection. Available at <http://WWW.ckadvocates.co.ke/2014/01/kenya-law-providing-for-the-child-rights-and-child-protection/>. Accessed on 2 August 2017.

<sup>731</sup> Kiprotich & Charles (note 22 above) 279.

<sup>732</sup> Ss 7-18 of the Children's Act 2001.

<sup>733</sup> Kiprotich & Charles (note 22 above) 279.

<sup>734</sup> Cap.141. Note that the word 'Cap' is written next to an Act, it refers to a specific Chapter in the Laws of Kenya.

<sup>735</sup> Cap.143.

<sup>736</sup> Cap.144.

<sup>737</sup> Kiprotich & Charles (note 22 above) 281.

<sup>738</sup> See the long title of the Children and Young Persons Act

With regard to the Guardianship Act, its purpose was to deal with the guardianship and custody of infants and matters incidental thereto.<sup>739</sup> This legal provision contained the rights of surviving parents with regard to guardianship as well as powers of courts, the power of a parent to appoint testamentary guardians, the power of guardians, equal right of a mother to apply to court, the power of a court to make order as to custody, the power of a court to remove a guardian, disputes between joint guardians, guardianship in cases of judicial separation and divorce, in case of separation the deed between mother and father, the power of a court as to production of an infant, the power of a court to order repayment of costs of bringing up an infant, court making order to have regard to the conduct of a parent, the power of a court as to infant's religious education, enforcement of orders for payments of money, principles on which questions relating to custody, upbringing, etc., of infants are to be decided, saving, rules of court.<sup>740</sup>

As for the Adoption Act, this statute aimed towards the making and registration of adoption orders; to provide for the registration and control of adoption societies and other persons in connection with the adoption of children; to restrict the making and receipt of payment in connection with the adoption of children and for connected purposes. The Act contained three parts namely the registration of adoption rules, the effects of adoption orders, adoption societies and schedules.

Following this brief overview of children's rights issues in Kenya, a discussion of the domestic laws pertaining to children's rights issues in Kenya is now in order.

Emphasis will be placed on the Constitution and the Children's Act 2001 as the two legal frameworks that became crucial when analysing children's survival rights in Kenya.

#### **4.2.1 Kenyan laws providing for children's rights**

The Republic of Kenya has enacted several laws catering for the protection of children's rights. These laws are the Constitution of Kenya 2010 (the 2010

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<sup>739</sup> See the long title of the Guardianship of infants Act.

<sup>740</sup> Ss 3-19 of the Guardianship of infants.

Constitution), the Children Act 2001, the Penal Code Act, the Evidence Act and the Employment Act.<sup>741</sup>

#### **4.2.1.1 The 2010 Constitution**

The new Kenyan Constitution came into force on 27 August 2010.<sup>742</sup> Interestingly, Article 2 (1) of the 2010 Constitution provides that ‘this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government’. This constitutional provision clearly indicates how the Kenyan Constitution like the 1996 Constitution is supreme.<sup>743</sup> Furthermore, Article 2(4) indicates that ‘Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid’. This is similar to the South African constitutional set up where the Constitutional Court is empowered to test the consistency of any conduct and legislation against the Constitution.<sup>744</sup>

The great achievement of the 2010 Constitution is that, on the one hand it includes a progressive Bill of Rights which reflects the international human rights standards encompassing categories of rights.<sup>745</sup> The 2010 Constitution highlights the first generation rights, namely the civil and political rights such as the right to life, human dignity, liberty, freedom rights and security of the person.<sup>746</sup> The second generation rights, namely socio-economic rights such as the right to food, housing, sanitation, water, health, and social security are also guaranteed<sup>747</sup> as well as the third

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<sup>741</sup> Onyango & Njuguma (note 13 above) 22. The list is not exhaustive as one may come across another legislation that it is not mention in this study for example a Subordinate Courts (separation and maintenance) Act Cap 153) is also providing for children’s rights in case of maintenance, however it is not discussed in this study. The Law of Succession Act (Cap 160) which focuses on inheritance by the Children of the Property of the deceased, the Sexual offence Act 3 of 2006 which creates new offences that are not covered in the Penal Code, the Refugee Act 13 of 2006 which emphasises that the a refugee child should be given similar treatment as any other child in Kenya. The HIV and AIDS Prevention and Control Act 14 of 2006 which provides protection and safeguard to children infected with HIV and the Borstal Institutions Act (Cap 92) which protects children facing juvenile justice system .

<sup>742</sup> Odongo (note 75 above) 116.

<sup>743</sup> See S 2 of 1996 Constitution.

<sup>744</sup> S 2 of the 1996 Constitution.

<sup>745</sup> Odongo (note 75 above) 116. See Chapter 4 of the 2010 Constitution, part 2 deals with Rights and Fundamental Freedoms.

<sup>746</sup> Arts 26- 39.

<sup>747</sup> Arts 43-46.

generation rights such as the right to a clean and healthy environment.<sup>748</sup> On the other hand, a significant milestone achieved is that the 2010 Constitution, unlike its predecessor provides for children rights.<sup>749</sup> Evidently, Article 53 of the 2010 Constitution states that:

1. Every child has the right-
  - a) to a name and nationality from birth;
  - b) to free and compulsory basic education;
  - c) to basic nutrition , shelter and health care;.
  - d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence ,inhuman treatment and punishment, and hazardous and exploitative labour;
  - e) to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not; and
  - f) not to be detained, except as a measure of last resort, and when detained, to be held
    - i. for the shortest appropriate period of time; and
    - ii. separate from adults and in conditions that take account of the child's sex and age.
2. A child's best interests are of paramount importance in every matter concerning the child.

It can also be argued that as the 2010 Constitution includes children's rights provisions, it places an obligation on the State to protect, promote and fulfill the rights and freedoms not only of adults but also those that purport to benefit children.<sup>750</sup> Everyone is currently a beneficiary of the entrenched Bill of Rights. It follows that if such right is infringed, everyone is given the opportunity to approach the court.<sup>751</sup> In addition, the blue-print document also guarantees free access to other institutions, such as the Independent Human Rights Commission.<sup>752</sup> The Children's Act 2001 is also an additional document that purports to improve the rights and welfare of Kenyan children.

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<sup>748</sup> Art 42. With regard to the generation of rights discussion see Chapter Two.

<sup>749</sup> The 1969 Constitution did not have the right of children guaranteed. See Onyango& Njuguma (note 13 above).

<sup>750</sup> Art 21(1) of the 2010 Constitution.

<sup>751</sup> Art 48 of the 2010 Constitution.

<sup>752</sup> Art 59 of the 2010 Constitution.



#### 4.2.1.2 Children's Act 2001

The Children's Act 2001 came into operation on 1 March 2002. This Act differentiates between a child and a child of tender years.<sup>753</sup> A child means any human being under the age of eighteen years while a child of tender years is a child under the age of ten years.<sup>754</sup> This Act was enacted to provide for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care, and protection of children.<sup>755</sup> It also provides for the administration of children's institutions, following the principles of the CRC and ACRWC.<sup>756</sup>

The most significant aspect of the Children's Act is that it clearly reflects the principles of the CRC and the four categories of rights discussed in this study.<sup>757</sup> The first principle this Act provides for is the best interest of the child principle in s 4 (2).<sup>758</sup> The second principle is the child's right to survival and development in s 4 (1).<sup>759</sup> In this regard, the survival right takes center stage as it is clearly intended in the Children's Act 2001 that the State must fulfil its obligation.<sup>760</sup> The third principle refers to the right to non-discrimination in s 5.<sup>761</sup> The fourth principle is the right to participation which affords an opportunity to everyone to express their opinion in terms of s 4 (4).<sup>762</sup>

A further progressive achievement of the above Act is that it not only safeguards the rights of the child but also binds the child in terms of specifying that he or she also

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<sup>753</sup> See Part I (Preliminary) of the Children's Act 2001.

<sup>754</sup> Ibid.

<sup>755</sup> See the long title of the Children's Act 2001.

<sup>756</sup> Ibid.

<sup>757</sup> See Part II of this Act which is titled 'Safeguards for the Rights and welfare of the Child'; Ss 3-22.

<sup>758</sup> The Act indicates that 'in all actions concerning children, whether undertaken by the Public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

<sup>759</sup> The Children's Act 2001 provides that 'Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.'

<sup>760</sup> See S3 of the Children's Act 2001 which states that 'the Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child sets out in this Part.'

<sup>761</sup> The Act provides that 'No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.'

<sup>762</sup> The Act indicates that 'in any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.'

has duties and responsibilities as a child as set out in s 21.<sup>763</sup> Odongo points out that the Children's Act 2001 was the first amongst the new pieces of legislation on the child enacted in Africa since 1990 to provide that the child has duties and responsibilities as well.<sup>764</sup> By including such a provision in the Children's Act 2001, the Kenyan Government has demonstrated its commitment not only at international level but also at regional level to align local legislation within the African cultural context.<sup>765</sup> The ACWR also provides for the duties and responsibilities of the child in Art 31.<sup>766</sup>

Furthermore, the Children's Act 2001 includes enforcement of the rights in cases where any person infringes a child's rights as seen in this particular legislation.<sup>767</sup> Interestingly, it should be pointed out that the Kenyan government is made significant strides in enacting legislation specifically for children, notwithstanding the fact that there is a need to find measures and programmes to realise such rights in practice. Further to the discussion of Kenyan laws providing for children, the Penal Code will now be scrutinised below.

#### **4.2.1.3 The Penal Code (Cap 63)**

The Penal Code incorporates the penal system in Kenya.<sup>768</sup> This Act protects children by specifying which acts and omissions amount to child abuse.<sup>769</sup> With regards to criminal liability a child who has less than eight years old child may not be charged with any offence.<sup>770</sup> However, a child between eight and twelve years

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<sup>763</sup> The Act emphasises that 'In the application of the provisions of this Act, and in any matter before a court of law concerning any child, due regard shall be had to the duties and responsibilities of a child to—

(a) work for the cohesion of the family; (b) respect his parents, superiors and elders at all times and assist them in case of need; (c) serve his national community by placing his physical and intellectual abilities at its service; (d) preserve and strengthen social and national solidarity; and (e) preserve and strengthen the positive cultural values of his community in his relations with other members of that community: Provided that in reckoning the requisite duty and responsibility of any individual child, due regard shall also be had to the age and ability of such child and to such limitations as are contained in this Act.'

<sup>764</sup> Odongo (note 75 above) 115.

<sup>765</sup> Ibid.

<sup>766</sup> Where it points out 'that Children have responsibilities towards their families and societies, to respect their parents, superiors and elders, to preserve and strengthen African cultural values in their relation with other members of their communities'.

<sup>767</sup> S 22 of the Children's Act 2001.

<sup>768</sup> Onyango & Njuguma (note 13 above) 3.

<sup>769</sup> Ss 210, 211, 214, 242 A of the Penal Code.

<sup>770</sup> S 14 (1) of the Penal Code.

might be held criminally responsible provided that it is proven that he or she was able to distinguish between what is right and wrong.

In addition, the Penal Code also states that a male child under the age of twelve is incapable of having carnal knowledge or sexual intercourse.<sup>771</sup> Therefore a criminal action cannot be taken against an eleven year old boy who has committed the offence of rape or defilement. This position obtains because such a youth is deemed incapable of the moral discernment necessary to form *culpa* or legal blameworthiness in the eyes of the law.<sup>772</sup>

By the same token the Penal Code protects children from sexual abuse in any of the following forms: rape, defilement, indecent assault, incest (both by male and female) and unnatural offences.<sup>773</sup> The said Act also protects a child against physical abuse which includes assault, be it bodily harm and grievous bodily harm and other forms of offences such as concealment of birth,<sup>774</sup> killing an unborn child,<sup>775</sup> and procuration of an abortion.<sup>776</sup>

While scrutinising this Act, it can be argued that that the Kenyan government takes appropriate measures to protect children against any form of abuse. Although the focus of our study is not on child abuse, it is worthwhile to mention that a key objective of this study is to find out how the African countries under study realise children's rights, particularly survival rights which is not covered in the Penal Code. In addition, an additional piece of legislation that will be discussed below is the Evidence Act.

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<sup>771</sup> S 14 (2) of the Penal Code.

<sup>772</sup> S 14 (3).

<sup>773</sup> S 162 of the Penal Code.

<sup>774</sup> S 227 of the Penal Code.

<sup>775</sup> S 228 of the Penal Code and s 210 deals prohibits infanticide where a woman willingly causes death of her child being under the age of twelve months.

<sup>776</sup> S 210 provides for infanticide, s 227 protects against concealing birth, s 228 deals with killing of an unborn child.

#### **4.2.1.4 The Evidence Act (Cap 80)**

S 124 of the Evidence Act addresses the issue of the corroboration of evidence by children of tender years.<sup>777</sup> S

124 of the Evidence Act read with s 9 of the Oaths and Statutory Declaration Act indicates that an accused may not be convicted on the basis of the uncorroborated evidence of a child of tender years.<sup>778</sup> The evidence of such child must be supported by further independent evidence.<sup>779</sup> Meanwhile, the second paragraph in s124 emphasises that in a criminal case involving a sexual offence where the only evidence is that of the victim child of tender years, the court needs to receive the evidence of the child and proceed with the conviction of the accused provided that the court is satisfied that the child is telling the truth.<sup>780</sup> Looking at this provision, one may argue that the Evidence Act is not only concerned about the child witness testimony in a criminal case but is also concerned that the children's survival right is not violated by default during criminal trials. In summary the Evidence Act indicates the Kenyan government endeavours to safeguard the child's rights at all the times.

Further, legislation relating to children's rights and protection is the Employment Act 11 of 2007.

#### **4.2.1.5 The Employment Act No 11 of 2007**

The Employment Act protects all children below the age of sixteen from employment in industrial undertaking despite formal training or internship.<sup>781</sup> The Act explains the meaning of worst form of child labour.<sup>782</sup> The said legislation also

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<sup>777</sup> Corroboration means independent evidence, which involves the accused of a crime by linking it with him. Children of tender years are children under the age of ten years as defined in s 2 of the Children's Act 8 of 2001.

<sup>778</sup> Onyango & Njuguma (note 13 above) 37.

<sup>779</sup> Ibid.

<sup>780</sup> See also Onyango & Njuguma (note 13 above) 37.

<sup>781</sup> S 56 of the Employment Act 11 of 2007 deals with the prohibition of employment of children between thirteen years and sixteen years of age.

<sup>782</sup> See Part I (Preliminary) of the Employment Act where it states that 'worst form of child labour with respect to juveniles, means their employment, engagement or usage in any activity comprising of—

a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory recruitment of children for use in armed conflict;

defines what a young person is.<sup>783</sup> The Act also states what “employment” means in the context of children.<sup>784</sup> Furthermore, the Act addresses issues relating to child employment specifically because the legislature regards child labour in a serious light and has introduced employment rules to regulate it. The reason why this legislation prohibits the employment of children is that the exploitation of children in the work place continues to threaten many children in Kenya today.<sup>785</sup>

Ultimately in analysing the laws that protect and provide for children in Kenya, it can be argued that theoretically Kenya has embarked on a transformative legal framework. Particularly the Constitution and the Children’s Act have given priority to children’s survival rights in Kenya.<sup>786</sup> Notwithstanding, the major problem is the extent to which Kenya practically demonstrates real commitment to respect, protect and fulfill children’s rights.

The section that follows will examine closely available programmes and policies relating to children’s survival rights’ bearing in mind that poverty stands out as a major cause and driver of violations against children’s rights in Kenya.

#### **4.2.2 The fulfilment of children’s survival rights in Kenya**

From the foregoing discourse, it was seen that the two significant laws that impact the rights of children in Kenya are the 2010 Constitution and the Children’s Act 2001. Furthermore, it can be seen that the 2010 Constitution provides for children survival rights in the form of socio economic rights in particular because it states

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- b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
  - c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
  - d) work which, by its nature or the circumstances in which it is carried Out, is likely to harm the health, safety or morals of the child; in S 53, the employment Act prohibits all forms of worst forms of child labour.

<sup>783</sup> Part I (Preliminary) of the Employment Act.

<sup>784</sup> S 52 of the Employment Act 11 of 2007 provides that “employment” means employment of a child in a situation where— (a) the child provides labour as an assistant to another person and his labour is deemed to be the labour of that other person for the purposes of payment;

(b) the child’s labour is used for gain by any person or institution whether or not the child benefits directly or indirectly; and

(c) There is in existence a contract for service where the party providing the service is a child whether the person using the services does so directly or by agent.

<sup>785</sup> CRIN ‘Kenya: Children’s rights reference in the Universal Periodic Review’(2010). Available at [https:// www.crin.org/en/library/publications/kenya-childrens-rights-references-universal-periodic-review](https://www.crin.org/en/library/publications/kenya-childrens-rights-references-universal-periodic-review). Accessed on 06 September 2017.

<sup>786</sup> See Arts 43-46 of the Constitution and s 4 of the Children’s Act 2001.

that ‘every child has the right to basic nutrition, shelter and health care’.<sup>787</sup> In addition, a general clause in the 2010 Constitution also guarantees economic and social rights.<sup>788</sup> The 2010 Constitution insists on the duty of the state to provide convenient social security to people who are unable take care of themselves and their dependants.<sup>789</sup> Furthermore, the Children’s Act 2001 also envisages a provision safeguarding survival rights whilst the best interest of the child principle places more emphasis on a child’s right to life.<sup>790</sup> However the part of the Children’s Act 2001 becomes interesting where it indicates that ‘the Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realisation of the rights of the child...’.<sup>791</sup> It is in view of the steps that government should take that this section explores. This part of the study seeks to explore available programmes and policies on children’s survival rights in Kenya specifically the right to basic nutrition, health care and social services.

#### **4.2.2.1 Children’s right to basic nutrition in Kenya**

As mentioned above, Article 53 (1) (c) of the 2010 Constitution states that ‘every child has the right to basic, nutrition, shelter and health care’. In addition, the Children’s Act in its s 23 (2) (a) (II) provides that parents have the duty to maintain the child particularly feed him with an adequate diet. In light of these provisions, it becomes obvious that the Government of Kenya (GOK) is doing its best to implement children’s rights to nutrition. As Iskander correctly sums it, ‘the true test of the Children’s Act lies in the degree to which its provisions are implemented and enforced’.<sup>792</sup> The Children’s Act even caters for penalties in case of the infringement of the children’s rights.<sup>793</sup> As a result, in an attempt to promote, protect and fulfil children’s rights; the GOK initiated the National Plan of Action (NPA) 2008-2012 which focused on the analysis of children’s rights to survival, development, protection and participation.<sup>794</sup> The 2008-2012 National Plan was reviewed by the

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<sup>787</sup> Art 53(c).

<sup>788</sup> Art 43.

<sup>789</sup> Art 43(3) of the 2010 Constitution.

<sup>790</sup> S 4 (1) of the Children’s Act 2001.

<sup>791</sup> S 3 of the Children’s Act 2001.

<sup>792</sup> P Iskander ‘Children rights legislation in Kenya: an overview’. Available at <https://www.law.utoronto.co/ihrp/hiv-iskander.doc>. Accessed on 15 September 2017.

<sup>793</sup> S 20 of the Children’s Act 2001.

<sup>794</sup> Republic of Kenya (Vision 2030) ‘National Plan Action for Children in Kenya 2015-2022’ (2015) 2.

National Council for Children's services (NCCS) with the collaboration of other ministries, departments and agencies.<sup>795</sup> The aim of the review was to identify the achievement, the gaps, lessons to be learnt and challenges faced. As a result the 2015-2022 NPA was developed.<sup>796</sup> The 2015-2022 NPA is in line with the 2010 Constitution and has been compiled to accomplish the goals envisioned in the Kenya Vision 2030.<sup>797</sup>

The current NPA indicates possible priorities and interventions for the progressive realisation of children's rights in Kenya.<sup>798</sup>

Basically, what the GOK aims to do is to transform Kenya into a new, advanced, middle-income country which provides a standard of life for its entire citizen by 2030. This plan is portrayed as Kenya vision 2030.<sup>799</sup> Since, the focus of this study is on children, basic nutrition is dealt within two fold. The first focus is the nutrition of children under the age of five years. The second is the nutrition of school going children.

With regard to children under five, GOK adopted various policies and commitments namely the Food and Nutrition Security Policy,<sup>800</sup> the Breast Milk Substitute and Regulations Control Act.<sup>801</sup> These were further enhanced by legislation for mandatory fortification of wheat flour, maize and oil with vitamins and joining the Scaling up Nutrition movement.<sup>802</sup> Despite all the efforts made most of the children are still deprived of rights to basic nutrition due to inadequate coordination of

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<sup>795</sup> Ibid.

<sup>796</sup> Ibid.

<sup>797</sup> Ibid. The Vision 2030 aim is the transformation of Kenya into a newly industrialising, middle-income country which provides a high quality life to all its citizens by 2030. Therefore the state will enhance the productivity of crops and livestock, incomes and food security and nutrition.

<sup>798</sup> Republic of Kenya (note 794 above) 2.

<sup>799</sup> Republic of Kenya 'School Nutrition and Meals Strategy for Kenya' Ministry of Education. Science and technology, Ministry of Health, Ministry of Agriculture, livestock and fisheries (February 2016).

<sup>800</sup> This policy points out the improvement of nutrition in public and private sector. Its objectives are : 'To achieve good nutrition for optimum health of all Kenyans; to increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times; to protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.'

<sup>801</sup> 34 of 2012. The purpose of this Act is to 'provide for appropriate marketing and distribution of breast milk substitutes; to provide for safe and adequate nutrition for infants through the promotion of breastfeeding and proper use of breast milk substitutes, where necessary, and for connected purposes'.

<sup>802</sup> Republic of Kenya (note 794 above) 5.

service provision among key stakeholders as well as inadequate resources to implement the planned activities.<sup>803</sup>

In relation to school going children, measures to ensure that the most vulnerable child is not forgotten have been taken by implementing school-feeding programmes.<sup>804</sup> Poverty, hunger and malnutrition have had a huge impact on Kenyan children.<sup>805</sup> In response, the GOK developed the School nutrition and meals strategy, to ensure that school going children are well nourished and healthy to be able to utilize the opportunity to learn. The following are the objectives of the meals strategy:

1. To increase intake and awareness of adequate, culturally appropriate nutritious meals amongst school age children;
2. To improve enrolment, attendance, retention, completion and learning of school age children with equity;
3. To promote economic, social and agricultural development;
4. To develop mechanisms for a nationally-owned and sustainable programme;
5. To promote partnerships for resource mobilization for school meals;
6. To strengthen governance and multi-sectorial coordination mechanisms for the school nutrition and meals programme.<sup>806</sup>

Basically, the strategy of providing school meals is implemented in three methods namely centralised method, decentralized method and any given combination of the two.<sup>807</sup>

The centralised method is employed when procurement is fulfilled centrally and the food is allocated to schools for preparation of meals, either at national or county level.<sup>808</sup> Decentralised method is when funds are sent to schools, which initiates the procurement at the local level; when purchase is made from the local smallholder farmers this is referred to as 'home-grown School Meal Initiative'.<sup>809</sup> This may happen at the national, county and school levels.<sup>810</sup>

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<sup>803</sup> Ibid, 3.

<sup>804</sup> CRIN Kenya (note 785 above).

<sup>805</sup> UNICEF (note 707above) 1/2. Note that poverty and child malnutrition are targeted as goal 1 in the Millennium Development Goals. Currently the focus is on the Sustainable Development Goals.

<sup>806</sup> Republic of Kenya (note 794 above) 10.

<sup>807</sup> Republic of Kenya (note 794 above) 10.

<sup>808</sup> Ibid.

<sup>809</sup> Republic of Kenya (note 794 above) 10.

<sup>810</sup> Ibid.



The mixed method is a combination of the centralised and decentralised methods. The mixed method can be extended at local level.<sup>811</sup> A school can either receive funds to purchase food locally or receive food which has been procured centrally.<sup>812</sup> In this case coordinated efforts are necessary to uphold the goal for which this strategy was developed. It can be argued that the Home-Grown School Meals programmes are the most appropriate method for Kenya.<sup>813</sup> Despite the gap in the training and capacity development of the smallholder farmers, this programme contributes not only to the improvement of children's universal access to education and nutrition but also to the development of the community as a whole.<sup>814</sup>

This strategy is aligned to other policy considerations which aim at ensuring that all children at the primary school level receive a hot midday meal each school day.<sup>815</sup> Although the content of each policy is not elaborated in this study, it should suffice to say that the strategies purport to enhance the education, health and nutritional status of Kenyan school children. Implementing this strategy comes with challenges. The following challenges can be highlighted as a by-product of implementing school feeding programmes in Kenya:

- Creating unintended negative effects through price changes in local markets;
- The risks that sprout from the increased complexity of adding local procurement to the implementation design;
- The diverse and unequal underlying conditions within and between regions across the country;
- Boosting local production to meet programme demand requires a significant amount of coordination and efforts;

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<sup>811</sup> Ibid.

<sup>812</sup> Ibid, 34.

<sup>813</sup> Under the home-grown programme government transfers money directly to schools and indicates valuable guidelines on key aspects such as nutritional arrangement of food baskets, sufficient procurement processes and monitoring and evaluation.

<sup>814</sup> Ibid.

<sup>815</sup> Ibid, 9. The following are the relevant legislation and policies: Basic Education Act (2013) which requires the state to set aside resources for school meals ; National Education Sector Plan 2013-2018 pinpoints that health and nutrition are crucial on the overall achievement of school age children and encourages the introduction of school meals programme ; Education and Training Medium Term Plan Two (MTP II) 2013-2018 in this paper government notes the provision of water and sanitation in schools, de-worming and immunization of children; Ministry of Education Strategic Plan 2013-2017 emphasises on free education ; School Health Policy 2009 recommends school meals in Kenyan schools; Food and Nutrition Security Policy (2011) indicates that the state should eradicate hunger and malnutrition in the entire country ; Health Policy 2014-2030; Food and Nutrition Security Strategy 2015-2025 ; National Nutrition Action Plan 2012-2017 promotes appropriate nutrition for school children and adolescents ; National Social Protection Policy (2011) admits school meals as pivotal safety net for children and their families.

Identifying the appropriate procurement mechanisms is a delicate exercise of assessing complex trade-offs and unintended negative effects.

The strategy also stresses the importance of issues that it has to look at namely the need to strengthen the institution; to encourage community participation, prioritise the local smallholder supply and purchase directly from them. Therefore the current legal framework and procedure should be reviewed for effective access of smallholder farmers access to market as suppliers.<sup>816</sup> The strategy also emphasises the need for technical support to develop capacities at all levels, as well as the involvement of the private sector.

In a capsule, it could be argued that since GOK has the international and local obligation to protect, fulfil and promote the children's right to basic nutrition, this is evidenced by the implementation of the school nutrition and meals strategy which stresses that hunger and malnutrition have a negative impact on children. A further right that the GOK has an obligation to fulfill is the right to health care. The right to health care in respect of the children constitutes part of the discussion below:

#### **4.2.2.2 Children's rights to health care in Kenya**

Kenya's obligation *vis-à-vis* her response to international instruments is worth stating. Kenya is considered a dualist state which requires the domestication of international treaties or conventions through the promulgation of specific legislation.<sup>817</sup> As a result the CRC has been fully domesticated by the enactment of the Children's Act 2001. Article 24 of the CRC emphasises children's right to a good quality healthcare. Likewise, the 2010 Constitution provides for children's right to basic health care.<sup>818</sup> In addition, s 9 of the Children's Act 2001 affirms that every child has the right to health and medical care as a responsibility of both parents and government.

Notwithstanding Odongo argues that the highest attainable standard of health emphasised in Article 43 of the 2010 Constitution and the s9 of the Children's Act 2001 both still remain a pipe dream for many Kenyans and Kenyan children.<sup>819</sup> It

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<sup>816</sup> Republic of Kenya (note 794 above) 10.

<sup>817</sup> CRIN Kenya (note 785 above) 1/3.

<sup>818</sup> Art 53 (c).

<sup>819</sup> Odongo (note 75 above) 136.

can be argued that there has been few improvements as the GOK develops the Kenya Vision 2030 Medium Term Plan II which insists 'on universal access to healthcare, preventive and primary healthcare, clean water, management of communicable diseases, maternal and child health and non-communicable diseases'.<sup>820</sup>

In response to the above challenge the GOK decided to give a high priority on how best to deploy its human resources.<sup>821</sup> With regard to children, the state has taken both curative and preventive measures involving antenatal care, safe motherhood, enhanced immunisation coverage, balanced nutrition, safe drinking water and sanitation, control and management of malaria, pneumonia, diarrhoea and HIV AND Aids. Arguably this is in line with Oluduro and Durojaye's observation that the right to health care means more than medical care and medicines.<sup>822</sup> According to these writers health care also entails the satisfaction of basic needs that improve health, namely access to sanitation, food, potable water, housing and clothing as a lack of these basic needs exposes children to most world diseases.<sup>823</sup>

As was seen, there has been slight improvement on the right to health care due to the increases in usage of mosquito nets among children, and increases in the proportion of births assisted by skilled professionals, also a certain improvement of postnatal care.<sup>824</sup> Notwithstanding, despite efforts made to reduce infant and child mortality in Kenya, the following scenarios pose major challenges : access to health services is poor; access to health facilities involves long distances, the healthcare system is inadequate to meet demand, supply of vital drugs is inadequate, the environment is unhygienic, there is a high level of malnutrition and poverty among children, early childhood and birth complications precisely low birth weight and infections such as sepsis, meningitis, HIV and malaria are prevalent.<sup>825</sup>

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<sup>820</sup> Republic of Kenya 'Health Sector strategic and investment plan July 2013-June 2017: the second medium term plan for Health. Ministry of Medical Services and Ministry of Public Health and Sanitation Afya House2.

<sup>821</sup> Republic of Kenya (note 794 above) 4.

<sup>822</sup> Oluduro & Durojaye(note 650 above) 22.

<sup>823</sup> Ibid.

<sup>824</sup> Republic of Kenya (note 794 above) 4.

<sup>825</sup> Ibid 6.

Furthermore, it is also relevant to put a spot light on HIV and AIDS and their impact on children and adolescent health. On the one hand HIV and AIDS pose a threat to a child's health. On the other it affects the nutritional status of children and exacerbates common infections on children.<sup>826</sup> The 2016 AIDs Progress report asserts that:

'The country achieved reduction of new HIV infections by 20 percent among adults and 49% among children with impressive gains made in counties between 2013 and 2015 against 2019 set targets. Sixteen counties reduced their number of new HIV infection by more than 50%'.<sup>827</sup>

The 2019 targets set consist of reducing new HIV infections among adults by seventy five percent and reducing the HIV transmission rates from mother to child from fourteen percent to less than five percent.<sup>828</sup> Obviously Kenya is progressively meeting its target.<sup>829</sup>

On the other hand, in connection with adolescent health, GOK indicates that eighty percent of children are likely to become teenage parent and the situation has not improved since 2008.<sup>830</sup> On the contrary the percentage of women who become mothers at a younger age increased from three percent at the age of fifteen to forty percent at the age of nineteen.<sup>831</sup> The most likely to have begun bearing a child are teenagers from poor households.<sup>832</sup> The plan of Action for Adolescents indicates that the main issues and challenges that adolescents are facing are namely lack of access to reproductive health information and services; unsafe sexual behaviour, commitment to harmful practices such as genital mutilation, early, arranged and forced marriages, and gender based violence and abuse, drug and substance abuse.<sup>833</sup> The above figures reveal trends that support the prognosis that there is a need to improve adolescent health, through developing programmes to inform and educate children themselves.

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<sup>826</sup> Ibid, 11.

<sup>827</sup> Ministry of Health 'Kenya Aids Response progress Report 2016' (2016)8. Available at [www.nacc.or.ke](http://www.nacc.or.ke) . Accessed on 6 October 2017.

<sup>828</sup> Ibid 8.

<sup>829</sup> Ibid 9.

<sup>830</sup> Republic of Kenya 'National Adolescent Sexual and Reproductive Health Policy' (2015)9. See also the Kenya National Bureau of statistics, Kenya Demographic and Health Survey, key indicators Reports (2014).

<sup>831</sup> Republic of Kenya (note 794 above) 6.

<sup>832</sup> Ibid.

<sup>833</sup> Ibid.

Moreover, as was seen in the area of health between the periods of 2010 to 2017, several significant policies were developed which were in line with the 2010 Constitution.<sup>834</sup> These policies will not be discussed deeply in this study as only Kenya Health policy 2014 -2030 goals and objectives will be highlighted below.<sup>835</sup> Nonetheless it is of a great importance to argue that despite the development of these pertinent policies, the matter of adolescent's health and youth with disabilities have not been appropriately considered. As a result there is a need to develop a policy to specifically address the special needs of adolescents with disabilities.

#### **4.2.2.2.1 Kenya Health Policy 2014-2030.**

This policy is an effort to pave the way leading to the fulfilment of the right to health as enshrined in 2010 Constitution.<sup>836</sup> The Constitution strives for the 'highest attainable standard of health'.<sup>837</sup> Being one of the organs of state the Department of Health has a duty to implement the values and principles entrenched in the Constitution.<sup>838</sup>

Basically, this policy implies two obligations: the first obligation is the realisation of fundamental human rights including the right to health. The second point is the contribution to economic development as conceived in vision 2030.<sup>839</sup> In order to fulfil these obligations, the health policy involves goals, objectives and orientations.

It is relevant for the analysis of the Health Policy to place emphasis on these goals, objectives, and orientations. The health policy goal is 'to attain the highest possible

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<sup>834</sup> Ibid.

<sup>835</sup> See Kenya Health Sector Strategic Plan KHSSP III 2013-2017; Kenya National Pharmaceutical Policy ;Haemophilus influenza Type B and pneumococcal vaccines; The Food and Nutrition Security Policy; The Breast Milk Substitutes Regulation and Control Bill; The National Infant and Young Child Nutrition (IYCN) Strategy; A National Nutrition Action Plan for Kenya; Mandatory fortification. Increased budgetary allocation to health to reach Abuja target of 15% of government annual budget; Kenya National HCT guidelines 2008; HIV and AIDS Prevention and Control Act 2006; Kenya HIV Prevention Revolution Road Map – count down to 2030; Kenya AIDS Strategic Framework 2014/2015; Kenya Aids Indicator Survey 2013; the National Water Policy 2012;The Water Bill 2013; the Water Sector Strategic Plan; The Government-adopted Community-Led Total Sanitation; Both the Medium Term Plan I and the KHSSP; National School Health Policy and Guidelines; Manual and Guidelines on the Identification and Referral of Children with Disabilities and Special needs – MOH 2010; Training Manual for Health Workers on Prevention, Early Identification and Intervention of Disabilities-MOH 2013; the Adolescent Sexual and Reproductive Health Policy 2005-2015.

<sup>836</sup> See Arts 43; 53-57.

<sup>837</sup> Art 43 (c).

<sup>838</sup> See Arts 10; 232. See also Chapters 6 and 12 of the 2010 Constitution.

<sup>839</sup> Ministry of Health (Republic of Kenya) 'Kenya Health Policy 2014-2030: towards attaining the highest standard of health' (2014) Available at <http://www.health.go.ke>. Accessed 09 October 2017.

standard of health in a responsive manner'.<sup>840</sup> The health policy will support 'equitable, affordable and high quality health services at the highest attainable standards for all Kenyans'.<sup>841</sup> The health sector will be directed by the primary healthcare approach.

As mentioned above the policy has two obligations:

The first obligation is the progressive realisation of the right to health under the devolved system of government. Kenya operates at one national government level<sup>842</sup> and through forty- seven county government levels.<sup>843</sup> At the national and county level GOK needs to cooperate and collaborate as counties and government are interdependent.<sup>844</sup> Therefore, the national and county government will have to apply measures to progressively realise the right to health as envisioned in Article 21 of the 2010 Constitution.<sup>845</sup> The health sector plans to employ a human rights-based approach.<sup>846</sup>

As a result for each health intervention GOK will integrate human rights norms and principles specifically in the design, implementation and evaluation of these interventions and programmes.<sup>847</sup> As emphasis is also placed on human dignity, GOK has to give attention to the needs and rights of all;<sup>848</sup> precisely children, persons with disabilities, youth, marginalised groups and elderly people.<sup>849</sup>

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<sup>840</sup> Ibid.

<sup>841</sup> Ibid.

<sup>842</sup> Ibid 3.

<sup>843</sup> Ibid 3.

<sup>844</sup> Ibid 3.

<sup>845</sup> Ibid 30. Art 21 provides that '(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, and youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

<sup>846</sup> Ibid.

<sup>847</sup> Kenya Health Policy (note 839 above) 30.

<sup>848</sup> Ibid.

<sup>849</sup> Ibid.

The second obligation is the contribution to economic development. The Health Policy supports the long term agenda of vision 2030 in order to provide high quality health services.<sup>850</sup> Accordingly, the following are the objectives of the Health Policy:

Eliminate communicable disease: the aim is to reduce encumbrance of communicable diseases.<sup>851</sup>

- To break- off and reverse the rising burden of non-communicable conditions and mental disorder: this will be addressed through implementing strategies to address detected non communicable condition and mental disorder in the country.<sup>852</sup>
- To reduce the burden of violence and injuries by employing strategies to address the causes of injuries and violence. Attention will be given to gender, age, geographical distributions and other factors.<sup>853</sup>
- To provide essential care by contributing affordable, equitable and quality health care support suited to the client need.<sup>854</sup>
- To minimise exposure to health risk factors: by strengthening health promotion and facilitation of the use of products and services that lead to healthy lifestyles in the population.<sup>855</sup>
- To strengthen collaboration with the private sector and other sectors that have a certain impact on health by choosing 'health in all Policies' approach.<sup>856</sup>

Furthermore, in order to achieve the objectives outlined in this Policy there are eight orientations where investment is expected to be made:

1. Organisation of Service Delivery: Organisational arrangements required for delivery of services;
2. Health Leadership and Governance: Oversight required for delivery of services;

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<sup>850</sup> Republic of Kenya 'Health sector Strategic and investment Plan (KHSSP) July 2013-June2017: the Second Medium term Plan for Health' (2013). Available at <http://www.health.go.ke.accessed> on 10 October 2017.

<sup>851</sup> Kenya Health Policy (note 839 above) 31.

<sup>852</sup> Ibid.

<sup>853</sup> Ibid 32.

<sup>854</sup> Ibid 33.

<sup>855</sup> Kenya Health Policy (note 839 above) 34.

<sup>856</sup> Ibid 35. This approach ensures the health sector collaborate with and influences the design, implementation and monitoring and interventions in all sectors namely economic, security, justice, education and nutrition.

3. Health Workforce: Human resources required for provision of services;
4. Health Financing: Financial arrangements required for provision of services;
5. Health Products and Technologies: Essential medicines, medical supplies, vaccines, health technologies, and public health commodities required for provision of services;
6. Health Information: Systems for generation, collation, analysis, dissemination, and utilisation of health-related information required for provision of services;
7. Health Infrastructure: Physical infrastructure, equipment, transport, and information communication technology (ICT) needed for provision of services; and
8. Research and Development: Creation of a culture in which research plays a significant role in guiding policy formulation and action to improve the health and development of Kenyans.<sup>857</sup>

Looking at the goals, objectives and orientation of the health policy, one may argue that the Health Policy provides the evidence of slight improvement on the health sector for everyone in general and children in particular. This is in line with what Odongo suggests ‘the formulation and the implementation of the requisite policies to provide a key flesh to the bare bones of the provisions in the Constitution’.<sup>858</sup> He further recommends the need for children’s improved access to basic services such as health.<sup>859</sup>

In connection with the right to health and basic nutrition enforcement, it should be noted that article 22 of the 2010 Constitution provides for the enforcement of the Bill of Rights.<sup>860</sup> Although there are not many cases where litigants are children claiming their rights against the state, the case of *Florence Amunga Omukanda & another v Attorney General & 2 others*<sup>861</sup> is selected to mention the attack that led to the morbid death of two children aged eight years and 3 weeks. The first applicant claimed that the state failed to take positive action to protect her children

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<sup>857</sup> Kenya Health Policy (note 839 above) 34.

<sup>858</sup> Odongo (note 75 above).

<sup>859</sup> Ibid 141.

<sup>860</sup> This Article indicates that ‘(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members’.

<sup>861</sup> [2016] eKLR. The facts were on 30 December 2007 following the announcement of the election result the first petitioner (applicant) was attacked by unknown intruders while she and her two daughters were peacefully asleep in her house which was burnt from outside and she and the children were unable to escape. The house was locked from outside by the intruders she was entrapped in the fire and lost consciousness and was in a coma over 2 months and when she regain conscious she was informed by her friend that her children had burnt during the arson.



as enshrined in article 26<sup>862</sup> and article 53.<sup>863</sup> The court found that the applicant failed to prove that the state compromised or violated her rights to property, life and equality.<sup>864</sup> It is regrettable that the court failed to provide a broad interpretation so as to protect the children's right to life. It is suggested that citizens should familiarize themselves with the law and policy in their domestic forums before approaching the courts to claim their rights. Moreover, considering the first obligation of the Health Policy which follows human rights based approach, it is envisaged that in future the bearer of these rights will be approaching the court to claim fulfilment of their rights by the state.<sup>865</sup> The Court in turn needs to act in accordance with article 23(1) of the 2010 Constitution.<sup>866</sup> As Flood and Gross assert, 'the court should keep firmly in mind that the overall equity and equality agenda underpinning health human rights'.<sup>867</sup> Another right amounting to the survival right is the right to social security.

#### **4.2.2.3 Children's rights to social security in Kenya**

As was seen above, the terms social security and social assistance are used interchangeably in this study to include a scheme in terms of which individuals or groups of individuals received a needs-based assistance from the public fund without themselves ever having contributed to the scheme.<sup>868</sup> Article 43 (e) states that 'every person has the right to social security'.<sup>869</sup> S 3 of the Children's Act 2001 asserts that 'government shall take steps to the maximum of its available resources to achieve progressively the full realization of the rights of the child.' As mentioned in chapter three the CRC did not use the term social service or social assistance. Instead it used the term family care and appropriate care.<sup>870</sup>

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<sup>862</sup> Right to life.

<sup>863</sup> This article provides for Children constitutional rights.

<sup>864</sup> *Florence Amunga omukanda & another v Attorney General & 2 others* [2016] Eklr para 87.

<sup>865</sup> C Flood & A Gross Litigating the Right to Health: What can we learn from a comparative Law and Health care Systems Approach' (2014) *Health and Human Rights* 62, 69.

<sup>866</sup> Art 23 deals with Authority of courts to uphold and enforce the Bill of Rights. It indicates that ' (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bills of Rights.

<sup>867</sup> Flood & Gross (note 865 above) 70.

<sup>868</sup> See Chapter Three.

<sup>869</sup> 2010 Constitution.

<sup>870</sup> Dutsche & Monson (note 462 above) 23.

Basically, GOK has the largest social protection programme named the Cash Transfer for Orphans and Vulnerable children (CT-OVC).<sup>871</sup> The programme is established to address the vulnerability of families and children to poverty mostly caused by HIV/AIDS.<sup>872</sup> This programme offers financial support to caretaking families of orphans by granting them limited forms of social cash transfer.<sup>873</sup>

Ideally, the CT-OVC programme started as collaboration between the Department of Home Affairs and UNICEF.<sup>874</sup> The objective was to motivate fostering and retention of orphans and vulnerable children within their families and communities.<sup>875</sup> Iskander emphasises that 'orphans suffer emotional trauma and psychosocial distress, lack of parental guidance, poverty, vulnerability to hazardous substances, labour and sexual exploitation, and lack of access to education'.<sup>876</sup> It is reported that Kenya has 1.6 million orphans of whom approximately 892.000 are considered to be HIV positive.<sup>877</sup> As a result the CT-OVC programme was relevant to assist these vulnerable children.

In 2004, the CT-OVC started small with targets of 500 households in three locations.<sup>878</sup> Ten years later in 2014, the programme had expanded nationwide reaching approximately 250.000 households.<sup>879</sup> This programme has influenced the emergence of other cash transfers targeting further groups of people.<sup>880</sup> The

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<sup>871</sup> Huang & others (note 706 above) 945.

<sup>872</sup> Ibid.

<sup>873</sup> Ibid. see also Odongo (note 75 above) 137; JH Bryant 'Kenya's Cash transfer Programme: Protecting the Health and human rights of orphans and vulnerable children' (2009)11 *Health and Human Right*. Available at <http://www.hhrjournal.org/index.php/hhr/article/viewArticle/174/259>. Accessed 09 October 2017).

<sup>874</sup> J Bosworth & others 'the cash Transfer Programme for orphans and vulnerable children: The Catalyst for Cash Transfer in Kenya' in B Davis & others (eds) *From Evidence to Action: the story of Cash Transfers and impact evaluation in Sub Saharan Africa* (2016) UNICEF 117,117.

<sup>875</sup> Ibid. Orphans are children who have lost one or both parents.

<sup>876</sup> Iskander (note 792 above).

<sup>877</sup> UNAIDS, UNICEF, and USAID 'Children on the Brink 2002: A Joint Report on Orphan Estimates and Program Strategies' (2002) Available at [http://data.unaids.org/topics/young-people/childrenonthebrink\\_en.pdf](http://data.unaids.org/topics/young-people/childrenonthebrink_en.pdf). Accessed 21 January 2016).

<sup>878</sup> Bosworth & others (note 874 above) 118. The location here means the lowest administrative division in Kenya before the reform of 2010 Constitution. The three locations were arid lands, poor rural areas and poor urban areas.

<sup>879</sup> Ibid.

<sup>880</sup> Ibid. This study focuses on CT-OVC as it concerns children. However, there are also four other social assistance programme in Kenya namely the Older persons Cash Transfer, the Hunger Safety Net Programme (HSNP) this programme aim is to reduce extreme hunger and vulnerability by delivering regular and unconditional cash transfer of Kshs 5400 every two months starting from 5 th July 2016. The Hunger Safety Net Programme is supporting poorest and vulnerable households in

expansion of the CT-OVC programme was implemented in three phases namely the pre-pilot phase, pilot phase and expansion.

In the pre-pilot phase, the point of departure was that GoK introduced a proposal to the Global Fund for HIV, tuberculosis and malaria to assist with cash transfers to households taking care of OVC.<sup>881</sup> The proposal was rejected due to the fact that it was a first experience which had not been seen elsewhere.<sup>882</sup> As a result, the Department of Children Services within the Home Affairs and UNICEF concurrently with the Swedish International Development Agency (SIDA) and the Norwegian National Committee for UNICEF initiated cash grants in three areas of approximately 500 poor households taking care of OVC received USD\$6 per month.<sup>883</sup> The programme had a positive impact on the welfare of children in that the fund contributed to children's school uniforms, food and medical expenses.<sup>884</sup> Consequently, there was a need to expand the programme to the pilot phase.

The pilot phase is related to structural organisation, where all the systems were put in place.<sup>885</sup> This includes 'the establishment and testing of systems that would be capable of being scaled up, building capacity and institutions, and a rigorous impact evaluation which would provide evidence to inform the expansion and identify and quantify the developmental impacts in order to convince policy makers of the value of the approach'.<sup>886</sup> The pilot phase applied standardised procedures. The Kenya OVC team, officials and leaders were trained on how to manage the cash transfer.<sup>887</sup> It is argued that 'from 2007 to 2010 government and donors multiplied

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the poorest four Arid Counties of Turkana, Mandera, Wajir and Marsabit. The Cash Transfer for Persons with Severe Disability.

<sup>881</sup> Bosworth & others (note 874 above) 119.

<sup>882</sup> Ibid.

<sup>883</sup> Ibid.

<sup>884</sup> Ibid.

<sup>885</sup> Bosworth & others (note 874 above) 120.

<sup>886</sup> Ibid. Also see R Pearson & C Alviar 'Cash Transfers for Vulnerable Children in Kenya: From Political Choice to Scale Up', UNICEF Social and Economic Policy Working Paper. New York. (2009) UNICEF. Available at [http://www.unicef.org/socialpolicy/files/Postscript\\_Formatted\\_PPCI\\_cash\\_transfers\\_in\\_Kenya\\_Final\\_Dec\\_15.pdf](http://www.unicef.org/socialpolicy/files/Postscript_Formatted_PPCI_cash_transfers_in_Kenya_Final_Dec_15.pdf). Accessed on 20 January 2017.

<sup>887</sup> Ibid 121. Officials from the Ministry of Finances.

almost ten times as it became more widely known and politically acceptable'.<sup>888</sup> The pilot phase culminated into the expansion phase.

In 2013 the expansion phase the CT-OVC was expanded to reach 150.000 households.<sup>889</sup> By 2014 the number rose to 250.0000 while a further 90.000 were planned to be reached in 2015.<sup>890</sup> GoK planned to enroll the entire eligible households by 2018.<sup>891</sup> It should be noted that to qualify for CT-OVC a household needs to:<sup>892</sup>

- Have the presence of one OVC under eighteen years, has at least one parent deceased or is in chronic illness.
- The household should be 'ultra-poor';<sup>893</sup> ultra-poor is determined by household socio economic indicators such as low education attainment, unemployment and lack of access to clean drinking water.
- The household should not receive assistance from any other social program.<sup>894</sup>

Basically, a beneficiary household received a cash transfer of roughly 20 percent of the household's total monthly expenditures (Ksh 1500 or USD\$20).<sup>895</sup> The amount was extended to Ksh 2000 or USD\$24 per month transferred bi-monthly.<sup>896</sup>

The implementation of the CT-OVC encountered structural, institutional and administrative sets backs. However the main challenge was the lack of an impartial mechanism to differentiate the poverty levels of the eligible households.<sup>897</sup> It should be noted that the CT-OVC had a positive impact on children's survival rights. It promoted a multi-dimensional well-being of children between the ages of zero to

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<sup>888</sup> Bosworth & others (note 874 above).

<sup>889</sup> Ibid.

<sup>890</sup> Ibid.

<sup>891</sup> Ibid.

<sup>892</sup> Huang & others (note 706 above) 945.

<sup>893</sup> Ibid.

<sup>894</sup> W Mwasiaji 'Scaling up Cash Transfer Programmes in Kenya (2015) *International Policy Centre for Inclusive Growth* .one page n0 286.IPCIG, Brazilia, Brazil.

<sup>895</sup> Ksh means Kenya Shillings which is the Kenyan currency.

<sup>896</sup> Huang & others (note 706 above) 945. See also Fisher & others' The Livelihood Impacts of Cash Transfer in Sub Sahara Africa: Beneficiary Perspectives from Six Countries' (2017) *World development*. Available at <http://dx.doi.org/10.10.06./jwolrddev> 2017.05.20. Accessed 02 October 2017.

<sup>897</sup> Bosworth & others (note 874 above) 126.

seven years of age.<sup>898</sup> At the same time the CT-OVC programme reduced child morbidity.<sup>899</sup> This cash transfer programme delays sexual activity in young people. In this wise it also decreased teen-age pregnancy among the youth.<sup>900</sup> According to the Kenya evaluation team the CT-OVC increased investment spending on food and health.<sup>901</sup>

In sum, the CT –OVC in Kenya proved an effective programme that contributed to children’s survival rights required to be expanded to include every household for two reasons: the first reason is that every child is vulnerable and should be given a grant to assist his or her development; the second reason is that the majority of the population being poor, every child should be given the opportunity to have access to nutrition, shelter, health care and social protection as provided in the CRC,<sup>902</sup> 2010 Constitution,<sup>903</sup> the Children Act 2001<sup>904</sup> and the Kenya vision 2030.<sup>905</sup>

Having covered children survival rights in Kenya the rest of the chapter will now traverse children survival rights in the DRC.

### 4.3 Analysis of children’s survival rights in the DRC

The DRC previously known as ‘Zaire’ is located in Central Africa.<sup>906</sup> This country is surrounded by the Congo River in the west, a short plateau in the centre and mountains in the East.<sup>907</sup> The DRC is the third biggest state in Africa.<sup>908</sup> The

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<sup>898</sup> Huang & others (note 706 above) 954.

<sup>899</sup> Ibid.

<sup>900</sup> S Handa & others ‘The Impact of Kenya’s Cash Transfer for Orphans and Vulnerable Children on Early Pregnancy and marriage of adolescent girls (2015)131 *Social Science & Medicine* 36, 37. Also see S Handa & others ‘Targeting of Kenya’s Cash Transfer Program for Orphans and Vulnerable Children’, in S Handa & others. (eds), *Social Protection for Africa’s Children*(2011); Handa, & Thirumurthy, H. ‘Impact of the Kenya CT-OVC on the Transition to Adulthood’(2012); S Handa & others ‘The government of Kenya’s cash transfer program reduces the risk of sexual debut among young people aged 15–25’(2014) *PLOS ONE*, 9(1) 1–9.

<sup>901</sup> The Kenya CT-OVC Evaluation Team ‘The impact of the Kenya cash transfer programme for orphans and vulnerable children on household spending’. (2012a) *Journal of Development Effectiveness* 4(1) 9. The Kenya CT-OVC Evaluation Team ‘The impact of Kenya’s cash transfer programme for orphans and vulnerable children on human capital’ (2012 b) *Journal of Development Effectiveness*, 4(1) 38.

<sup>902</sup> Arts 6, 12,24,27,28.

<sup>903</sup> Art 53 (C).

<sup>904</sup> S 4.

<sup>905</sup> Republic of Kenya (note 794 above) 5.

<sup>906</sup> Zongwe (note79 above).

<sup>907</sup> Ibid.

country is endowed with enormous natural resources allocated across its eleven provinces.<sup>909</sup> The DRC is considered the eighteenth most populous nation in the world with a population of more than sixty-eight million.<sup>910</sup> Furthermore, the DRC is the fourth most crowded nation in Africa.<sup>911</sup>

Despite being a potentially rich country,<sup>912</sup> it can be argued that poverty and vulnerability largely characterise the Congolese population.<sup>913</sup> An average citizen in this country earns less than two dollars a day.<sup>914</sup> According to the UN development programme, the DRC ranks 176 out of 188 countries in terms of human development indicators.<sup>915</sup> What impacted on the DRC instability is the conflict with its roots forty years ago and whose aftermath still persists in one way or another till today.<sup>916</sup> The main causes of the on-going conflicts are 'local disputes over land and resources, the acquisitive goals of rebel groups and the predatory neighbouring states and ethnic and political grievances'.<sup>917</sup> While a discussion of the DRC conflicts may lie outside the perimeters of this investigation, it is worth mention that the sheer duration of these conflicts has impacted the country's development pace. As a result, the population suffers the worst consequences.<sup>918</sup> Moreover, vulnerable groups such as women and children continued to bear the worst brunt in

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<sup>908</sup> This is by area 2,344,854 Sq km. N B Kandala & others 'Malnutrition among children under the age of five in the Democratic Republic of Congo (DRC): does geographic location matter (2011) *BMC Public Health* (11)261. Available at <http://biometriccentral.com> Accessed on 15 October 2017.

<sup>909</sup> Kandala & others (note 908 above). Art 2 of the Current Congolese Constitution (February 2006) mentions that now the DRC consists of the city of Kinshasa and 25 provinces.

<sup>910</sup> Ibid.

<sup>911</sup> Ibid.

<sup>912</sup> N M Nyemba 'The impact of poverty on Children's Rights in the Democratic Republic of Congo' (2015) Unpublished LLM thesis, University of Pretoria.

<sup>913</sup> Ibid.

<sup>914</sup> Conradie & Whitman (note 16 above) 3.

<sup>915</sup> UNDP 'Human Development Report 2016'. Available at <http://hdr.undp.org/en/data>. Accessed on 23 October 2017. The UNDP defines HDI as the human development index is a 'summary measure for assessing progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living'.

<sup>916</sup> The DRC became a sovereign state in 1960 where MOBUTU reigns for thirty two years in dictatorship and was most of the time in conflict with nine neighbouring countries. In 1997, Kabila overthrew Mobutu regime and later on Kabila was also assassinated. Since 1997, the country has constantly been at war and this was considered as 'the Africa's first world war'. For more information see C Williams 'Explaining the Great War in Africa: How conflict in the Congo became a continental crisis' (2013) *The Fletcher Forum of World Affairs* (37) 2, 83.

<sup>917</sup> Williams (note 917 above) 81.

<sup>918</sup> Kandala & others (note 908 above) 2.

the conflicts.<sup>919</sup> According to UNICEF these conflicts had ‘grave humanitarian consequences’.<sup>920</sup>

Suffice it to say that the section dealing with the DRC covers the laws that guaranteed the fulfilment of children’s rights while the second part will deal with the realisation of children’s survival rights in the DRC.

#### **4.3.1 Congolese laws providing for children’s rights**

The DRC signed the CRC on 20 March 1990 and ratified it on 27 September 1990. Being a monist state once the DRC signs and ratifies an international convention, it automatically domesticated it as national law.<sup>921</sup> As a result there is no need of enactment and promulgation in another law. Although the DRC ratified and signed several other treaties it did not sign and ratify the ACRWC.<sup>922</sup> By signing the CRC the DRC committed itself to take appropriate measures to fulfil the children’s rights.<sup>923</sup> As a result the Constitution of the DRC (the 2006 Constitution), the Child protection law, Labour law, Penal Law, will be discussed below.

##### **4.3.1.1 The 2006 Constitution**

The 2006 Constitution is a result of several drafts and amendments after the demise of Mobutu.<sup>924</sup> The 2006 prioritised compliance with several international treaties particularly the CRC at international level study.<sup>925</sup> Article 4 of the 2006 Constitution

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<sup>919</sup> Ibid.

<sup>920</sup> UNICEF ‘Humanitarian Action For Children: the Democratic Republic of Congo’ (2017) available at <https://www.unicef.org/appeals/drc.html> .Accessed on 23 October 2017.

<sup>921</sup> M Killander international *law and Domestic Human Rights Litigation* Ed (2010).

<sup>922</sup> Treaties such as ICESCR ratified on 1 November 1976, ICCPR on 1 November 1976, ACHPR ratified on 20 July 1987 and signed on 23 July 1987.

<sup>923</sup> Art 4 of the CRC.

<sup>924</sup> Note that during Mobutu’s reign, the DRC had the 1967 Constitution which after many years of dictatorship, people claimed for democracy. As a result, the autocratic government enacted the transitional Constitution which was supposed to lead to fair elections. Unfortunately Mobutu was overthrown by Kabila. During the regime of Kabila, the Constitutional Decree n<sup>o</sup> 003 27 May 1997 relating to the Exercise of power in DRC was enacted, this official document had many irregularities and was modified more than three times and Kabila was also assassinated. Joseph Kabila the son succeeded his father. As a result, the Transitional Constitution of April 2004 was enacted thereafter many agreements to a peaceful political solution, a new Constitution was drafted to build and unify the country. This Constitution of the DRC of 18 February 2006 which was also later modified by the Law n<sup>o</sup> 11/002 of 20 January 2011 revising some articles of the Constitution of the DRC of 18 February 2006. Consequently, the 2006 Constitution that this study is referring to is the amended Constitution. For more details see J T Gathii ‘popular authorship and constitution making: Comparing and contrasting the DRC and Kenya’ (2008) 49 *William & Mary Law Review* 1110.

<sup>925</sup> See the preamble of 2006 Constitution.

provides for the children's rights to family care, protection, and asserts that the state has the duty to protect its children against any form of maltreatment. Article 47 guarantees the right to health and to food security. In addition, article 48 guarantees the right to decent housing and access to drinking water. However due to conflicts, lack of resources and lack of political will, it appears that the realisation of such rights in the DRC remains a wish list.<sup>926</sup> The current situation is that the entire population is affected by poverty.<sup>927</sup> A further piece of legislation that purports to improve child security in the DRC is the Child Protection Law.

#### **4.3.1.2 Child Protection Law 09/001 of 2009**

The Child Protection law came into operation in January 2009 (the 2009 Child Law).<sup>928</sup> This piece of legislation split the protection of the child into three, namely, the social protection of the child,<sup>929</sup> judicial protection of the child<sup>930</sup> and criminal protection of the child.<sup>931</sup> In relation to the social protection of the child, the 2009 Child Law provides ordinary protection<sup>932</sup>, special protection,<sup>933</sup> and exceptional protection<sup>934</sup>. Basically, ordinary protection concerns the child in the family, parental responsibilities and the rights,<sup>935</sup> of the child at work.<sup>936</sup> It stipulates which forms of labour are prohibited for the child. Generally it protects the child against all forms of exploitation.<sup>937</sup> Special protection in turn, is guaranteed in Article 62 of the 2009 Child Law.<sup>938</sup> Furthermore, exceptional protection prohibits the use of children in armed forces as well as in the Police service.<sup>939</sup>

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<sup>926</sup> According to UNICEF 'in the DRC some 8.5million people are estimated to be in urgent humanitarian assistance, including 5.1million children. Available at <https://www.unicef.org/appeals/drc.html>. Accessed on 23 October 2017.

<sup>927</sup> Nyemba (note 912 above)38.

<sup>928</sup> Available at [www.leganet.cd](http://www.leganet.cd). Accessed on 29 October 2017.

<sup>929</sup> Title II of the 2009 Child Protection Law.

<sup>930</sup> Title III of the 2009 Child Protection Law

<sup>931</sup> Title IV of the 2009 Child Protection law.

<sup>932</sup> Title II, Chapter one.

<sup>933</sup> Title II, Chapter two.

<sup>934</sup> Title II, Chapter three.

<sup>935</sup> Arts 46-48 of the 2009 Child Protection Law.

<sup>936</sup> Arts 50-56 of the 2009 Child Protection Law.

<sup>937</sup> Arts 57-61 of the 2009 Child Protection Law.

<sup>938</sup> This article reads as follows 'considered to be in a difficult situation and enjoys special protection, in particular:

the rejected, abandoned, neglected, vagrant and begging child or found a beggar, wanderer or habitually engaged in vagrancy or begging;



After the social protection, the Child protection law also guarantees child judicial protection in all institutions and organisations associated with the children's tribunal,<sup>940</sup> the competence of the children's tribunal,<sup>941</sup> the proceedings before the children's tribunal in conflict with the law<sup>942</sup>, and the mediation.<sup>943</sup> As can be seen from the above exposition judicial protection of the child in DRC is comprehensive.

More so, criminal protection extends to the protection of the child before birth where the killing or injuring of a pregnant woman is specifically prohibited.<sup>944</sup> Particularly, the protection of the child after birth where it is prohibited to intentionally attack the life and physical or mental integrity of the child.<sup>945</sup> It is also prohibited to damage the honour and personal freedom of the child.<sup>946</sup> The 2009 Child Law protects the property or the heritage of the child;<sup>947</sup> This Act also protects the child against sexual assault.<sup>948</sup> In addition it states that a Congolese child cannot be endangered.<sup>949</sup> The most significant part of the Act which includes the child survival rights is the right to health which cannot be infringed.<sup>950</sup>

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1. the child who, by his misbehaviour or undisciplined behaviour, gives serious causes of discontent to his parents or guardian or his entourage;
  2. a child engaged in debauchery or seeking his resources in gambling or in trafficking or occupation exposing him to prostitution, begging, vagrancy or crime;
  3. a child who is notoriously and continuously in need of protection or who does not attend any school or does not carry out any professional activity;
  4. the child usually abused;
  5. the economically or sexually exploited child;
  6. the child accused of witchcraft;
  7. the child who is the mother or the carrier of a pregnancy, the object of abuse by his parents or guardian.
  8. the child without family support or other following the loss of his parents;
  9. the child living with a disability;
  10. the child addict;
  11. the orphaned child,
  12. The gifted child also benefits from special protection'.

<sup>939</sup> Arts 71-73 of the 2009 Child Protection Law

<sup>940</sup> Arts 84-93.

<sup>941</sup> Arts 94-101.

<sup>942</sup> Arts 102-131.

<sup>943</sup> Arts 132-142.

<sup>944</sup> Arts 143-146.

<sup>945</sup> Arts 146-159.

<sup>946</sup> Arts 160-162.

<sup>947</sup> Arts 163-168.

<sup>948</sup> Arts 169-184.

<sup>949</sup> Arts 185-194.

<sup>950</sup> Arts 195 reads as follows: 'Any person in charge of a public or private health institution integrated into the primary health care system who does not comply with the health policy of the country and refrains from giving the necessary preventive care to the child is from one to six months punished by

To sum up, looking at the social, judicial and criminal protection of the child provided in the DRC 2009 Child Law, it can be argued that this legislation is in line with the provisions of the CRC.<sup>951</sup> This conclusion is also borne out in the objectives outlined in the 2009 Child Law where it indicates that:

The following objectives guarantee to the child the right to benefit from various administrative, social, judicial, educational, health and other measures aimed at protecting him from all forms of abandonment, neglect, exploitation and physical, moral injury, psychic and sexual,

- disseminate and promote the culture of the rights and duties of the child and make known to the child the intrinsic particularities in order to ensure the full development of his personality and prepare him for his civic responsibilities, -
- to involve the child in all that concerns him by appropriate means that can help him to acquire the virtues of work, initiative and personal effort, -
- cultivate in him the values of solidarity, tolerance, peace and mutual respect in order to make him aware of the indissociability of his rights and duties in relation to those of the rest of the community,
- strengthen the responsibility of the parents, the family and the community as a whole for the child.

These objectives are compatible with articles 2, 4, 5, of the CRC.<sup>952</sup> Specifically article 4 of the CRC stipulates that the State Parties must take appropriate legislative, administrative and other measures to ensure the implementation of the CRC provisions.

Further considerable achievement of the 2009 Child Law is that it also provides the duties and responsibilities of the child.<sup>953</sup> This section is similar to the Kenyan Children's Act 2001 which also pinpoints the duties and responsibilities of the child.<sup>954</sup> By contrast, the South African Children's Act does not include such a provision. Furthermore, article 2 of the 2009 Child Law protects different types of children in specific situations that need to be understood within the Congolese historical context.<sup>955</sup> In this regards it should be clear that the Congolese legislature

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principal penal servitude and a fine of one hundred and fifty thousand Congolese francs or one of these penalties only'. Art 198 states that 'Any parent, guardian or legal guardian who deliberately does not send his child to school is punished by a fine of fifty thousand Congolese francs'.

<sup>951</sup> See Arts 2-6 of the CRC.

<sup>952</sup> See CRC.

<sup>953</sup> Art 44 of the 2009 Child Law

<sup>954</sup> S 21 of the 2001 Children's Act.

<sup>955</sup> This article reads as follows : 'For the purposes of this Act, the following terms mean:

1. child: any person under the age of eighteen,

has achieved a landmark child protection provision. An additional law that guarantees the children's rights is the Labour Code.

#### **4.3.1.3 Labour code 015/2002 of 2002**

The Labour Code 015/2002 of October 2002 (the Labour Code) protects children below the age of fifteen against all forms of exploitation.<sup>956</sup> However, Article 133 of the Labour Code allows a fifteen year old child to work under special care. The Labour Code protects the child in terms of the termination of work.<sup>957</sup> Additionally it does not allow night shift work for children specifically between 7 p.m. and 5 a.m.<sup>958</sup> Nyemba points out that 'the Labour code only regulates the time and working conditions while the economic conditions are not regulated'.<sup>959</sup> As a matter of fact, the informal economy that is dominating in the DRC enables several infringements of children's rights by employers and parents who allow children to hawk in the streets.<sup>960</sup>

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2. Displaced child: the unaccompanied child of his parents or guardian who was forced to leave his home environment as a result of war, natural disasters or other serious events and moved to another location in "Interior of the country where he resides;
  3. refugee child: a child who has been forced to flee his country crossing an international border and is applying for refugee status or any other form of international protection;
  4. child in difficult circumstances: a child who does not enjoy basic rights and who does not have access to basic social services such as health, housing, food and education;
  5. child in exceptional circumstances: the child in situations of armed conflict, civil unrest or disturbance, natural disasters or significant and prolonged deterioration of socio-economic conditions;
  6. child with a physical or mental handicap: the child in a situation that may constitute an obstacle or a difficulty to the normal expression of all his physical or mental faculties, including intellectual and cognitive functions, language, motor skills and social performance;
  7. separated child: the child separated from his father and mother or from the person who exercised parental authority over him;
  8. (social worker: a State agent or an accredited body specialized in the resolution of problems related to human relations in order to improve the general well-being. He works to promote good morals)
  9. Child in conflict with the law: a child aged between fourteen and under eighteen, who commits a breach that is a criminal offense.....'

<sup>956</sup> Arts 3 & 6 of the Labour Code.

<sup>957</sup> Art 31 of the Labour Code.

<sup>958</sup> Arts 124-12 of the Labour Code.

<sup>959</sup> Nyemba (note 912 above) 40.

<sup>960</sup> Ibid.

#### 4.3.1.4 Penal Code 06/018 of 2006

The Penal Code was amended by the provisions of the Congolese law to protect victims of sexual violence.<sup>961</sup> Previously criminal law did not encompass the offences ordinarily criminalised by international law in the DRC.<sup>962</sup> Nowadays, most provisions impose harsh punishment for crimes committed against children. Article 167 provides that any attempt to indecently assault a child below the age of fourteen shall be punishable with between five to fifteen years of imprisonment. Furthermore, Article 168 stipulates that indecent assault committed with violence, juggling or threat against a child will be punishable with five to fifteen years of imprisonment. If the perpetrator assaults a child below the age of 10 the penalty is 20 years of imprisonment. Article 168 of the Penal Code further indicates that any person who exposes his genital parts close to any part of the child's body commits rape.

In sum, it can be seen that the DRC government has taken measures to protect children against abuse. Moreover, in the DRC several abandoned children in the streets have been accused of witchcraft.<sup>963</sup> However, the Penal Code protects precisely such children and prohibits any person associating any child with any superstitious and barbaric practices.<sup>964</sup> The Penal Code even protects an unborn child as it criminalises abortion.<sup>965</sup> As a result, a woman who commits abortion renders herself liable to imprisonment.<sup>966</sup> From the above it is evident that the DRC protects children against any form of abuse and exploitation.

The next section will analyse the realisation of children's survival rights in the DRC. It will look at the practicalities of whether the rights are yet to be realised in DRC.

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<sup>961</sup> Law 06/018 of 20 July 2006 amending and completing the Decree of 30 January 1940 of Congolese Penal Code.

<sup>962</sup> Nyemba (note 912 above) 41.

<sup>963</sup> Word vision 'child rights in the Democratic Republic of Congo: submission to the universal Period Review of Human Rights: Mid-term Evaluation 2012' Available at [https://www.upr-info.org/followup/assessments/session19/democratic\\_republic\\_of\\_congo/Democratic\\_republic\\_of\\_congo-WVV.pdf](https://www.upr-info.org/followup/assessments/session19/democratic_republic_of_congo/Democratic_republic_of_congo-WVV.pdf). Accessed on 08 November 2017.

<sup>964</sup> Art 58 of the Penal Code.

<sup>965</sup> Art 165 of the Penal Code.

<sup>966</sup> Art 166 of the Penal Code.

### **4.3.2. Fulfilment of children's survival rights in the DRC**

The realisation of children's survival rights mentioned in the previous chapter has concerned the rights to basic nutrition, the rights to health care services and social security or assistance. The study continues to look at the 2006 Constitution and the domestic laws that guarantee children's rights and protection in the DRC.

#### **4.3.2.1 Children's rights to basic nutrition in the DRC**

Article 48 of the 2006 Constitution points out 'the right to decent housing, the right of access to drinking water and electricity energy are guaranteed, the law establishes the condition for the exercise of these rights'. However, according to UNICEF as the population access to drinking water and sanitation decreased, the registration of births declined from thirty four percent in 2001 to twenty two percent in 2010.<sup>967</sup> In addition, the 2009 Child Law indicates that 'every child has the right to enjoy the best possible state of health. This right includes health care, breastfeeding and a healthy, sufficient balanced and varied diet'.<sup>968</sup> Yet children continue to suffer from chronic malnutrition since 2001.<sup>969</sup> The 2015 UNICEF report indicates that with the support of their organization 270,526 children in DRC severely affected by malnutrition were taken care of and treated.<sup>970</sup> With regard to the nutrition sector, Vitamin A supplements and deworming tablets were administered to fifteen million children between the ages of six to fifty nine months and thirteen million children between the ages of one to five years old.<sup>971</sup> Furthermore, current studies show that food insecurity and malnutrition are predominant in the DRC.<sup>972</sup> It was reported that even in Kinshasa the capital of the DRC, sixty percent of non-poor and seventy five percent of poor agonised about insufficient food to eat for the past twelve months of 2016.<sup>973</sup> The World Bank emphasises that 'malnutrition can also have

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<sup>967</sup> UNICEF 'Democratic Republic of Congo: Country programme document 2013-2017' (2013). Available at [https://www.unicef.org/about/execboard/files/2012-PL36\\_DRC\\_CPD-final\\_approved-English.pdf](https://www.unicef.org/about/execboard/files/2012-PL36_DRC_CPD-final_approved-English.pdf). Accessed on 09 November 2017.

<sup>968</sup> Art 21 of the 2009 Child law Protection.

<sup>969</sup> UNICEF (note 967 above) 3.

<sup>970</sup> UNICEF 'Annual report 2015: the Democratic Republic of Congo' (2015). Available at [www.unicef.org](http://www.unicef.org). Accessed on 10 November 2017.

<sup>971</sup> UNICEF (note 967 above) 1.

<sup>972</sup> World Bank 'WASH Poor in a Water-Rich Country: a diagnostic of water, sanitation, hygiene and poverty in the Democratic Republic of Congo' (2017)4.

<sup>973</sup> Ibid.

long-lasting negative effects, including a reduced capacity for manual work, poor mental capacity and further behavioural abnormalities.<sup>974</sup>

Consequently, it can be argued that the children's rights to basic nutrition are still to be realised in the DRC. As a result there is a need to develop specific policies and effective strategies to implement it. UNICEF and other international donors are making a huge contribution with regard to alleviating severe acute malnutrition in the DRC.<sup>975</sup> However, the main responsibility remains with government itself to take appropriate measures. Since there is a lack of leadership, there is a need to speed up the implementation of the Government's Priority Action Plan on agriculture as the country has the capacity in terms of land for agriculture.<sup>976</sup>

Actually, the National Agriculture Investment Plan (NAIP) is the DRC national planning structure for domestic and foreign investment in the agriculture sector for rural development.<sup>977</sup> This plan takes into consideration the needs, achievements and gaps that exist within the agriculture sector and provides a model for the investment and operation for that sector over a period of eight years (2013-2020).<sup>978</sup> The NAIP is making all efforts to align its programmes with the requirements of the Comprehensive African Agriculture Development Program (CAADP).<sup>979</sup> Therefore,

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<sup>974</sup> Ibid

<sup>975</sup> In DRC, UNICEF works with the contribution of many partners namely the Government of Belgium, Brazil, Canada, Estonia, Germany, Japan, Netherlands, Norway, South Korea, Spain, Sweden, Switzerland, UK, USA, The European Union, private foundations such as Bill and Melinda Gates Foundation, GAVI, The Micronutrient initiative, Qatar EAC, Rotary International, as well as the common Humanitarian Fund and UNICEF National committees.

<sup>976</sup> Kandala & others (note 908 above) 3.

<sup>977</sup> UNDP 'Democratic Republic of Congo Agriculture Investment opportunities Brief: CAADP Investment facilitation programme (2013). Available at [www.abghq.com/downloads/DRC.pdf](http://www.abghq.com/downloads/DRC.pdf). Accessed on 13 November 2013.

<sup>978</sup> Ibid, 3.

<sup>979</sup> CAADP started in 2003 in Maputo, Mozambique as a continent-wide African Union initiative and is head-quartered in South Africa within the AU's NEPAD Planning and Coordinating Agency. Countries signing the CAADP compact adopt the core principles of: ' • pursuing an average of 6% annual agricultural sector growth at country level;  
• allocating 10% of the national budget to agricultural development;  
• strengthening local ownership and promoting interventions based on country's opportunities and priorities;  
• building partnerships with a broad spectrum of actors;  
• promoting dialogue and building consensus among all key stakeholders for the priority issues to be addressed;  
• enhancing peer-review and sound analytical work to inform stakeholders in the sector;  
• enforcing mutual accountability to ensure sustainable resource utilisation;  
• favouring regional complementarities within the framework of regional economic communities such as SADC, COMESA, ECOWAS and EAC; and

the NAIP aims to reduce poverty, by providing food and nutrition security for all the Congolese people and to generate sustainable employment and incomes for all.<sup>980</sup>

To that effect five areas were highlighted for the following programme to be developed:

Programme 1: Promote sustainable agricultural sectors, first and foremost food value chains, and develop agribusiness in order to improve the income of farmers and other operators in the sector;

Programme 2: Improve the management within the food and nutrition security and strategic reserves;

Programme 3: Develop and disseminate research products to users and improve the professional competence of the various actors, and

Programme 4: Improving agricultural governance, promoting the integration of gender in the implementation of the Plan and the overall strengthening of sector related human and institutional capacities;

Programme 5: Reduce vulnerability in the agriculture sector to climate change.

Looking at the above programmes, the nutrition and food security ranks second to none with regards to priority. As mentioned above, the effective implementation of the NAIP will improve the chronic malnutrition which the country is facing.

#### **4.3.2.2 Children's rights to health care in the DRC.**

Article 42 of the 2006 Constitution insists on the protection of the youth health by the public authorities. To this effect Article 47 of the 2006 Constitution guarantees the right to health and food security. Furthermore, Article 21 of the 2009 Child Law provides that the child should enjoy the best possible state of health including health care. Despite the constitutional provisions of health care, in practice realising the right to health care in the DRC is a cause of great concern. In the health sector there is a lack of adequate health provision including human and material resources.<sup>981</sup> Poverty increases the levels of malnutrition and other diseases.<sup>982</sup> Factors persist which tend to hinder the realisation of the right to health in the DRC such as child mortality, the malaria epidemic and environmental health hazards that are a constant threat to human well-being.<sup>983</sup>

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• enhancing policy reforms for a more favourable environment for agricultural growth'.

<sup>980</sup> UNDP (note 977 above) 3.

<sup>981</sup> World Vision (note 963 above).

<sup>982</sup> Ibid.

<sup>983</sup> Ibid.

With regard to child mortality, as was seen the mortality rate among children under the five years of age was considered as one of the highest in the world.<sup>984</sup> Half the population of children under the age of five are affected by acute malnutrition in DRC.<sup>985</sup> In addition to the need to fight malnutrition there is a need for government in DRC to improve access to basic health services and care. The World Bank indicates that 'malnutrition is an acute and long term health risk and is linked to poor WASH'.<sup>986</sup>

With regard to malaria, it is reported that this disease remains a drastic driver of disease causation, consumes large amounts of hospital resources and accounts for the largest percentage of deaths.<sup>987</sup> Of 11.5 million on record more than 19.800 have died.<sup>988</sup> In connection with epidemics, it is reported that 'epidemic outbreaks continue to threaten children's survival and health'.<sup>989</sup> Cholera remains a major threat; more than twenty thousand cases and fatalities of one point nine per cent being disclosed in one year alone.<sup>990</sup> In addition, epidemics such as measles, polio and the ebola plague pose serious challenges for the population countrywide.<sup>991</sup>

In relation to environmental health, the DRC is affected by a lack of clean drinking water.<sup>992</sup> Moreover the water crisis is worsened by poor sanitation facilities.<sup>993</sup> Poor WASH is a risk factor that contributes to death and disability in the country.<sup>994</sup> A

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<sup>984</sup> CRIN 'the Democratic Republic of Congo: children's rights references in the universal periodic review' nineteenth session (2014). Available at [www.crin.org/publications/democratic-republic-congo-childrens-rights-references-universal-periodic-revi-o](http://www.crin.org/publications/democratic-republic-congo-childrens-rights-references-universal-periodic-revi-o). Accessed on 9 June 2017.

<sup>985</sup> Ibid. There are four type of under nutrition acute malnutrition or wasting, chronic malnutrition or stunting, underweight, micronutrient deficiencies. Acute malnutrition or wasting is identified by low weight for height, mostly the result of weight loss is related to a recent period of starvation. For more information see M Ag Bendeck (FAO) 'Nutrition terminology and hunger situation analysis' (2009). Available at [http://www.fao.org/fileadmin/user\\_upload/nutrition/docs/policies\\_programmes/CAADP/southern\\_africa/presentations/DAY1\\_Nutrition\\_Situation\\_Analysis.pdf](http://www.fao.org/fileadmin/user_upload/nutrition/docs/policies_programmes/CAADP/southern_africa/presentations/DAY1_Nutrition_Situation_Analysis.pdf). Accessed on 14 November 2017.

<sup>986</sup> World Bank Group (note 972 above).

<sup>987</sup> DRC Humanitarian Fund 'Annual Report Democratic Republic of Congo'(2016). Available at <https://reliefweb.int/report/democratic-republic-congo/democratic-republic-congo-drc>. Accessed on 24 December 2017.

<sup>988</sup> Ibid.

<sup>989</sup> UNICEF 'Humanitarian Action for Children-Democratic Republic of the Congo' (2017) Available at <https://www.unicef.org/appeals/drc.html> . Accessed on 23 October 2017.

<sup>990</sup> World Bank Group (note 972 above) 2.

<sup>991</sup> Ibid.

<sup>992</sup> Ibid

<sup>993</sup> World Bank Group (note 972 above) 2.

<sup>994</sup> Ibid.



commendable effort to solve this problem is the new Water Law which offers an opportunity for change.<sup>995</sup>

In a capsule, the DRC is engaging in policy-making processes focusing on education, health, child protection and WASH.<sup>996</sup> It is significant to develop these policies as soon as possible. A promising plan is the 2020 global strategy overview by the International Rescue Committee (IRC).<sup>997</sup> This international committee is planning to make considerable improvement in health, safety, education, economic wellbeing and decision making power.<sup>998</sup> Sarah indicates that

In order to maximise impact and achieve the priority outcomes, the IRC in the DRC is making new investments to use resources more efficiently, react more quickly when crisis strikes, be more responsive to beneficiaries and partners, expand program reach and improves program effectiveness.<sup>999</sup>

If successful this strategy will definitely transform the quality of life in the DRC. Another right subject to analysis is the right to social security or social assistance.

#### **4.3.2.3. Children's rights to social security and social assistance in the DRC**

According to Article 36 of the 2006 Constitution 'work is sacred'. To that effect the Constitution guarantees the protection against unemployment, an equitable and satisfactory remuneration and other means of social protection specifically for retirees and lifetime pensioners.<sup>1000</sup> As indicated already, social security and social assistance in this study are used interchangeably to include a scheme in terms of which individuals or groups of individuals receive need-based assistance from the public fund. Yet, in the DRC context social security refers to issues in relation to health, pension, and allowances.<sup>1001</sup> Basically there are two ways of acquiring these

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<sup>995</sup> Ibid.

<sup>996</sup> UNICEF (note 989 above).

<sup>997</sup> The IRC mission is to assist the world most vulnerable people to survive,

<sup>998</sup> T Sarah 'the IRC in the DRC: Strategy Action Plan' (2017) Available at [Rescue.org/where/DRC](http://Rescue.org/where/DRC). Accessed on 14 November 2017.

<sup>999</sup> Sarah (note 998 above) 3.

<sup>1000</sup> Art 36 of the 2006 Constitution.

<sup>1001</sup> JBW Kazamwali 'Congolese platform for social protection/PCPS international conference on social protection for those working informally; social security and income from informal economy'. Available at <http://www.saspen.org/conferences/informal2013>. Accessed on 15 November 2017.

benefits: firstly is membership by choice in a health mutual insurance and secondly compulsory membership in a state organisation.<sup>1002</sup>

The state organisation in charge of social security is called the Institution of Social Security (INSS).<sup>1003</sup> The latter institution used to receive all the workers in the formal sector.<sup>1004</sup> However maladministration led people to join health mutual insurance systems.<sup>1005</sup> To date, INSS is the only institution dealing with pensions, disability and family allowances.<sup>1006</sup> Workers in the informal sector do not receive any form of social protection. Against this backdrop, it can be concluded that with the exception of few groups of workers in the formal sector with a limited type of risk cover, the level of risk coverage is low in DRC.<sup>1007</sup> Congolese do not receive any kind of social security or assistance in the DRC.

More so, Article 69 of the 2009 Child Protection Law states that 'parents who are unable to ensure the survival of their children receive material or financial assistance from the State'. Furthermore, it is pointed out that the minister of social development interministerial decree will set the conditions of the State intervention.<sup>1008</sup> Nevertheless, it appears that the entrenched provisions are not applicable when it comes to the realisation of children's rights to social assistance.

Tellingly, as the population in the DRC lives below the poverty datum line, most families are not able to assist their children. Nyemba identifies various internal and external causes of poverty in the DRC.<sup>1009</sup> Internal causes include lack of governance, ineffective policy, corruption, unavailability of resources and the armed conflicts.<sup>1010</sup> External causes are attributable to activities of multi-national entities together with unfair international trade rules.<sup>1011</sup> The writer argues that among all these causes of poverty, the prolonged armed conflict with grave humanitarian implications has been the main driver of social and political problems affecting

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<sup>1002</sup> Ibid.

<sup>1003</sup> Kazamwali (note 1001 above).

<sup>1004</sup> Ibid.

<sup>1005</sup> Ibid.

<sup>1006</sup> Ibid.

<sup>1007</sup> Ibid.

<sup>1008</sup> Art 69 of the 2009 Child protection Law.

<sup>1009</sup> Nyemba (note 912 above) 45.

<sup>1010</sup> Ibid.

<sup>1011</sup> Ibid.

millions of Congolese.<sup>1012</sup> In early 2017, there was an intercommunal conflict in one of the DRC provinces of Great Kasai as well as Tanganyika with the result that more than 3.8 million people are presently displaced inside the country.<sup>1013</sup> This instability has led the country to over-rely on external humanitarian assistance.<sup>1014</sup> Currently 8.5 million people including 5.1 million children are deemed to be in urgent need of humanitarian assistance.<sup>1015</sup>

Relating to human assistance, it should be noted that UNICEF plays a significant role in the DRC. This organisation manages education, WASH, nutrition and NFI/shelter cluster at national and provincial level.<sup>1016</sup> In addition UNICEF coordinates cash working groups and multi sector humanitarian interventions.<sup>1017</sup>

In respect to social security benefits, the allocation of cash transfers and vouchers is mostly resorted to in an attempt to assist internally displaced households.<sup>1018</sup> In order to provide assistance to people and children affected by conflicts, UNICEF works hand in hand with an organisation named DRC humanitarian Fund (DRC HF).<sup>1019</sup> The DRC HF plays an important role in humanitarian action, providing flexible, prioritised and timely financial resources.<sup>1020</sup> Basically Congolese funding organisations receive contributions from donors. For example, in 2016 DRC HF donors contributed around US\$ 45.4 million.<sup>1021</sup> As a result, this organisation provided 2.3 million people with some form of humanitarian assistance.<sup>1022</sup> Funding

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<sup>1012</sup> UNICEF (note 989 above).

<sup>1013</sup> Ibid. The cause of these conflicts was the contests for the control of customary power and resources.

<sup>1014</sup> Kandala & others (note 908 above) 12.

<sup>1015</sup> UNICEF (note 989 above).

<sup>1016</sup> Ibid. In nutrition children from 6 to 59 months with severe acute malnutrition are admitted for therapeutic care. In health children from 6 to 14 months were vaccinated against measles. People affected by conflict receive primary care. In respect of NFI/shelter people accessed household items, and shelter material. In education classroom are set up, boys and girls between 5 to 11 years are given the support for quality education.

<sup>1017</sup> UNICEF (note 989 above).

<sup>1018</sup> JC Aker 'Comparing Cash Voucher Transfers in a humanitarian context: evidence from the Democratic Republic of Congo.' (2015) Policy research working paper.7456. Available at <http://documents.worldbank.org/curated/en/473271467994651219/Comparing-cash-and-voucher-transfers-in-a-humanitarian-context-evidence-from-the-Democratic-Republic-of-Congo....>

<sup>1019</sup> UNICEF (note 989 above)

<sup>1020</sup> DRC Humanitarian (note 987 above).

<sup>1021</sup> Ibid. Six donors contributed to the DRC HF namely the United Kingdom as the biggest donor's contributor (US\$20.2 million), Sweden (US\$12.2 million) and the Netherlands (US\$6.6 million), Ireland, Belgium and Luxembourg collectively contributed US\$6.4 million.

<sup>1022</sup> DRC Humanitarian Fund (note 987 above).

was mostly allocated to the eastern provinces such as Tanganyika, North-Kivu, South-Kivu, Maniema taking into account the level of vulnerability of the victims and the severity of the humanitarian need.<sup>1023</sup>

It should be noted that since the inception of DRC HF it has organised approximately US\$968 million and allocated more than US\$950 million through 1.316 projects.<sup>1024</sup> This organisation aims 'to promote the most effective response in any emergency'.<sup>1025</sup> Mostly, the DRC HF prefers to provide assistance with multi-purpose cash which is an unconditional cash transfer to enable qualifying household to meet basic needs.<sup>1026</sup> As mentioned above, in 2016 the DRC HF not only supported the affected households during armed conflicts, but also funded projects by providing assistance to cover food security or non-food item needs through cash transfers or vouchers.<sup>1027</sup>

Against this background, it can be argued that in the DRC there is no specific child grant support assisting children to receive reasonable cash monthly. As was seen, the cash transfer programme cannot eradicate poverty as envisaged in the Millennium development goals but can reduce poverty.<sup>1028</sup> Poverty reduction applies where parents earn below two dollars per month. The grant assists to fulfill the basic needs or survival rights of children. Therefore, the DRC should find a way to avoid overreliance on international donors. Thus there is a great need to implement the child support grant programme in the DRC. This may start gradually as DRC HF has a huge role to play because children's survival rights should be realised. It is a challenge to fulfill the needs of children countrywide.

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<sup>1023</sup> Ibid, 6.

<sup>1024</sup> Ibid, 7.

<sup>1025</sup> Ibid, 10.

<sup>1026</sup> DRC Humanitarian Fund (note 987 above) 10.

<sup>1027</sup> Ibid.

<sup>1028</sup> 191 United Nations state members committed to help achieve millennium development goals by 2015 and to eradicate poverty and hunger was one of the goals. For more details see Synthesis Report of the Secretary-General on the post-2015 'the road to dignity by 2030: ending poverty, transforming all lives and protecting the planet (December 2014). Available at [http://www.un.org/disabilities/documents/reports/SG\\_synthesis\\_report\\_road\\_to\\_dignity\\_by\\_2030](http://www.un.org/disabilities/documents/reports/SG_synthesis_report_road_to_dignity_by_2030) Pdf. Accessed on 17 November 2017. See also Osborn & others 'Universal Sustainable Developments Goals: understanding the transformational Challenge for Developed Countries a report of a study by stakeholder forum (May 2015). Available at [https://sustainabledevelopment.un.org/content/documents/1684SF\\_-\\_SDG\\_Universality\\_Report\\_-\\_May\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/1684SF_-_SDG_Universality_Report_-_May_2015.pdf) Accessed 20 November 2017.

#### **4.4 Analysis of measures of implementation taken by the three countries and concluding remarks by the Committee**

It was submitted in the introductory part of the study that Kenya, South Africa and the DRC are State Parties to the CRC as a result they committed themselves to fulfill the rights in the CRC.<sup>1029</sup> Ideally, States parties are required to take all appropriate legislative, administrative and other measures to implement the provisions of the CRC.<sup>1030</sup> As mentioned above, the three countries under study have domesticated the CRC in their national laws. The CRC is the key international child treaty. Government is required to report regularly on the progress made towards the realisation of children's rights.<sup>1031</sup> This report is done within two years of entry in force of the CRC for the State Party concerned.<sup>1032</sup> Thereafter the report is done within five years.<sup>1033</sup> The country reports provide an important tool to hold government accountable and to measure their progress or lack of progress towards promoting children's rights.<sup>1034</sup> Civil Society Organisations (CSO) can participate in the monitoring process by submitting the so called 'shadow report' or alternate report presenting their own data and challenging information provided in government reports.<sup>1035</sup>

Government and CSOs are also invited to make their reports and the presentations to the CRC Committee. After considering government reports and presentations the Committee release its concluding observations. These concluding observations also include recommendations which government needs to address in order to promote and protect children's rights more effectively.

Chapter three and the first two parts of chapter four elaborate on the realisation of children survival rights. However, as will be seen, analysing the current concluding remarks of the Committee on the rights of the child will pave a way for a comparative study in the next chapter.

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<sup>1029</sup> Art 44(1) of the CRC. See annexure.

<sup>1030</sup> Art 4 of the CRC. See annexure.

<sup>1031</sup> Art 44 of the CRC. See annexure.

<sup>1032</sup> Art 44 (1)(a) of the CRC. See annexure.

<sup>1033</sup> Art 44(1)(b) of the CRC. See annexure.

<sup>1034</sup> Art 44 (2) of the CRC. See annexure.

<sup>1035</sup> Art 45 of the CRC. See annexure.

#### **4.4.1 CRC Committee concluding remarks summary in respect of South Africa**

The general observation focuses on several areas. However this study places emphasis on the areas that are relate to the children's survival rights. These areas include the progress made as well as highlights on areas of concern.

##### **4.4.1.1 Progress achieved**

The Committee noted the South African<sup>1036</sup> ratification of and the accession to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2009 and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2003.<sup>1037</sup> The Committee also welcomed the adoption of a number of legal provisions and institutional and policy measures related to children's rights since its last review, including the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008, which is largely in line with the Convention.<sup>1038</sup>

There was also a progressive application of the CRC principles by the judiciary in South African jurisprudence.<sup>1039</sup> Furthermore the committee also noted the reduction of infant and child mortality rates and mother-to child-transmission of HIV/AIDS.<sup>1040</sup> In this regard the Committee welcomed the increase in birth registrations and efforts made by the State Party to develop strong legal and policy framework to combat violence.<sup>1041</sup>

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<sup>1036</sup> UN Committee on the Rights of the Child (CRC), concluding observations on the second periodic report of South Africa, 27 October 2016, CRC/C/ZAF/CO/2. Available at: <http://www.refworld.org/docid/587ce86b4.html>. Accessed 2 April 2018

<sup>1037</sup> CRC Committee Observations South Africa (note 1036 above) para2.

<sup>1038</sup> Ibid, para 2.

<sup>1039</sup> Ibid, para 3.

<sup>1040</sup> Ibid.

<sup>1041</sup> Ibid.

#### **4.4.1.2 Areas of concern**

##### **Legislation and policy**

The Committee was concerned about the weak implementation of the National Plan of Action of children as no report on progress made had been issued so far.<sup>1042</sup> Although the National Children's Rights Intersectoral Coordination Committee was established, there were no clear explanations of this committee's mandate.<sup>1043</sup>

In terms of the allocation, there was evidence of a lack of a system to identify and track the budget allocation and spending on children.<sup>1044</sup> In addition, the Committee was also concerned that Human Rights Commission does not have a legal mandate to deal with children rights. This concern was exacerbated by a lack of resources geared to enhance children's rights and protection.<sup>1045</sup> The insufficient involvement of the CSOs working on children services delivery was also noted.<sup>1046</sup>

##### **Right to life, survival and development**

While the Committee noted the reduction of infant and child mortality, infant and child mortality still persist due to factors such as violence, including abuse and neglect injuries from fire arms, malnutrition, pre-natal conditions and preventable diseases.<sup>1047</sup>

##### **Health and health services**

The Committee pointed out that South Africa is developing new guidelines for youth and adolescents health in order to address this issue comprehensively.<sup>1048</sup> However the Committee was concerned about the scale of health risks that adolescents are

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<sup>1042</sup> 2012-2017.

<sup>1043</sup> CRC Committee Observations South Africa (note 1036 above) para 7.

<sup>1044</sup> CRC Committee Observations South Africa (note 1036 above) para10.

<sup>1045</sup> Ibid, para 9

<sup>1046</sup> Ibid, para 15.

<sup>1047</sup> Ibid,para 25

<sup>1048</sup> Ibid, para 47.

exposed to from namely: HIV/AIDS infection, tuberculosis infection, suicide and depression, maternal death alcohol, and substance abuse.<sup>1049</sup>

## **Nutrition**

The Committee acknowledged the adoption of the Roadmap nutrition in SA<sup>1050</sup> as well as efforts made to facilitate breastfeeding.<sup>1051</sup> However the Committee was concerned about child malnutrition including undernutrition, micronutrients deficiencies which result in child mortality and morbidity, child food insecurity, inadequate quality of food provided at school, a high rate of obesity among children.<sup>1052</sup> A persistent low rate of exclusive breastfeeding up to six months was also noted.<sup>1053</sup>

## **Standard of living**

The committee acknowledged the substantial expansion of social security coverage for children in South Africa.<sup>1054</sup> This expansion resulted in an overall decline in child poverty. Nevertheless, the Committee was concerned about the poverty rate among the age groups one to seventeen, administrative barriers to access to the social security benefits for children. The amount of the CSG falls below the actual cost of providing the service.<sup>1055</sup>

As seen above the observations made by the Committee regarding the realisation of children's rights is similar to what was elaborated in chapter three earlier in this study. The next section explores the concluding observations in Kenya.

### **4.4.2 CRC Committee concluding remarks summary in respect of Kenya**

The Committee noted on the progress achieved and areas of concern.<sup>1056</sup>

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<sup>1049</sup> Ibid, para 47 (a-e).

<sup>1050</sup> 2013-2017.

<sup>1051</sup> CRC Committee Observations South Africa (note 1036 above) para 51.

<sup>1052</sup> CRC Committee Observations South Africa (note 1036 above) para 51 (a-e).

<sup>1053</sup> Ibid.

<sup>1054</sup> Ibid, para 53.

<sup>1055</sup> Ibid, para 53 (c).

<sup>1056</sup> UN Committee on the Rights of the Child (CRC), Concluding observations on the combined third to fifth periodic reports of Kenya, 21 March 2016, CRC/C/KEN/CO/3-5. Available at: <http://www.refworld.org/docid/57aaeb8b4.html>. Accessed 28 March 2018.



#### **4.4.2.1 Progress achieved in Kenya**

The Committee welcomed the ratification of or accession to the Convention on the Rights of Persons with Disabilities, in 2008;<sup>1057</sup> as well as the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, in 2007.<sup>1058</sup> Furthermore the Committee noted the adoption and promulgation of the Protection Against Domestic Violence Act;<sup>1059</sup> The Victim Protection Act;<sup>1060</sup> the Marriage Act<sup>1061</sup> setting the minimum age for marriage at eighteen years for all types of marriages; the 2010 Constitution of Kenya, revised in 2010, which stipulates the right of the child to have his or her best interests taken as a primary consideration.<sup>1062</sup> The Committee also welcomed the additional policy measures such as the National Plan of Action for Children, 2015-2022; the National Plan of Action for Children, 2008-2012; the National Plan of Action Against Sexual Exploitation of Children in Kenya, 2013-2017.<sup>1063</sup>

#### **4.4.2.2 Areas of concern<sup>1064</sup>**

##### **Legislation and policies.**

Although the Committee recognised that the revised 2010 Constitution of Kenya entrenches certain rights of children,<sup>1065</sup> it was concerned about the harmonisation of national legislation and regulations with the Convention.<sup>1066</sup> Furthermore, the Committee was also concerned that the National Plan of Action for Children did not provide substantial information on how the plan would be financed.<sup>1067</sup>

##### **Right to life, survival and development**

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<sup>1057</sup> Ibid, para 3(a)

<sup>1058</sup> Ibid.

<sup>1059</sup> No. 2 of 2015

<sup>1060</sup> No. 17 of 2014

<sup>1061</sup> No. 4 of 2014

<sup>1062</sup> CRC Committee observations Kenya (note 1056 above) Para 3(h).

<sup>1063</sup> Ibid para 5.

<sup>1064</sup> The areas of concern elaborated in this report encompasses many areas. However this study focuses on the areas of legislation , policies, strategies, and the children's survival rights.

<sup>1065</sup> CRC Committee observations Kenya (note 1056 above) para 7.

<sup>1066</sup> Ibid, para 8.

<sup>1067</sup> Ibid, para 9.

The Committee raised a major concern in Kenya about the killings, and trafficking of children with albinism for body parts, including acts committed by family members.<sup>1068</sup> In cases of violence against children the committee stressed that there is a lack of access to justice for child victims of violence.<sup>1069</sup> The Committee also mentioned low rates of investigation and prosecution, frequent delays in court proceedings, lenient penalties imposed as well as the risk of victimisation inherent in the justice system.<sup>1070</sup>

### **Health and health care services**

Despite the reduction the mortality rate of children under five, and the initiatives for making health care for children under five and maternity health free of charge;<sup>1071</sup> the Committee noted that the cost of health-care services still posed a barrier against accessing basic health-care services.<sup>1072</sup>

The Committee was concerned about the high rates of early pregnancy and maternal mortality among the adolescents.<sup>1073</sup> In addition the rate of unsafe abortion remains high. Pregnant girls faced discrimination in accessing health care services given that the service is costly whilst health-care workers exhibited negative attitude towards these pregnant girls.<sup>1074</sup>

### **Nutrition**

The Committee raised a concern about the lack of an orderly follow –up regarding nourishment of infants and breastfeeding, which lower the exclusive breastfeeding rate of children less than six months.<sup>1075</sup> Furthermore the Committee is also concerned about partial application of the regulation on breast milk substitutes.<sup>1076</sup>

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<sup>1068</sup> Ibid, para 25.

<sup>1069</sup> Ibid, para 33 (d).

<sup>1070</sup> Ibid.

<sup>1071</sup> Ibid, para 47

<sup>1072</sup> Ibid, para 47 (c).

<sup>1073</sup> Ibid, para 49.

<sup>1074</sup> Ibid, para 49 (a).

<sup>1075</sup> CRC Committee observations Kenya (note 1056 above) para 53.

<sup>1076</sup> Ibid.

The Committee pointed out that the maternity leave regulation does cover women working in the informal sector.<sup>1077</sup>

### **Standard of living**

Although the Committee recognised the rights entrenched in the 2010 Constitution regarding housing, sanitation, food, water and social security,<sup>1078</sup> it also welcomed the significant increase in the number of children covered by the Cash Transfer of Programm of OVC.<sup>1079</sup> The Committee was however concerned about the adoption and implementation of several laws, policies and strategies intended to realise the constitutional rights to housing, sanitation, water, food, and social security.<sup>1080</sup> The Committee also noted with disapproval the forced evictions and displacement of people including children.<sup>1081</sup> Its concern was noted against the background of lack of sanitation and safe drinking water. At the same time it was a matter of concern that CT-OVC does not cover the cost of healthcare except the children under five<sup>1082</sup>

In view of the above observation it can be argued that Kenya is slowly making progress in the realisation of children's survival rights.

#### **4.4.3 CRC Committee concluding remarks summary in respect of the DRC**

In the same vein the Committee has also welcomed some progress made in the DRC and pinpointed several areas of concern.<sup>1083</sup>

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<sup>1077</sup> Ibid.

<sup>1078</sup> Ibid, para 55.

<sup>1079</sup> Ibid.

<sup>1080</sup> Ibid, para 55 (a).

<sup>1081</sup> Ibid, para 55 (c).

<sup>1082</sup> Ibid, para 55 (f).

<sup>1083</sup> UN Committee on the Rights of the Child (CRC) *Concluding observations on the combined third to fifth periodic report of the Democratic Republic of Congo*, 3 February 2017, CRC/C/COD/CO/3-5. Available at: <http://www.refworld.org/docid/589dc2794.html>. Accessed 28 March 2018.

#### **4.4.3.1 Progress achieved in the DRC**

The Committee noted with approval the implementation and ratification of international human rights treaties specifically the Convention on the Rights of Persons with Disabilities on 30 September 2015. Another achievement that the Committee welcomed was the adoption of legislation, policies and strategies namely: the Act amending the Family Code of 1987 on 15 July 2016, which introduces some measures against child marriage, and the framework Law on Education of 11 February 2014.<sup>1084</sup> Furthermore, the Committee recognised the establishment of the National Commission of Human Rights in March 2013 as well as numerous strategies and plans, including the National Education Strategy and the National Plan for developing literacy and informal education,<sup>1085</sup> the 2012 Action Plan to limit the recruitment and use of children and other grave violations of children's rights by the armed forces and the security services, the Action plan to stop child Marriage,<sup>1086</sup> as well as the National Plan for Orphans and Vulnerable Children.<sup>1087</sup>

#### **4.4.3.2. Areas of concern**

##### **Legislation**

The Committee was however concerned about the insufficient implementation of legislation, especially the Child Protection Law.<sup>1088</sup> The Committee emphasised that while numerous policies and strategies were adopted, there was a need of a national comprehensive policy on children to encompass all areas covered by the Convention.<sup>1089</sup>

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<sup>1084</sup> CRC Committee observations DRC (note 1083 above ) para 4.

<sup>1085</sup> 2012-2020.

<sup>1086</sup> 2015-2018

<sup>1087</sup> 2016-2020.

<sup>1088</sup> CRC Committee observations DRC (note 1083 above) para 7.

<sup>1089</sup> Ibid,para 8.

## **Right to life, survival and development**

The Committee was seriously concerned about children's rights in the DRC. It noted the grave violation committed against children by both State and non-state actors,<sup>1090</sup> Malaria and HIV/AIDS were reported in rural areas.<sup>1091</sup> Lack of appropriate medical assistance to mothers,<sup>1092</sup> killing and selling of body parts of children with albinism stick out as a great humanitarian concern.<sup>1093</sup>

## **Health and health services**

The Committee stressed that the budget allocation to the health sector remains very low. This resulted in poor infrastructure and equipment thus compromising the quality of the health service delivery and straining professional personnel. In the process children suffer especially against the constant inability of the health system to roll out sufficient supplies of vaccines.<sup>1094</sup> Furthermore the Committee is concerned about early pregnancies that carry a major risk for the survival, health and development of girls.<sup>1095</sup>

## **Standard of living**

The Committee pointed out lack of clean, potable water, adequate sanitation facilities, unhealthy environment and food security.<sup>1096</sup> There is need for the DRC as a State Party to commit itself to target 1.3 of the Sustainable Development Goals on implementing nationally appropriate social protection systems and measures for

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<sup>1090</sup> Ibid, para17(a).

<sup>1091</sup> Ibid, para 17 (b).

<sup>1092</sup> Ibid, para 17(c).

<sup>1093</sup> Ibid.

<sup>1094</sup> Ibid ,para 35.

<sup>1095</sup> Ibid ,para 36.

<sup>1096</sup> CRC Committee observations DRC (note 1059 above ) para38.

all.<sup>1097</sup> The Committee stressed out the lack of appropriate resources to eradicate child poverty.<sup>1098</sup>

Against this backdrop, it is submitted that all the three countries under study have made significant progress as highlighted by the Committee. Nonetheless there still remain challenges that need to be addressed to realize children's survival rights.

#### **4.5 Conclusion**

The investigation in this chapter covered three parts. First, the chapter aimed to highlight the conceptual framework of children's survival rights in Kenya by indicating the manner in which this country incorporated children's rights at the domestic level. As was seen, different laws providing children's rights were elaborated namely the 2010 Constitution, the Children's Act 2001, the penal code, the Employment Act and the Evidence Act. Available policies, programmes and strategies for the realisation of children's rights were also evaluated. From the investigation it became evident that Kenya put a legal framework in place which can enforce policies but as was noted there is a need to expand the child support grant.

Secondly, the chapter investigated the realisation of children's survival rights in the DRC. What was revealed is that there are various laws guaranteeing children's rights in the DRC including the 2006 Constitution, the Child Protection law, the Labour code and the Penal Code. Furthermore, the chapter attempted to analyse some strategies and programmes available for the realisation of children's survival rights. It was submitted that for better realisation of survival rights child support grants should be implemented in a manner so as to assist children countrywide. In addition it has become apparent that more policies and strategies need to be developed and implemented.

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<sup>1097</sup> See note 48 above. SDGs are intended to be universal in the sense of embodying a universally shared common global vision of progress towards a safe, just and sustainable space for all human being to thrive on the planet. They reflect the moral principles that no-one and no country should be left behind and everyone and every country should be regarded as having a common responsibility of playing their part in delivering the global vision.

<sup>1098</sup> CRC Committee observations DRC (note 1059 above) para 38.

Thirdly, the chapter explored the concluding observations made by the Committee on Rights of the Child on the current report submitted by South Africa, Kenya and the DRC. While exploring these observations, this chapter focused on the progress achieved by each country and pinpointed the main areas of concern. It was submitted that each country under study has reason to be proud of some degree of achievement. Nonetheless some areas of concern that need to be addressed are nutrition, right to life, survival and development as well as health and an acceptable standard of living.

## **CHAPTER FIVE**

### **REALISING CHILDREN' S SURVIVAL RIGHTS: A COMPARATIVE ANALYSIS OF SOUTH AFRICA, KENYA AND THE DRC**

#### **5.1 Introduction**

Chapter four dealt with the legal framework and programmes available for the realisation of children's rights firstly in Kenya, and in the DRC. Furthermore the chapter analysed the CRC Committee concluding remarks in respect of the three countries under study. As it has been highlighted already, the countries under study have promulgated laws providing for child survival rights. However, as has been seen above, implementation of policies and programmes always poses a problem for some countries. Specifically in the DRC the need to develop policies still exists. It was suggested that child support grant programmes need to be designed, developed and implemented in the DRC as such implementation programmes becomes critical in the alleviation of poverty.

The present chapter aims to give a country by country report of children's socio-economic rights that have been defended in Kenya, DRC, and South Africa. The chapter will concentrate on the legal position of these countries particularly so as to point out the shortcomings in respect of each country. Emphasis is placed on the best practice methods and lessons to be learnt. By way of background the investigator will identify Norway as a best practice example.

#### **5.2. The legal position in the three countries under study.**

South Africa, Kenya and the DRC ratified the CRC. As State Parties they are compelled to take all legislative and other measures to ensure the fulfilment of the rights enshrined in the CRC.<sup>1099</sup> The rationale behind the selection of these three countries for a comparative examination is that poverty constitutes a challenge on the way of a speedier, efficient and better realisation of children's survival rights in these countries. A second reason is that Kenya, DRC and South Africa are all

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<sup>1099</sup> Art 4 of the CRC. See annexure.



developing African countries with varying socio-economic standards.<sup>1100</sup> It will also be relevant to draw lessons that reflect the African values and knowledge systems before relying on any other country located abroad.<sup>1101</sup>

As was seen above, with regard to the implementation of international norms and treaties, the DRC, as a country, adopted a monist system whereby treaties and conventions automatically obtain validity. Contrary to the DRC, South Africa and Kenya fit into a dualist system whereby international law norms do not automatically become incorporated into domestic law unless they have become domesticated as law. To this end, the legal position in the jurisdictions will be compared. In doing so this study focuses on the promulgation, effectiveness and enforcement of the domestic laws. In addition the study will not evade mention of any practicalities standing against the realisation of children's survival rights if detected.

### **5.2.1 Promulgation of laws**

Firstly with regard to the promulgation of domestic laws, all three countries have put domestic laws in place to ensure that children's survival rights are realised.<sup>1102</sup> The South African 1996 Constitution being the supreme law has an entrenched Bill of Rights regulating children's rights in s 28.<sup>1103</sup> The rights to basic nutrition, health services and social services are also guaranteed within the 1996 Constitution.<sup>1104</sup> Furthermore, the South African Children's Act 38 of 2008 indicates that parents have the responsibility to care and maintain the child.<sup>1105</sup> The South African Social Assistance Amendment Act as well provides for the assistance of a child applicant.<sup>1106</sup>

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<sup>1100</sup> See chapter 1 of this study.

<sup>1101</sup> It may happen that at the regional level an African country is reprimanded of serious violations of human rights. See *Social and Economic Rights Action Center and Another v Nigeria* Communication N<sup>o</sup> 155/96.

<sup>1102</sup> See Chapter three and Chapter Four.

<sup>1103</sup> S 2 of the 1996 Constitution is the supremacy Clause, the Bill of Rights is contained in Chapter 2.

<sup>1104</sup> S 27 of the 1996 Constitution.

<sup>1105</sup> S 18.

<sup>1106</sup> Chapter 2 of the Social Assistance Act.

Similar to South Africa, the 2010 Kenya Constitution embodies constitutional supremacy with an entrenched Bill of rights.<sup>1107</sup> The Kenyan supreme law provides for the right to food, sanitation, water, health and social security.<sup>1108</sup> Children's rights are also guaranteed in Article 53 of the 2010 Constitution. Furthermore, the Kenyan Children's Act 2001 stresses that government and family need to ensure the survival and development of the child.<sup>1109</sup>

Unlike the Kenya and South Africa constitutions, the 2006 DRC Constitution only mentions that everyone is obliged to respect the constitution and comply with the laws of the Republic.<sup>1110</sup> DRC has no clear provision emphasising the supremacy of the Constitution. On the contrary, the Congolese Constitution leaves room for constitutional review subject to certain conditions.<sup>1111</sup> Leaving aside the DRC, South Africa and Kenya also provide that children have a right to family care.<sup>1112</sup> As a result, the public authorities have the duty to protect children against any form of maltreatment.<sup>1113</sup> Similar to Kenya and South Africa, the DRC has a child protection law which adequately details the classes of protection available to a child. The classification ranges from social protection, juridical protection to criminal protection.<sup>1114</sup> Therefore, this expose provides adequate evidence that the DRC, Kenya and South Africa have taken measures to incorporate the CRC requirements into their domestic laws. In addition the current CRC Committee's concluding observations of each country under study provides evidence specifically in order to show progress made.<sup>1115</sup> The Committee welcomed these State Parties ratification and implementation of international treaties as well as domestic legislation.

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<sup>1107</sup> Chapter 4 of the 2010 Constitution.

<sup>1108</sup> Arts 43-46.

<sup>1109</sup> S 4 of the Children's Act 2001.

<sup>1110</sup> Art 62 of the 2006 Constitution, see also Art 168.

<sup>1111</sup> Title VIII, Art 218 of the 2006 Congolese Constitution.

<sup>1112</sup> S 41 of the 2006 Congolese Constitution.

<sup>1113</sup> Ibid.

<sup>1114</sup> See Title II, Title III and Title IV of the 2009 Child Law Protection.

<sup>1115</sup> See Chapter four section 4.4 Analysis of measures of implementation taken by three countries and concluding remarks by the Committee.

## 5.2.2 Justiciability and law enforcement

In respect to justiciability and law enforcement, some court cases on children's survival rights have been recorded in the South African<sup>1116</sup> and Kenyan courts.<sup>1117</sup> In the DRC most of the cases brought to the International Criminal Court (ICC) concerned sexual offences against children and the prohibited use of children as soldiers.<sup>1118</sup> This contrast arises as a result of the armed conflict that affected the country. Below is the discussion of relevant judgement of each country under study

### 5.2.2.1 A brief analytical look into South African case law

Children's rights in South Africa received a significant boost with the enactment of a supreme constitution with an entrenched justiciable Bill of Rights. In South African law a child's constitutional enjoyment of rights begins at birth. Birth as a threshold for legal identity is entrenched in the Constitution because it provides for the child's right to a name and a nationality from the moment of his or her birth.<sup>1119</sup> Skelton has the following to say about the right to a name:

The right to a name starts with birth and includes the right to be registered by the state in a birth register immediately after birth. Inclusion in the population register provides access to social grants, education and health and social services and facilitates the child's subsequent participation in the civil and political community by enabling her to apply for an identity document and to vote.<sup>1120</sup>

Conversely prior to birth the unborn child is excluded from the purview of enjoyment of rights including that of life because it is merely a foetus, and, in consequence, cannot be attributed with the substantive characteristic of legal personality.<sup>1121</sup>

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<sup>1116</sup> *Government of the Republic of South Africa and Others v Grootboom and Other* 2001 (1) SA; *Treatment Action Campaign v Minister of Health* 2000 BCLR (4) 356 (T).

<sup>1117</sup> *Florence Amunga Omukanda & another v Attorney General & 2 others*[2016] eKLL

<sup>1118</sup> *The Prosecutor v German Katanga and Mathieu Chui; Prosecutor v Thomas Lubanga Dyilo; Prosecutor v Jean Pierre Bemba Gombo* Available at [www.icc-cpi.imy/menys/icc/situations](http://www.icc-cpi.imy/menys/icc/situations)+ and +cases. Accessed on 02 December 2017. See also C Kabati 'The ICC's Jurisdictional Limitations and the Impunity for War Crimes in the DRC: A plea for the Establishment of a Special Criminal Tribunal' Unpublished LLM thesis, University of Kwazulu Natal, December 2012.

<sup>1119</sup> S 28 (1) (a) of the Constitution imposes a duty on the state because it gives the child legal identity.

<sup>1120</sup> Skelton( note 356 above) 603.

<sup>1121</sup> *Christian Lawyers Association of South Africa v The Minister of Health* 1998 11 BCLR1434 (T)

Happily in South Africa the right enshrined in s 28(1)(a) is a universal right.<sup>1122</sup> As a result the right is not circumscribed in any way whatsoever and is available to 'every child' including the child of foreign parents whether the parents are in South Africa temporarily or permanently, legally or illegally<sup>1123</sup>.

### ***The Treatment Action Campaign Case***<sup>1124</sup>

The background to the Treatment Action Campaign (TAC) case is found in the trial court process where the applicants, comprising a number of associations and members of civil society brought a claim against the Minister of Health to immediately plan and implement an effective, comprehensive and progressive programme to make the antiretroviral drug (nevirapine) available to pregnant mothers already identified with HIV and to their new-born babies. The critical concern for the applicants however was that the restricted availability of the drug to only two select test centres per province violated the right to health of HIV positive pregnant women as well as their children throughout the country who were not exposed to those test centres.<sup>1125</sup>

In view of the fact that the applicants based their claim on ss 27 and 28, both sections merit quoting *in extenso*.

The socio-economic provision on health care, food, water and social security states that

- (1) Everyone has the right to have access to -
- (a) health care services, including reproductive health care<sup>1126</sup>;
- (b) sufficient food and water<sup>1127</sup>; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance<sup>1128</sup>.

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<sup>1122</sup> Art 7 of the CRC.

<sup>1123</sup> *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

<sup>1124</sup> TAC case (note 1116 above)

<sup>1125</sup> *Ibid* par 5.

<sup>1126</sup> S 27(1)(a)

<sup>1127</sup> S 27(1)(b)

<sup>1128</sup> S 27(1)(c)

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights<sup>1129</sup>.

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

The socio-economic provision on children states that

(1) Every child has the right –

.....

(c) to basic nutrition, shelter, basic health care services and social services<sup>1130</sup>.

The trial court held that the right to anti-retroviral treatment for pregnant mothers created a positive obligation on government which the Minister (for the state) could not duck. In this way the court's holding in *TAC* confirmed that 'basic health care service' is not an act of charity which government may extend or not extend as it wishes, but is an actionable right under the Supreme Constitution and the Bill of Rights.

The *TAC* application and the ensuing court order compelling government to

Plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner<sup>1131</sup>.

was a triumph for the right to basic health care service in general and, in particular, that of children, in South Africa. However the decision did not meet universal approval. The respondents appealed the order.

Going back to the trial phase of the case, among the reasons the respondent (government) put forward to justify delaying the distribution of the drug were *inter alia* the following:

(1) there was a need to evaluate the safety and effectiveness of the treatment,

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<sup>1129</sup> S 27(2)

<sup>1130</sup> S 28 (1) (c)

<sup>1131</sup> *Minister of Health and Others v Treatment Action Campaign and Others* Case CCT 8/02 In par 8 (1)

(2) there were insufficient funds and hence insufficient capacity in the entire health system to roll out Nevirapine as a nationwide MTCT project<sup>1132</sup>.

The conceptual and humanitarian hardship which the court had to grapple with was the obvious hardship that would be faced by a great many thousands of mothers who would not be financially capable of accessing treatment outside of the few research stations and training sites in each province.

The point about insufficient funds as pleaded in the respondents' response to the TAC application cannot pass without a comment to it. It begs comment in the sense that at the moment human rights jurisprudence in South Africa is at a level that a court is not debarred from scrutinising a department's budgetary processes and decisions.<sup>1133</sup> That indeed is a progressive development in human rights jurisprudence.

What needs bearing in mind in the court's treatment of the positive obligation created by socio-economic rights in the TAC case was largely the criterion of reasonableness. According to the court it was unreasonable that the respondent opted to withhold the necessary nevirapine treatment to a significant segment of potential recipients for a protracted period of time, notwithstanding the fact that the cost to the victims in terms of human suffering was indeed grave.

In general the characteristics of a reasonable programme identified by Liebenberg are instructive.<sup>1134</sup> Some of his key criteria which should drive informed decision-making in human rights obligations include but are not necessarily limited to:

1. The programme must be comprehensive, coherent and co-ordinated
2. The state has a duty to provide adequate and appropriate financial and human resources to enable the programme to work.

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<sup>1132</sup> *Treatment Action Campaign v Minister of Health* 2004 (4) BCLR 356 (T).

<sup>1133</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) where the court said that it was not acceptable for government to plead that it had insufficient funds when in fact it would have had sufficient funds had it planned and budgeted for a line item in order to fulfil its constitutional obligations

<sup>1134</sup> S Liebenberg 'Taking stock: The jurisprudence on Children's Socio-Economic Rights and its Implications for Government Policy' (2004) *Economic and Social rights in South Africa* Review 234.

3. The programme must be balanced, flexible as well as transparent so that its content can be communicated clearly to the public it is aimed to benefit.
4. It must be flexible enough to meet the urgent and immediate needs of those whose needs are the most urgent by reason of the intolerable conditions under which they find themselves.

***The Government of the Republic of South Africa and Others v Grootboom and Others*<sup>1135</sup>**

The facts in the *Government of the Republic of South Africa and Others v Grootboom and Others* provide a classic illustration of the kind of intolerable conditions envisaged by the criterion of reasonableness just quoted.<sup>1136</sup> *Grootboom* involved the socio-economic right to housing. The provision on housing states that

- (1) Everyone has the right to have access to adequate housing.<sup>1137</sup>
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.<sup>1138</sup>
- (3) No one may be evicted from their home, or have their home demolished, without an order of court after considering all the relevant circumstances. No legislation may permit arbitrary evictions<sup>1139</sup>.

Stated briefly the facts in the case were the following: *Grootboom* and most of the other respondents lived in shacks situated at a water logged informal settlement in Wallacedene where there was neither water, sewage nor services for the removal of refuse.<sup>1140</sup> Most of the inhabitants in the informal settlement in Wallacedene were children. Only about 5 out of 100 shacks had power for lights. About 25 out of 100 households received no income at all. The rest lived off an income of below R500<sup>1141</sup>.

<sup>1135</sup> *Grootboom*( note 1116 above).

<sup>1136</sup> 2001 (1) SA 46 (CC).

<sup>1137</sup> S 26 (1) Note also that this section sets out the parameters of the right and does not exclude children. See par 34 in the judgement per Jacob J.

<sup>1138</sup> S 26 (2)

<sup>1139</sup> S 26 (3). Note also that the section affirms a negative right which outlaws arbitrary evictions.

<sup>1140</sup> Thus several rights in the Bill of Rights could be said to have been effectively invaded: the right to human dignity, the right to equality, the right to a clean environment, and of the socio-economic rights set out in ss 26 and 27.

<sup>1141</sup> *Grootboom* (note 1116 above)para 7

Many of the respondents had placed their names on the municipality's waiting list for subsidised low-cost housing. In the face of intolerable conditions at Wallacedene and after an indefinite wait for a housing allocation, the respondents moved into privately owned land out of desperation. It was at this informal settlement that the land owner had them removed. Their removal was carried out in a most inhumane way in that it was at the beginning of the cold, windy and rainy Cape winter. Their homes were bulldozed and their possessions were destroyed during the process<sup>1142</sup>. It is patently clear that the case history in *Grootboom* entailed an egregious violation of the rights guaranteed in s26, especially s26(3) which prohibits evictions, or demolitions except by court order and only 'after considering all the relevant circumstances' of the evictees. Unfortunately judging by the manner in which the evictions were carried out, the conscience raising and humanitarian empathy which the Constitution drafters envisaged in s26 (3) did not materialise in *Grootboom*.

Nevertheless the court held that the government has an obligation to act positively to ameliorate the conditions of people who find themselves in circumstances of homelessness. It must provide access to housing, health care, sufficient food and water, and social security to people who are unable to support themselves and their dependants.<sup>1143</sup> However the court stated that the government was not obliged to act beyond available resources to realise the right to access to adequate housing immediately.<sup>1144</sup> The constitution only requires that the right to housing be realised 'progressively'.<sup>1145</sup> Notwithstanding, the court noted that there was 'at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing'.<sup>1146</sup>

Furthermore in *Grootboom* Jacob J delineated the scope of the substantive provisions in ss 26 and 27. Right from the start he outlined the context of ss 26 and 27 which is characterised by the intolerable conditions under which a majority of people have to live and raise their offspring, not only in the Western Cape but

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<sup>1142</sup> Ibid , paras 8-10

<sup>1143</sup> Ibid, para 83 Jacob J stressed that "human beings are required to be treated as human beings"

<sup>1144</sup> *Grootboom* (note 1116 above)para 94

<sup>1145</sup> Ibid, para 95.

<sup>1146</sup> Ibid , para 34.



throughout South Africa. As a result he went on to point out that the people of South Africa were committed to social justice and the improvement of the quality of life for everyone (including children) and that the preamble to South Africa's Constitution reflects the commitment to that goal.<sup>1147</sup>

Against this background Mrs Grootboom and Others based their second claim on s 28(1)(c) of the Bill of Rights which provides that children have the right to shelter. The court held that s 28(1)(b) places an obligation on the state to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children. However the court's treatment of s 28(1)(c) was guarded and nuanced. The Constitutional Court rejected the holding of the *court a quo* that people who have children become entitled to jump the housing queue purely by virtue of being parents, guardians or care givers of children. It was an anomalous reasoning which ignored the fact that there may be adults who may be very old or sick or more deserving than parents of children. Let alone the unintended anomalous result that ultimately even 'Children could become stepping stones to housing for their parents instead of being valued for who they are'.<sup>1148</sup>

Whilst human rights jurisprudence in South Africa does not recognise any hierarchy of values, the court stated the need for socio-economic rights to be read together in their social and historical context<sup>1149</sup>. At this juncture two comments beg articulating: first, it is a salutary interpretational practice that the court recognised that though the text of a provision in the Bill of Rights is the starting point, a proper interpretation of a rights provision may entail moving beyond the text itself to its context whether the context is historical or political or economic.<sup>1150</sup> Second, it bears noting that in the context of the s26(1) provision guaranteeing 'adequate access to housing,' the court rejected the notion of 'a minimum core obligation' because of the numerous difficulties it raises. Mainly the problem with specifying a minimum core obligation is that implementing the notion would progressively present depending which group one is dealing with. What could be appropriate to one group might not be acceptable to another. An additional differential might be differences in socio-

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<sup>1147</sup> Ibid, paras 1-1126

<sup>1148</sup> *Government of the Republic of South Africa v Grootboom*, case CCT 11/00 par 71

<sup>1149</sup> Ibid, para 25.

<sup>1150</sup> Skelton ( note 356 above) 135

economic levels. A further differential might be location in terms of whether the minimum core was intended to alleviate the housing conditions of beneficiaries in an urban setting or in a country environment.<sup>1151</sup>

To come back to s 28(1) (c), *The Government of the Republic of South Africa v Grootboom* is authority that s 28(1)(c) must be read together with 28(1)(b) and (c). On this order of reading, the court concluded that the obligation to provide shelter to their children is imposed primarily on the parents as s 28(1)(c) does not of its own impose any primary obligation on the government to provide shelter on demand to parents and their children. It is only in the eventuality that children have become dislodged from their families, then only in that event, does the state become charged with the responsibility to provide shelter to the children. As a result the Court in *The Government of the Republic of South Africa v Grootboom* (per Jacobson J) set aside the order handed down in *Grootboom and Others v Oostersburg Municipality* (per Davis J).

From the foregoing discourse the purpose was to demonstrate, through select case law, i.e. through the *Treatment Action Campaign* (TAC) case and the landmark judgement in *Grootboom* that, the rigour in the available human rights jurisprudence may be trusted to protect the survival rights children who are the least able to fend for or defend themselves currently in South Africa.<sup>1152</sup>

Furthermore the *Khosa v The Minister of Social Development and Others*<sup>1153</sup> concerned a constitutional challenge to s3(c) of the Social Assistance Act 59 of 1992. The applicants were indigent Mozambican citizens who had acquired permission to live in South Africa as permanent residents in terms of exemptions under the repealed Aliens Control Act 96 of 1991. They prayed the court to grant constitutional invalidity of s 3(c) of this Act because it disqualified them from receiving child-support grants, care-dependency grants as well as old-age grants. As a result of being disqualified to receive social assistance the applicants had become destitute indeed and had no wherewithal to improve their lot in South

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<sup>1151</sup> *Government of the Republic of South Africa v Grootboom* (note 1148 above) paras 31-37

<sup>1152</sup> G J Annas 'The Right to Health and the Nevirapine Case in South Africa' in *The New England Journal of Medicine* (2003) February 20, 2003.

<sup>1153</sup> *Khosa v The Minister of Social Development* Case CCT 12/03 and in 2004 (6) SA 505 (CC).

Africa<sup>1154</sup>. They would have qualified for social assistance under Social Assistance Act but fell short of s3(c) which read that

Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he -

- (a) is an aged or disabled person or a war veteran;
- (b) is resident in the Republic at the time of the application in question;
- (c) is a South African citizen; and
- (d) complies with prescribed conditions.

The application was unopposed in the Pretoria High Court, as it then was called. The High Court found for the applicants and accordingly struck down the challenged provision as prayed in the notice of motion. The Court granted the following order subject to confirmation by the Constitutional court in terms of Rule 16(1) of the Rules of the Constitutional Court and s 172(2) of the Constitution:

It is ordered that

1. Section 3(c) of the Social Assistance Act, 59 of 1992 (prior to amendment by the Welfare Laws Amendment Act, 106 of 1997) is inconsistent with the Constitution of the Republic of South Africa, 108 of 1996 (the "Constitution"), and invalid.
2. Section 3(c) of the Social Assistance Act (prior to amendment by the Welfare Laws Amendment Act, 106 of 1997) is struck down.

Before the order was made, the court had to consider the standing of the applicants in terms of s 38 of the Constitution and held that the status of the applicants as permanent residents was sufficient to accord them standing.<sup>1155</sup> Further what the writer finds gratifying with the holding of the Court on *locus standi in Khosa* is that the court recognised that the applicants brought the application in the interest of permanent residents and as well as children in the care of permanent residents.<sup>1156</sup> The latter were indeed members of a group or class of people who would qualify for social assistance under the Act but for the fact that they were not South African citizens. It was mentioned that they (the permanent residents) acted on behalf of children<sup>1157</sup> who could not act on their own but who would qualify for social

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<sup>1154</sup> Ibid, paras 2-5.

<sup>1155</sup> *Khosa* (note 1153 above) paras36-37.

<sup>1156</sup> Emphasis my own

<sup>1157</sup> Emphasis my own

assistance but for the fact of being excluded by the impugned Act requiring citizenship<sup>1158</sup>.

A close study and analysis of the reasoning of the Constitutional Court in this proceeding indicates how the court was prepared to vindicate the applicants' right to fair treatment under s9, dignity in s10 and life under s 11. The children's right under s28 was also vindicated<sup>1159</sup>.

The purpose of this concluding case law is to reinforce earlier approving observations made by the writer in the *TAC and Grootboom* case analyses.

In closing it is well worth reiterating that in the *Khosa* case the court was not shy to base its normative evaluations on the Grootboom jurisprudence. In taking a cue from the *Grootboom* case, Mokgoro J, writing for the majority, rightly quoted Jacob J in *Government of the Republic of South Africa and Others v Grootboom and Others* that that rights are interrelated and are all equally important in such a way that an assessor of issues cannot separate the founding values of human dignity, equality and freedom from socio-economic rights in the South African Constitution<sup>1160</sup>.

What becomes clear from the above case law is that in South Africa children's survival rights are not only provided by the legislature but are also justiciable and enforceable by the courts of law. However, Erasmus correctly insists that courts need to consider the realities of South African society when laying down the principles that should be exercised to enforce the rights of children.<sup>1161</sup> Rosa and Dutschke also argue that the courts need to define properly the scope and the content of children's socio-economic rights.<sup>1162</sup> As a result when adjudicating any

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<sup>1158</sup> *Khosa* (note 1153 above) paras 36-37

<sup>1159</sup> *Ibid*, paras 39.

<sup>1160</sup> *Khosa* (note 1153) para 40.

<sup>1161</sup> Erasmus 'There is something you are missing; what about the Children? : Separating the Rights of Children from those of their Caregivers' (2010) 25 *SAPL*.

<sup>1162</sup> Rosa & Dutschke (note 461 above) 247. Many others authors as well insist on the Court failure to engage sufficiently with the substantive scope and content various socio economic rights S Liebenberg the Judicial Enforcement of social security Rights in South Africa :Enhancing Accountability for the Basic needs of the Poor (2003) 14 (unpublished paper presented at the international Expert Seminar on Social Security); D Bilchitz ' Towards a Reasonable Approach to the Minimum core: Laying foundation for future Socio-Economic Rights Jurisprudence'(2003)19 *SAJHR* 1,5. M Petierse 'coming to terms with the Judicial Enforcement of socio-economic rights (2004)20 *SAJHR* 383,406.

children's substantive right, a clear explanation of that right is needed. This calls on the legislators and policy makers to draw a comprehensive and inclusive protocol of, for example, children's socio economic rights.

#### **5.2.2.2 A brief analytical look into Kenyan case law**

Similar to South Africa in respect of law enforcement and standing, article 21 of the 2010 Constitution guarantees access to legal remedies and holds government accountable for the infringement of socio-economic rights in Kenya. In light of the above, the Kenyan case of *Florence Amunga Omukanda & another v Attorney General & 2 others* provides a case in point.<sup>1163</sup> In this matter, the applicant was attacked by unknown intruders while she and her daughters were asleep in her house which was subsequently burnt down from outside by the intruders. She was entrapped in the fire and lost consciousness in the process and was in a coma for two months. She alleged that when she regained consciousness, she was informed by her friend that her two daughters had been burnt during the arson.<sup>1164</sup> In the resultant application the mother argued that the state had failed to take positive action to protect her children as mentioned in articles 23 and 26 of the Kenyan Constitution. Respectively, article 23 is related to the authority of courts to uphold and enforce the Bill of Rights and article 26 entails the right to life. The question in this case was whether the State through the Police had violated the applicant's children's rights by failing to protect them during the violence.<sup>1165</sup> However the court found that the applicant had failed to prove that the state violated her rights to property, life and equality. The court in this case failed to hand down a fair judgement in relation to children's rights infringements as the applicant had not given tangible evidence of birth certificates proving that she had children.<sup>1166</sup> Nor had she handed in academic records from the school.<sup>1167</sup> Given these

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<sup>1163</sup> *Florence case* (note 864 above). The following were the leading cases Zimbabwe Human rights NGO Forum v Zimbabwe (2006)AHLR128 ACHPR; *Hajrizi Dzemaji v Yugoslavia* (complaint161/2000); the *Minister of Safety and Security v Ian Gordon Bryn Hamilton* (case n<sup>o</sup> 457/2002); *Minister of Safety and Security and Another v Carmichele* (2004)4 LRC; *Charles Murigu Murithii and two others v Attorney General* (2015) Eklr ; *Mahmut Kaya v Turkey application n<sup>o</sup> 22535/93*, European Court of Human Rights.

<sup>1164</sup> *Florence case* (note 864 above) para 87.

<sup>1165</sup> *Ibid*, para 75

<sup>1166</sup> *Ibid* , para 76.

<sup>1167</sup> *Ibid* para 77.

inconsistencies and deficiencies in her testimony, the court did not believe that the child victims were actually her children. As a result the court dismissed her application.<sup>1168</sup> Despite the unsuccessful case of the applicant, the Kenyan Constitution allows that in case of children's rights infringement, any person has the right to approach the court and claim that his or her children's rights have been infringed.<sup>1169</sup> The court also states that 'where an allegation of violation of the constitutional rights and fundamental freedoms are alleged particularly against State Actors, the State is enjoined to investigate the matter.'<sup>1170</sup> In other words the state has the duty to investigate human rights violations. As a result, similar to South Africa, law enforcement exists in Kenya although there are some flaws on the part of Kenya government, which writers deem as unlawful discrimination.<sup>1171</sup>

While mentioning discrimination on the part of government handling some children's rights issues, it is strategic to introduce the Nubian *children's* case.<sup>1172</sup> This case is related to the children of Nubia.<sup>1173</sup> Nubians are originally from Sudan.<sup>1174</sup> They were forcibly enrolled into the British colonial army brought to Kenya by the British rulers during colonial times.<sup>1175</sup> Although Nubians lived in Kenya for more than a century, they were not considered Kenyan citizens.<sup>1176</sup> As a result their children faced numerous restrictions such as denial of Kenyan citizenship at birth as well as denial of access to education and to health care.<sup>1177</sup> By law denying children such basic human rights amounted to the infringement of the right to survival and development,<sup>1178</sup> right to a name, nationality<sup>1179</sup> and health care.<sup>1180</sup> Subsequently,

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<sup>1168</sup> *Florence case* (note 864 above) para 76.

<sup>1169</sup> Art 23 of 2010 Constitution.

<sup>1170</sup> *Florence case* (note 864 above) para 86. The court referred to the case of *Velasquez Rodriguez v Honduras* judgement of 27 July 1985.

<sup>1171</sup> CRIN 'Kenya : how to get recognised – Nubian children and the struggle for citizenship' Available at [https://www.crin.org/sites/default/files/kenyacasesestudyfinal\\_1.pdf](https://www.crin.org/sites/default/files/kenyacasesestudyfinal_1.pdf). Accessed on 11 December 2017.

<sup>1172</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. Available at:

<http://www.refworld.org/cases/ACERWC/4f5f04492.html>. Accessed 4 April 2018.

<sup>1173</sup> CRIN (note 1171 above).

<sup>1174</sup> *Ibid.*

<sup>1175</sup> *Nubian children's case* (note 1172 above) para 2. At the time Sudan was under British rule.

<sup>1176</sup> *Ibid.*

<sup>1177</sup> CRIN (note 1171 above).

<sup>1178</sup> Art 6 of the CRC .

the matter was brought to the attention of The African Committee of Experts on the Rights and the Welfare of the Child.<sup>1181</sup> The African Committee recommended that GOK should take all the necessary legislative, administrative and other measures to ensure that children of Nubian descent get nationality at birth.<sup>1182</sup> What transpires, from this discussion is that when realising children's rights, a state needs to avoid discriminating against any child given the fact that non-discrimination is one of the principles in the CRC.<sup>1183</sup> It should be noted that all rights apply to all children without exception. It is the State's obligation to protect children from any form of discrimination and to take positive action to promote their rights. The critical point about the realisation of children's rights is the extent to which the duty-bound state displays the will to not only take legislative steps to realise those rights but also to take other measures beyond legislative measure to fulfil them.<sup>1184</sup>

### 5.2.2.3 A brief analytical look into Congolese case law

As above mentioned under the limitations of this study<sup>1185</sup> there is a paucity of judicial decisions on the protection of children's rights in the DRC. Most of the current cases related to children's rights violations in the DRC are brought before the International criminal Court (ICC).<sup>1186</sup> In *Germain Katanga's* case for example it was alleged that the perpetrator and his accomplice civilians committed crimes against humanity when they killed civilians including children.<sup>1187</sup> At least two hundred civilians lost their lives in Bogoro village during armed conflicts in 2003.<sup>1188</sup>

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<sup>1179</sup> Art 7 (1) of the CRC.

<sup>1180</sup> Art 24 of the CRC.

<sup>1181</sup> *Nubian children's* case (note 1150 above) Para 1.

<sup>1182</sup> *Ibid*, para 69.

<sup>1183</sup> Art 2 of the CRC.

<sup>1184</sup> See Oluduro & Durojaye (note 650 above).

<sup>1185</sup> See chapter one.

<sup>1186</sup> See note 1118 above.

<sup>1187</sup> Open society Justice Initiative : 'Trial background who are Germain Katanga & Mathieu Ngudjolo? Available at [www.Katangatrial.org/trial-bacground/who-are-katanga-and](http://www.Katangatrial.org/trial-bacground/who-are-katanga-and) Ngudjolo chui? Accessed on 02 December 2017. See also some old case *Free Legal Assistance Group and Others v Zaire*, Communications N<sup>o</sup> 25/89, 47/90, 56/91, 100/93; *Katangese people 'Congress v Zaire*, 8<sup>th</sup> Annual Report of the Commission 1994/1995. Communication 75/92.; *Union interafricaine de Droits de l'homme v Zaire* 9<sup>th</sup>, Communication 102/93. Activity Reports 1995/1996 AnnexVIII.

<sup>1188</sup> *German Katanga* case (note 1118 above). Art 7(1) of the Rome Statute provides that: '

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with

It was alleged that they were responsible for perpetrating crimes sexual slavery, abduction and rape of girls and women. They forced and threatened women and girls to engage in sexual intercourse with the combatant. The court found that there was a violation of article 7 (1) (a) and article 8 (2) (b) (xxxvi) of the Rome Statute.<sup>1189</sup> Furthermore, in the *Lubanga's* case, the perpetrator was found guilty in the International Criminal Court for recruiting and using children as soldiers in violation of article 8 (2)(b)(xxvi) of the Rome Statute.<sup>1190</sup> In addition, in *Jean Pierre Bemba's* case, the accused was a military commandant who failed to take appropriate measures to prevent his soldiers from committing crimes of rape and murder.<sup>1191</sup> The court found that the accused committed crimes against humanity, in that the crimes were in violation of article 28 (a) of the International Criminal Court Rome Statute.<sup>1192</sup> In essence the persisting effects of the armed conflict due to the presence of armed groups in the DRC have led to severe violation of children's rights. This situation remains one of the main concern in the CRC Committee's concluding observations.<sup>1193</sup>

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knowledge of the attack: (a) Murder; in addition art 8 (2)(b)(xxvii) of the Rome statute states that : War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.'

<sup>1189</sup> *German Katanga* case (note 1118 above).

<sup>1190</sup> A Cole 'Thomas Lubanga: Landmark decision for international justice' 15 March 2012. Available at <http://www.osisa.org/law/blog/landmark/-decision-international-justice> Accessed 02 December 2017.

<sup>1191</sup> *The Prosecutor v Jean Pierre Bemba Gombo* ICC01/05-01/08. Available at <https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf>. Accessed on 06 December 2017.

<sup>1192</sup> Ibid. Art 28(a) of the ICC Rome Statute reads as follow: In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

<sup>1193</sup> Committee observations DRC (note 1083 above) para 5.



As far as enforcement of domestic law is concerned, there is a recent landmark decision of the South Kivu Military Court (set up as a mobile court) delivered on the 13<sup>th</sup> of December 2017. This case involves the *Government of the DRC v Frederick Batumike and others*.<sup>1194</sup> The facts are that there was a persisting strife and violence in Kavumu a poor village in the South Kivu province in the Eastern part of the DRC. Between 2013 and 2016 more than forty young girls in this village aged between thirteen months to twelve years were kidnapped and raped during the night.<sup>1195</sup> A similar pattern of violence and rape was observed in other cases. After being kidnapped by one or several men, the victim would be raped. Her hymeneal blood would be taken, sometimes with the help of a sharp object. Then the victim would be abandoned.<sup>1196</sup> Initially, local judicial authorities considered and treated the attacks as a mere isolated incidents.

In May 2014, a Task Force was created by a group of NGOs led by 'physicians for human rights' to support the victims.<sup>1197</sup> In May 2016, Trial International joined the Task Force. A new judicial strategy was adopted after the victims' lawyers requested the military prosecutor to take over the case.<sup>1198</sup> Since the acts committed were considered as attacks on the civilian population they were regarded as a crime against humanity. The military granted the request and opened the investigation as a crime against humanity. The suspect belonged to a militia group named 'Jeshi la Yesu' (Jesus's Army). The group was allegedly responsible for the continuous rape of Kavumu girls.<sup>1199</sup> This movement was initially confined to the protection of Bishibirhu plantations which started under the leadership of Walter

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<sup>1194</sup> RP0105/2017. The final judgement in this case is available in French only it can be accessed at the link <https://trialinternational.org/wp-content/uploads/2017/12/Arr%C3%AAt-final-Kavumu-CM.pdf>. Accessed on 4 April 2018.

<sup>1195</sup> *Batumike case* (note 1194 above) para1.

<sup>1196</sup> *Ibid.*

<sup>1197</sup> See <http://www.physiciannsforshumanrights.org/>. Accessed on 4 April 2018

<sup>1198</sup> Trial International available at <https://trialinternational.org> accessed on 4 April 2018 is a NGO fighting impunity for international crimes and supporting victims in their quest for justice. Trial international constituted and coached a collective of Congolese lawyers representing the Kavumu girls and their families. They helped documenting the case as well as designing the legal and judicial strategy adopted by the civil parties in the Kavumu trial.

<sup>1199</sup> *Batumike case* (note 1194 above) para 1.

Muller.<sup>1200</sup> However his successor, Batumike, transformed this movement into an army group creating insecurity in the Kabare territory.

In September 2017, Batumike and seventeen other suspects were charged with rape and crimes against humanity, murder and insurrectional movement and attacks against Congolese military positions.<sup>1201</sup> Batumike was accused of creating that militia and ordering attacks. After many incidents the trial began on 09 November 2017.

On 13 December 2017 the military court of South Kivu convicted eleven militants for sexual violence as crimes against humanity against thirty seven young girls.<sup>1202</sup> The militants were also convicted for their participation in an insurrectional movement and for the murders of individuals who denounced their abuses.<sup>1203</sup> Batumike and eleven others were sentenced to life imprisonment for kidnapping and raping thirteen girls in Kavumu and the reparation of US \$5000 to each survivor of that attack.<sup>1204</sup> This case is relevant in the sense that it created a precedent for other victims in DRC. Furthermore this case was for the first time that an acting politician was found guilty as a superior of crimes committed by him or by the militia he controlled and financed in the DRC. As a member of parliament Batumike enjoyed immunity in terms of article 107 of the 2006 Constitution. Article 107 states that ‘no member of parliament may be prosecuted, searched, arrested ,detained or judged for opinions or votes delivered in the exercise of his functions.....’ It is obvious that sitting parliamentarians enjoy immunities from prosecution conferred by the 2006 Constitution.<sup>1205</sup> Nonetheless, the principle of irrelevance of official capacity in cases of investigation and prosecution for international crimes as stated in article 27 of the Rome Statute prevails over the Constitutional provision.<sup>1206</sup> As a result

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<sup>1200</sup> Ibid

<sup>1201</sup> Ibid, para 3.

<sup>1202</sup> Ibid, para 18.

<sup>1203</sup> Ibid, para19.

<sup>1204</sup> Ibid,para 20.

<sup>1205</sup> D Perissi & E Taquet ‘the Kavumu trial :Complementary in Action in the Democratic Republic of Congo’. Available at [https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative\(February](https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative(February) 2018). Accessed on 04 April2018.

<sup>1206</sup> Art 27 of the Rome Statute focuses on the Irrelevance of official capacity. This art indicates that 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from

Batumike's immunity was considered irrelevant as there was no violation of the 2006 Constitution. Interestingly, the court's decision affirms the prevalence of the Rome Statute over the national Constitution as far as domestic immunities are concerned. It is submitted that the immunities conferred by the 2006 Constitution to government officials or to heads of state are not relevant when it comes to prosecuting international crimes.<sup>1207</sup> This case set an important example for the global fight against impunity.<sup>1208</sup> Given the fact that a culture of impunity seemed to have taken root in DRC on the part of both the state and non-state actors, even the UN Stabilization Mission in Congo (MONUSCO) applauded the holding of this unprecedented trial and the ensuing court's decision.<sup>1209</sup> MONUSCO referred to it as a major landmark in the fight against impunity for sexual violence in DRC.<sup>1210</sup> With this recent decision of *Batumike case* there is no doubt that the level of commitment to law enforcement slowly started to improve in the DRC state.

In summary, with respect to justiciability and law enforcement, it can be argued that both the South African and Kenyan governments try by all means to enforce the law. However, a challenge still exists in DRC law enforcement as most of the cases have to be brought in the International Criminal Court. As a result the current domestic decision on Batumike seems a welcome step in the right direction. The next section will traverse practicalities in the realisation of children's rights.

### **5.2.3 Practicalities in the realisation of children's survival rights.**

In this study children's survival rights entail children's socio-economic rights specifically the right to basic nutrition, basic health care and the right to social assistance. In respect of the realisation of these three basic rights, it may be argued that South Africa is developed as it runs school feeding schemes which ensure that

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criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

<sup>1207</sup> Ibid.

<sup>1208</sup> See <https://monusco.unmissions.org/en/monusco-applauds-decision-rendered-south-kivu-military-court-kavumu-trial-against-frederic-batumike>. Accessed on 04 April 2018.

<sup>1209</sup> World Vision (note 963 above).

<sup>1210</sup> Monusco (note 1208 above)

the poorest child does get at least one meal a day. In addition free medical care for pregnant women as well as children under six years of age is available in South Africa.<sup>1211</sup> The social grants purport to assist in the maintenance of the children.<sup>1212</sup> As evidence of government commitment, from October 2016, the government increased the CSG to three hundred and sixty rand per month per child.<sup>1213</sup>

In the same vein, with regard to basic nutrition, health care services and social assistance the three services can be regarded as a minimum bench mark. As in the case of South Africa, Kenya has also developed school nutrition and meals feeding system to safeguard children's health and development.<sup>1214</sup> This project is undertaken under three approaches: centralised approach decentralised approach and mixed approaches.<sup>1215</sup> Several policies are in place to ensure that a Kenyan child receives a hot midday meal at primary school level.<sup>1216</sup> In terms of the fulfilment of the children's rights to health, contrary to South Africa, it can be argued that the right to health care is available and accessible.<sup>1217</sup> In Kenya there has been a slight improvement on the right to health care.<sup>1218</sup> This improvement is evidenced by the distribution of mosquito nets and the deployment of an increased number of skilled professionals.<sup>1219</sup>

In respect of children's right to social security and assistance, Kenya runs a social protection programme named CT-OVC to address the needs of families and children vulnerable to poverty.<sup>1220</sup> This programme has a positive impact on children's survival rights. Following its success it was suggested that it should be expanded to assist any household with children living in poverty rather than only orphans.<sup>1221</sup>

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<sup>1211</sup> For more details see Chapter Two.

<sup>1212</sup> See Chapter three of this study.

<sup>1213</sup> Delany & Jehoma (697 above)29.

<sup>1214</sup> See Chapter Four of this study.

<sup>1215</sup> Ibid.

<sup>1216</sup> See Chapter four.

<sup>1217</sup> Martin (note 677 above).

<sup>1218</sup> UN Committee observations Kenya(note 1056 above) para 47.

<sup>1219</sup> See Chapter Four of this study.

<sup>1220</sup> Huang& others (note 706 above).

<sup>1221</sup> Ibid. the UN Committee also confirms that see UN Committee observations Kenya (note 1056 above) para 56 (h).

However, the realisation of survival rights in the DRC differs from that of Kenya and South Africa in the sense that there is a lack of school nutrition meals targeting children in DRC.<sup>1222</sup> As a result many children there suffer from chronic malnutrition.<sup>1223</sup> Fortunately, UNICEF is making a huge contribution in almost every aspect of child life in the DRC.<sup>1224</sup> In comparison with Kenya, South Africa, and DRC does not mean to indicate that malnutrition is non-existent in South Africa and Kenya.<sup>1225</sup> The writer has merely placed emphasis on the high rate of malnutrition in DRC.<sup>1226</sup> As a result children's basic right to nutrition are yet to be realised. In relation to the right to health, the situation is unacceptable as it is in Kenya as there is a lack of adequate health care system including human and material resources.<sup>1227</sup> The dominant factors jeopardising the right to health in the DRC are a high child mortality, epidemics and environmental health hazards.<sup>1228</sup> In respect to the right to social assistance and social security, the DRC position is different from that of South Africa and Kenya. The prolonged armed conflict had grave humanitarian implications as the main factors that destroyed the lives of a million people in the DRC.<sup>1229</sup> As a result there is an over-reliance on humanitarian assistance.<sup>1230</sup> The DRC HF in collaboration with UNICEF provides assistance of multipurpose cash which is an unconditional cash transfer empowering households to meet basic needs of life.<sup>1231</sup> This is done mostly in cases of emergency. Unlike South Africa and Kenya, where there is a regular monthly cash transfer to vulnerable families, in the DRC the cash transfer is occasional. Against this backdrop, the shortcomings in respect of each country are discussed below.

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<sup>1222</sup> UNICEF (note 967 above).

<sup>1223</sup> Ibid. this statement is also confirmed by UN Committee observations DRC (note 1083 above) para 35.

<sup>1224</sup> Ibid.

<sup>1225</sup> Martin (note 677 above); Odongo (note 75 above).

<sup>1226</sup> World Bank (note 972 above).

<sup>1227</sup> Worldvision (note 963 above).

<sup>1228</sup> World Bank (note 972 above).

<sup>1229</sup> UNICEF (note 967 above).

<sup>1230</sup> Kandala & others (note 908 above).

<sup>1231</sup> DRC Humanitarian (note 987 above).

### 5.3 shortcomings in respect of the realisation of child survival rights in the three countries

In South Africa, as mentioned above, laws provide for the realization of children's rights. Buchner-Eveleigh points out that South Africa has 'a wealth of legislation and policies'.<sup>1232</sup> There is an abundance of case law to show that all human rights are justiciable in South Africa.<sup>1233</sup> However, a comprehensive explanation of the substantive content of children's rights leaves room for improvement in South Africa as well.<sup>1234</sup> Erasmus emphasises that

In the process of giving substantive content to section 28 (1)(c) the court should be guided by the Constitution, the constitutional values, the transformative aims of the Constitution and international law. Defining section 28 (1)(c) means the court should identify the minimum entitlement of the right because this section refers to the basic attenuated level of services needed for a dignified existence. Identifying the minimum entitlement of section 28 (1)(c) does not entail an absolute rigid standard, in entitlement a high level of justification is set for situations where the minimum entitlement of this rights is not respected, protected and fulfilled'.<sup>1235</sup>

What transpires from the above statement is that when interpreting s28(1)(c), the court needs to set out clearly what 'minimum entitlement of rights is' and who are the bearers of such rights. The meaning of minimum entitlement will be of great assistance in case of AIDS-orphans or members of child-headed households. In addition, poverty and social exclusion are factors that still hamper a full realisation of children's survival rights even in South Africa also.<sup>1236</sup>

Kenya, has taken steps towards designing and developing policies. In this way the country has provided flesh to the framework in the 2010 Constitution.<sup>1237</sup> The Kenyan vision 2030 is to transform Kenya into a newly, advanced middle-income country which provides a minimum standard of living for all citizens.<sup>1238</sup> However, some factors indicate that there are still challenges and constraints hampering the realisation of children's rights in Kenya. Factors such as poor health services, the

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<sup>1232</sup> Buchner-Eveleigh (note 622 above).

<sup>1233</sup> See *TAC case* (note 1116 above), *The Centre for Child Law and Others v MEC for Education and Others case No 19559/06* (30 June 2006) (*Luckoff case*).

<sup>1234</sup> Erasmus (note 1161 above).

<sup>1235</sup> *Ibid*.

<sup>1236</sup> Martin (note 677 above).

<sup>1237</sup> Odongo (note 75 above), See note 519 above.

<sup>1238</sup> Republic of Kenya (note 498 above)

location of health services long distances away from recipient communities, the unhygienic environment and persistent malnutrition and poverty.<sup>1239</sup> In these conditions enforcement of existing laws and policies remains weak in Kenya and needs improvement.<sup>1240</sup> Having a comprehensive legal framework is not itself sufficient to produce an efficient political, economic, social and financial support to ensure an efficient delivery.<sup>1241</sup> Although the duty bearers and constructive tools are present to make children's rights a reality,<sup>1242</sup> what complicates matters is that duty bearers do not have a clear understanding of various applicable laws, policies and guidelines relating to children.<sup>1243</sup> As a result laws and policies are inadequately applied.<sup>1244</sup> There is also a shortage of resources to implement and monitor laws and policies effectively.<sup>1245</sup>

In the DRC, legislation is also in place, but there is a huge shortcoming between the promulgation of law and development of policies to harmonise the implementation of the legal framework.<sup>1246</sup> There is also a lack of law enforcement, or justiciability of children's rights in case of infringement.<sup>1247</sup> Basically, 'justiciability' entails standing which 'relates to the relationship between the applicant in a case and the relief sought'.<sup>1248</sup> It is the duty of the court to enforce the law and the right of an applicant to be given access to approach a competent court with an allegation that his or her right has been infringed. In addition to the lack of law enforcement in the DRC, a further shortcoming arises from in the high rate of poverty, malnutrition, child mortality, malaria, outbreaks of epidemics and an environment that is not conducive to human well-being.<sup>1249</sup> There is a great need to design, develop and implement policies to strengthen the existing child protection law. The next section will elaborate on the best practice scenarios generating relevant lessons to be learnt.

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<sup>1239</sup> Ibid.

<sup>1240</sup> E Palmqvist 'Children's rights in Kenya: an analysis based on the CRC Reports' Save the children (2006).

<sup>1241</sup> The African Child Forum 'overview and context: Harmonising laws in Eastern and Southern Africa' (2007). Available at <https://www.africachildforum.org>. Accessed on 07 December 2017.

<sup>1242</sup> Palmqvist (note 1240 above) 35.

<sup>1243</sup> Republic of Kenya Report 'Taking child protection to the next level in Kenya' (2015) UNICEF.

<sup>1244</sup> Ibid.

<sup>1245</sup> Ibid.

<sup>1246</sup> CRC Committee observations DRC (note 1083 above) para 7.

<sup>1247</sup> Ibid, para 8.

<sup>1248</sup> Skelton (note 356 above) 72.

<sup>1249</sup> CRC Committee observations South Africa (note 1036 above) para 35.

## 5.4 Best practice scenarios and lessons to be learnt

### 5.4.1 Best practice scenarios

Despite the shortcomings as pinpointed above in respect of the three countries there are also relevant lessons to be learnt and implemented at the domestic level in each country. This section will indicate the best practice scenarios in terms of the existing legal frameworks, in light of the practicalities standing on the way of the fulfilment of children's survival rights.

Firstly from the perspective of the legal framework, in South Africa the best practice scenario is the 1996 South African Constitution which empowers the Constitutional Court to develop ways for the implementation of socio-economic rights specifically in the context of children's rights.<sup>1250</sup> As a result the court enforces the law, ensures access to legal remedies and allows everyone to pursue a claim in court whenever denied any socio-economic right.<sup>1251</sup> In addition the 1996 Constitution holds government accountable when it does not respect, promote, protect and fulfil its obligations.<sup>1252</sup> However, these obligations must be fulfilled by taking reasonable legislative and other appropriate measures to the maximum extent of the state's available resources.<sup>1253</sup>

In Kenya similar to South Africa the Constitution is the supreme law of the country. The Children's Act 2001 clearly reflects the principles of the CRC particularly in terms of the best interest principle, children's right to survival and development, the right to non-discrimination as well as the right to participation.<sup>1254</sup> A further achievement is that the Children's Act 2001 does not only safeguard the rights of the child but also binds the child in terms of specifying his or her duties and responsibilities.<sup>1255</sup>

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<sup>1250</sup> S39 of the 1996 Constitution.

<sup>1251</sup> Ss 38 & 172 of the 1996 Constitution, s 15 of the Children's Act 2005.

<sup>1252</sup> S 7 of the 1996 Constitution.

<sup>1253</sup> Berry & Proudlock (note 586 above) 38.

<sup>1254</sup> See ss 3-22 of the 2001 Children's Act.

<sup>1255</sup> Ss 4-5 of the Children's Act 2001



In the DRC the 2009 Child Protection Law clearly splits the protection of the child into three categories, namely, the social, judicial and criminal protection.<sup>1256</sup> This comprehensive explanation of the protection provided to children, enables a smooth adjudication of children's rights cases when a matter is brought to court. A further significant stride is the 2009 Congolese Child Law that is similar to Kenya and South Africa's in that it also stipulates the duties and responsibilities of the child.<sup>1257</sup> This is a unique conception reflecting the influence of an African country.

Secondly, looking at the best practices in terms of the realisation of children's survival rights, South Africa and Kenya run support grant programmes which contribute towards alleviating poverty. Both grants adequately impact poverty, basic health care services, food security and nutrition.<sup>1258</sup> By contrast, despite emergency cash transfers, the DRC runs no sustainable social protection programmes that provides for children's survival rights. As a result children's rights are yet to be realised in DRC.<sup>1259</sup>

#### **5.4.2 Lessons to be learnt**

From the foregoing, the lessons to be learnt in South Africa cannot be taken lightly. Despite its achievement in law enactment and enforcement, South Africa has a need to review the Children's Act 38 of 2005 as well as other pieces of legislation relating to health and to clearly explain the substantive content of each child's rights guaranteed in s 28 of the Constitution. For example when adjudicating children's right to basic health care the National Health Act needs perhaps to be clearer on what it means by the right to basic health.<sup>1260</sup> According to General Comment n<sup>o</sup> 14 the right to health means that a right must be accessible, available, acceptable and

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<sup>1256</sup> Title II, III, IV of the Child protection.

<sup>1257</sup> Art. 44 of 2009 Child Protection Law, s 21 of the Children's Act 2001, s16 of the children's Act 2005.

<sup>1258</sup> M Samson & others' The impact of a promise realized: South Africa's Child Support Grant' in B Davis & others (eds) *From Evidence to Action: the story of Cash Transfers and impact evaluation in Sub Saharan Africa* (2016) UNICEF 307.

<sup>1259</sup> M Garcia & C T M Moore The cash dividend: the rise of cash transfer programs in Sub – Saharan Africa The World Bank (2012)232. Emergency CTs were used in 2004 to help reintegrate up to 120,000 ex-combatants in the Democratic Republic of Congo. Beneficiaries received an initial payment of US\$110 and then received monthly cash transfers of US\$25 for one year. See also Bailey s & Others 'Child –sensitive protection in DRC: A Diagnostic Study 'Overseas Development institute (2011). Available at [http:// www. Odi.org.uk](http://www.Odi.org.uk). Accessed on 12 December 2017.

<sup>1260</sup> Buchner-Eveleigh (note 622 above).

of a good quality.<sup>1261</sup> In essence, South Africa can learn from the DRC which has a comprehensive 2009 Child Protection Law which clearly differentiates between judicial protection, social protection and criminal protection of the child.<sup>1262</sup> In respect of the substantive content of children's rights, South Africa can also learn from Kenya given the fact that the latter country has incorporated clear significant explanation of the CRC principles included in the 2001 Children's Act.<sup>1263</sup>

With regard to CSG, in South Africa, there is a need to universalise this programme.<sup>1264</sup> To universalise child benefits means that all children need to receive the benefit irrespective of the level of the household income.<sup>1265</sup> As compared to targeting CSG which applies the means test, academic writers note that the means test creates institutional and administrative barriers when it comes to proving income or producing relevant documents.<sup>1266</sup> In this way the test can encourage fraud and corruption.<sup>1267</sup> Basically the CSG shortcomings are not unnoticed. As previously mentioned there are administrative factors and other challenges negatively impacting institutional capacity.<sup>1268</sup> These include confusion around the means test, problems with documentation, direct cost of applying, the little amount of the CSG, other obstacles.<sup>1269</sup> Nonetheless, research done by Samson and others indicates that universalisation would impact specifically on the following barriers:<sup>1270</sup>

Possible perverse incentives amongst applicants not to disclose their full income and the associated concerns about fraudulent applications, concerns which drive the development of increasingly onerous application procedures and requirements and thereby erect further barriers to access;  
Barriers created by the need for documents (and multiple trips and transport cost) to prove income

<sup>1261</sup> General Comment n<sup>o</sup> 14 of the CESR 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural right' (2000). Available at [https://www.nesri.org/sites/default/files/Right\\_to\\_health\\_Comment\\_14.pdf](https://www.nesri.org/sites/default/files/Right_to_health_Comment_14.pdf). Accessed on 12 December 2017.

<sup>1262</sup> Title II chapter one-three of the 2009 Child Protection Law.

<sup>1263</sup> S3-22 of the 2001 Children's Act.

<sup>1264</sup> Proudlock & other (note 65 above)

<sup>1265</sup> S Jehoma & E Guareni 'Universalisation of the Child Support Grant' in Delany & al (eds) *South African Child Gauge* (2016) 80.

<sup>1266</sup> M Samson & others 'Feasibility Study on the Universal Provision of the Child support Grant (CSG) in South Africa' (2011) UNICEF & Department of Social Development..

<sup>1267</sup> Martin (note 677 above) 64.

<sup>1268</sup> See Chapter two. See also Delany & Jehoma (note 697 above) 52.

<sup>1269</sup> Delany & Jehoma (note 697 above) 52.

<sup>1270</sup> Samson & others (note 1266 above)

Confusion about the means test and income threshold among the public and SASSA staff, a state of affairs which results in the exclusion of prospective beneficiaries;  
 Administrative inefficiencies caused by the implementation and monitoring of the means test, processes which consume a significant amount of human and financial resources;  
 Corruption amongst SASSA staff: there is a high risk of corruption where officials are responsible for admitting only those beneficiaries who comply with the means test requirements;  
 Stigmatisation: universalising the CSG would eliminate distinctions between those who are on the 'welfare' and those who are not.

Watkins and others argue that expanding a social grant programme reduces chances of excluding eligible households. On the contrary, it creates social solidarity and reduces the fear of families being targeted.<sup>1271</sup> Further argument in favour of the need to universalise the CSG is that, universalisation facilitates an inclusive social security programme which is in line with the Constitution because it states that everyone is entitled to access social security.<sup>1272</sup> Even the Department of Social Development (DSD) is of the opinion that universalisation is a better option.<sup>1273</sup> The only challenges that the DSD is facing is to prepare an appropriate modelling to prove the impact of universalisation on equality and national development policies.<sup>1274</sup>

It can be argued that the South African CSG has the potential to accomplish a full realisation of children's survival rights if implemented to benefit every child just as in Norway. Basically, Norway ranks in the top ten countries in the KidsRights Index as it adheres to and is equipped to improve children's rights.<sup>1275</sup> Norway was considered as a country with positive characteristics to rank high on the list.<sup>1276</sup> Norway has an automatic child grant support programme which offers a best practice scenario for South African to learn from while universalisation of CSG is

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<sup>1271</sup> K Watkins & others 'the state of the world's children 2016' A fair chance for every child (2016) UNICEF.

<sup>1272</sup> Jehoma & Guareni (note 1265 above). See also Article 27(1) (c) of the 1996 Constitution.

<sup>1273</sup> Martin( note 677 above)78.

<sup>1274</sup> Ibid

<sup>1275</sup> Kidrights index 2017 available at [www.kidsrightsindex.org](http://www.kidsrightsindex.org). Accessed on 12 December 2017. The KidsRights index considers five domains when it comes to the realisation of children rights namely the right to life, right to health care, right to education, right to protection, enabling environment for child rights. The index provides the overview of a country performance on each of five domain and make recommendation on how to improve.

<sup>1276</sup> KidsRights index (note 1275 above).

suggested.<sup>1277</sup> Although Norway falls outside the countries demarcated for analysis in this study, yet it has been instructive to look at it as a jurisdiction that has implemented a successful CSG programme.<sup>1278</sup> As a result, Norway provides an area for future research where a researcher could compare the CSG systems in Norway and South Africa.

Kenya has a need to strengthen law enforcement and judicial effectiveness.<sup>1279</sup> In this regard Kenya might learn a lesson from South Africa where the government is held accountable to realise socio-economic rights.<sup>1280</sup> The situation in Kenya is that numerous policies have been adopted, but have not yet been implemented, monitored and evaluated.<sup>1281</sup> There is also a need of public awareness and community orientation that will inform people in general and children in particular on ways to approach the court to seek relief.<sup>1282</sup> With regard to social protection, given the fact that forty percent of the population in Kenya are children from poor families, the CT-OVC programme that needs to avoid discrimination must include every child rather than only orphans and vulnerable children.<sup>1283</sup> The CT-OVC effects huge cash transfers only to families taking care of orphans and vulnerable children.<sup>1284</sup> Having started in 2004 and expanded in 2014 the CT-OVC has spread nationwide. From 2018 the Kenyan Government plans to enrol eligible households in the programme.<sup>1285</sup> This study suggests that with this significant programme the government of Kenya needs to assist all households which are eligible without discrimination. As a result, to achieve the progressive realisation of children's rights both South Africa and Kenya need to universalise their social protection programmes.<sup>1286</sup>

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<sup>1277</sup> VZagorskis 'Your social security rights in Norway'. Available at <http://ec.europa.eu/social/main.jsp?catId=849&langId=en>. Accessed on 12 December 2017.

<sup>1278</sup> Despite Portugal which ranks number one in the KidsRights Index 2017. Runners up in the top ten are Norway, Switzerland, Iceland, Spain, France, Sweden, Thailand, Tunisia and Finland.

<sup>1279</sup> Republic of Kenya Report (note 794 above) 22.

<sup>1280</sup> See *Grootboom* (note 1116 above).

<sup>1281</sup> Republic of Kenya Report (note 794 above) 22.

<sup>1282</sup> Kiprotich & Charles (note 22 above) 282. See also Art 42 of the CRC.

<sup>1283</sup> CRC Committee observations Kenya (note 1056) para 56(h).

<sup>1284</sup> Bosworth & Others (note 874 above).

<sup>1285</sup> Ibid.

<sup>1286</sup> Progressive realisation may be understood as a process whereby socio-economic rights is realised or fulfilled through the state action progressively or over a certain period of time. for more

Throughout this study, it has been evident that DRC faces many challenges in realising children's survival rights.<sup>1287</sup> For many years, despite efforts made to combat poverty, Congolese children are still not realising their rights to basic nutrition, health care services as well as their rights to social security assistance or protection.<sup>1288</sup> While comparing South Africa, Kenya and the DRC, this study reveals that poverty affects households when caregivers are not able to meet their children's basic needs. As a result children become the most negatively affected by poverty. In order to alleviate such deep poverty levels and to comply with state commitment to the CRC, South Africa and Kenya have designed and implemented child social grant systems.<sup>1289</sup> Research has shown the positive impact of the intervention that has operated by way of cash transfer on children's nutrition and health.<sup>1290</sup> Furthermore, as seen already, the cash transfer facility allows households to invest more effectively on children's schooling and learning.<sup>1291</sup> It can be said that CSG programmes, if introduced timeously, can reduce risky behaviour amongst adolescents.<sup>1292</sup>

Basically, several Sub-Saharan African countries implement a cash transfer system, even if the objectives may differ from one country to another and over time.<sup>1293</sup> Garcia and Moore observe that:

Many programs, including several short-term cash-for-relief programs in Ethiopia, Kenya, Malawi, Swaziland, and Tanzania, have objectives related to ensuring the survival of beneficiaries or decreasing hunger for those in danger of malnutrition or starvation. Longer-term programs with such objectives include Kenya's Hunger Safety Net Programme (HSNP), Mozambique's Food Subsidy Program (Programa Subsídio de Alimentos, or PSA), Senegal's Child-Focused Social Cash Transfer (CF-SCT) program, and Zambia's Social Cash Transfer (SCT) program. Still other

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details see J Brickhill & N Ferreira 'Socio-Economic rights' in I Currie & J De Waal (eds) *the Bill of Rights handbook* (2013) 563.

<sup>1287</sup> See chapter four of this study. See also the CRC Committee observations DRC ( note 1059 above)para6.

<sup>1288</sup> Democratic Republic of Congo 'Poverty reduction and growth strategy paper' (2006)18.

<sup>1289</sup> Art 4 of the CRC.

<sup>1290</sup> Huang & others (note 706 above) 943; S Tiwari & others 'impact of cash transfer program on food security and nutrition in Sub-Saharan Africa: a cross country analysis' *global Food Security* 11 (2016)72; E Fischer & others 'The livelihoods impacts of cash transfer in the sub-Saharan Africa: Beneficiary perspectives from six countries' *World development* xx (2017) xxx. Available at <http://dx.doi.org/10.1016/j.worlddev.2017.05.020>.; See also Hjem & others 'Poverty and perceived stress: evidence from two unconditional transfer programs in Zambia' *Social science and medicine* 177(2017)110.

<sup>1291</sup> Bosworth & Others(note 874 above)

<sup>1292</sup> Ibid.

<sup>1293</sup> Garcia & Moore (note 1259 above).

programs want to help households meet their food consumption needs while protecting their productive assets, such as the Direct Support component of Ethiopia's Productive Safety Net Programme (PSNP-DS) and the Direct Support component in Rwanda's Vision 2020 Umurenge Programme (VUP), or to encourage household productivity, such as Ethiopia's PSNP-DS and Zimbabwe's Protracted Relief Program.<sup>1294</sup>

In a capsule, in order to realise the child survival rights the DRC needs to learn a lesson from both South Africa and Kenya. Thus DRC has a need to design, implement, monitor and evaluate a child support grant system especially which will target primarily ultra-poor families. At a glance such intervention will appear impossible and unsustainable given the fact that the DRC ranks 193th out of 196 countries in terms of respect for the rights of the child.<sup>1295</sup> In terms of the design and implementation of CSG the DRC can follow the approach taken by Kenya. When it started the implementation of CT-OVC, Kenya was in a situation where the proposition was denied by some donors given the fact that this kind of intervention had not been operationalised in that country before.<sup>1296</sup> However, the Ministry of Home affairs in collaboration with UNICEF, SIDA and the Norwegian National Committee initiated the programme to demonstrate the feasibility of cash grants as a response to its OVC crisis.<sup>1297</sup> The CT-OVC programme was monitored assessed, the community was involved, and policy makers as well as political leaders were also included.<sup>1298</sup> The development of the CT-OVC was implemented in three phases: pre-pilot, pilot and then the expansion.<sup>1299</sup>

DRC can borrow a similar approach as used in Kenya starting with a pre-pilot phase selecting at least 500 poor households,<sup>1300</sup> raising children from 0-7 years. If successful, then the DRC government may proceed to the pilot phase and expansion phases.<sup>1301</sup> Moreover, the lesson that the DRC needs to learn is that in the Kenyan experience, implementing the cash transfer programme required

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<sup>1294</sup> Ibid.

<sup>1295</sup> See Children's rights 'Rankings of countries according to their respect for the Rights of the Child –Humanium. We make children's rights happen'. Available at <http://www.Humanium.org/en/rcrri/>. Accessed on 12 December 2017.

<sup>1296</sup> Bosworth & others (note 874 above) 119.

<sup>1297</sup> Ibid.

<sup>1298</sup> Bosworth & others (note 874 above) 120.

<sup>1299</sup> Ibid.

<sup>1300</sup> Ibid.

<sup>1301</sup> Bosworth & others (note 874 above) 120.

evidence based on each step in order to protect the programme.<sup>1302</sup> Furthermore, community participation was crucial.<sup>1303</sup> The community was involved in addressing the basic questions and to convince the policy makers.<sup>1304</sup> The GOK was also involved in order to locate both the programme and the evaluation phase firmly within the government structure and implementation time frames.<sup>1305</sup>

It is worth bearing in mind that the DRC is naturally richly endowed with several mineral resources. However the population is not benefiting from this wealth.<sup>1306</sup> As a result, with credible political will on the part of Congolese state authorities, in collaboration with international donors genuinely supporting the social security programme for children, the implementation of CSG could be achievable.<sup>1307</sup> The writer is fully aware that attempts to improve social protections in the DRC have been made difficult due to challenges of poor governance and weak human resource capacity varying through lack of national strategy, low prioritisation of social protections and against a background of very limited funding.<sup>1308</sup>

What the DRC needs to learn from South Africa is the law enforcement, review and reform, policy design, development and implementation. The DRC can learn a lesson from South Africa where government is obliged to respect, protect, promote and fulfill rights in the Bill of rights so that the law and state conduct should always be in line with the Constitution.<sup>1309</sup> As Kamwuimbi recommended, the Congolese government needs to make significant progress in areas of prosecution, protection and prevention of violations.<sup>1310</sup> As a result the DRC government has a huge responsibility to end corruption that takes place with impunity so as to respect, protect, promote and fulfil human rights in general and children's rights in particular.

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<sup>1302</sup> Ibid.

<sup>1303</sup> Ibid.

<sup>1304</sup> Ibid.

<sup>1305</sup> Ibid.

<sup>1306</sup> Democratic Republic of Congo 'poverty reduction and growth strategy paper' (2006).

<sup>1307</sup> V Arnould & K Vlassenroot 'EU policies in the Democratic Republic of Congo: Try and fail' paper commissioned by the Human Security Study Group (2016).

<sup>1308</sup> Sarah & Others (note 257 above) 34.

<sup>1309</sup> Ss 2 & 7 (1) of the 1996 Constitution.

<sup>1310</sup> K T Kamwimbi 'Forced Child Labour: A Critical Analysis of the Democratic Republic of Congo's Compliance with International Labour Standards' Unpublished LLM thesis February 2013.

From the forgoing discourse, it is submitted that the three countries under study can derive good lessons from the respective jurisdictions. With regard to law enforcement both the DRC and Kenya can adopt the South African approach in appropriate measures to fulfill children's rights.<sup>1311</sup> In respect of promulgation of laws, for example legislation relating to children matters with a comprehensive content appear to be attractive propositions. South Africa can learn from DRC detailed 2009 Child Protection Law as well as Kenya's 2001 Children's Act which encompasses the four principles of the CRC. In respect of the social protection it was submitted that South Africa needs to universalise its CSG programme. Kenya also needs to expand its CT-OVC programme to include more vulnerable children. The DRC needs to borrow the Kenyan procedure and model to create the CSG programme.

Nonetheless for better realisation of children's survival rights, it is suggested that the three countries need to attain to the guidelines proposed in this study by relying on the decision in the *Ogoni* case on the duty to respect, protect and promote human rights.<sup>1312</sup> The study suggests the key principle to follow for better realisation of children's rights these include non-discrimination, human-rights based, culture sensitive, availability of resources, public awareness, law enforcement.

## **5.5. Conclusion**

This chapter compared South Africa, Kenya and the DRC from three aspects, namely, the legal position, the shortcomings and the best practices and lessons to be learnt.

With regard to the legal position, the promulgation of the laws, justiciability and law enforcement and practicalities of the fulfilment of child survival rights were analysed. The chapter indicated that the three countries under study have created laws guaranteeing children's survival rights. However, relating to law enforcement, policy designing, monitoring and evaluation, a clear substantive content is needed. Kenya in turn still needs to work on policy implementation and to strengthen law enforcement. The DRC also needs to tighten its law enforcement and to develop

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<sup>1311</sup> Art 4 of the CRC

<sup>1312</sup> See Chapter two, section 2.5 Guidelines for effective realisation of children's rights.



further policy directives. This chapter went further and discussed selected case law in respect of justiciability of children's socio-economic rights covering the three countries under study. In South Africa the study relied on *Grootbom*, *TAC* and *Khosa* case law. An analysis of the case law indicated that South Africa makes strong efforts to enforce the law. Its court is accessible to litigants and scrutinises each case on its own facts. In respect of Kenya, the *Florence* and *Nubian* case law was also discussed to pinpoint the law enforcement and discrimination in realising socio-economic rights in Kenya. In the DRC it was submitted that most of the claims were dealt with at international level by the ICC. However a recent case of Batumike set a domestic precedent when dealing with abuse and violence against children.

With respect to the shortcomings, the chapter highlighted the issue of poverty as posing a worrying challenge within the country. However as was pointed out earlier in the study, in order to comply with the CRC requirements both South Africa and Kenya have instituted child benefit programmes so as to alleviate poverty in line with the CRC Committee directives. As was seen from the chapter being concluded, the addition of a cash transfer system enhanced poverty alleviation in a manner that has had a positive spin-off for child survival rights. By contrast, DRC does not command such a track record. Its lack of a sustainable social programmes catering for children is a cause for concern.

In relation to the best practice scenarios and lessons to be learnt, this study suggests that South Africa could facilitate the introduction of the CSG system across all sections of the population in order to avoid any differentiation whatsoever. In terms of promulgation of comprehensive laws it was suggested that South Africa could follow a better approach taken by Kenya and the DRC. Likewise Kenya could consider what it could benefit from success scenarios of CT-OVC by including all children irrespective of considerations of income. With regard to law enforcement Kenya could consider the South African model of approaching the court in respect to enforcement of the law.

In the case of the DRC the proposition was that the country needs to design, implement, evaluate and monitor the CSG. The most instructive approach was the Kenyan experience where the pre-pilot, pilot, expansion phase proved to be a

success. In addition the DRC could also learn from the law enforcement method in adopted in South Africa. To sum up: the study suggests that for better realisation of children's survival rights all the three countries should adhere to the model guidelines produced in this thesis.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Introduction

The previous chapter presented a comparative analysis of South Africa, Kenya, and DRC. It treated comparative analysis under three rubrics: namely the legal position, shortcomings identified as well as best practice scenarios and lessons to be learnt thereof. This chapter concludes the investigation by presenting the findings of the study and provides recommendations and area for further research and concluding remarks.

#### 6.2 Findings of the study

This research aimed to determine the extent to which children's survival rights can be realised in South Africa, Kenya and DRC. Survival rights in this study were confined to the children's rights to basic nutrition, basic health care services and social security or protection.<sup>1313</sup> Social protection programme are related to social assistance and social security. The findings from this study have been able to indicate that in the three respective jurisdictions, there was no scarcity of achievement of laws guaranteeing children's rights. Numerous programmes for the realisation of children's rights were also present in countries such as South Africa and Kenya. As indicated in this study, deviating from South Africa and Kenya, the DRC still has a lot to accomplish in terms of the agreed milestones. In this regard, it was submitted that there is room for improvement if law enforcement is in place, clear explanation of how substantive rights can be designed, developed, monitored and evaluated.

- As shown in Chapter two, this study endeavoured to elaborate the conceptual and theoretical framework underpinning children's survival rights. The concept child, childhood and rights were explored. From the perspective of a theoretical framework, the two theories were analysed: i.e. the liberationists and

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<sup>1313</sup> See discussion in Chapter Two, Section 2.4.1.3

protectionist theory. It was submitted that the liberationist theory supports that children should exercise their rights without interference. On the contrary protectionists on the contrary espouse the view that children should be protected because they lack maturity. However this study opted for a mixed approach where the protectionist and liberationist elements should not be seen as opposed but as both contributing to the child's development. This is even evidenced in the CRC principles which incorporated different categories of children's rights where they are able to exercise some rights themselves and the specific rights only with adult's assistance. An overview of human rights perspectives was also done. It became clear that survival rights are inconceivable without the question of who benefits from these rights and who becomes bound. As a result the guidelines for effective realisation was produced along the key principles that every African country needs to consider namely non-discrimination, human-rights based, culture sensitive, availability of resources, public awareness and law enforcement.<sup>1314</sup>

- In respect of current laws, policies and programmes available in South Africa, the study indicated that South Africa provides laws guaranteeing children's survival rights namely the 1996 Constitution, the National Health Act 3 of 2003, the Social Assistance Act 13 of 2004, the Children's Act 38 of 2005 as well as further provisions which do not specifically discuss children's survival rights in particular but also widen the scope of children's protection rights.<sup>1315</sup> With regard to policies and programmes available in South Africa,<sup>1316</sup> firstly it can be said that in the area of basic nutrition the study identified the National Integrated Policy on Early Childhood Development which aims to transform service delivery in South Africa. Secondly, in the area of health care services the study noted the availability of free basic service health care service for children under six years as well as pregnant and lactating mothers. The primary health care services, the adolescent and youth health policy, the white paper on national health insurance are also interventions worth noting. Thirdly, in the area of social security the study showed that in South Africa the CSG provides a successful grant system dealing with poverty alleviation, despite administrative barriers and other challenges such as lack of awareness

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<sup>1314</sup> Chapter two, section 2.5

<sup>1315</sup> See Chapter three, section 3.2.3

<sup>1316</sup> Chapter three, section 3.3.

among the potential beneficiaries. Therefore the above mentioned laws, programmes and strategies applied in South Africa can be regarded as progressive in the implementation of children's survival rights.

- The study highlighted challenges that each country faces in respect of the realisation of children's survival rights. It confirmed that poverty remains a common challenge for all the three countries. However it is noteworthy that South Africa and Kenya are progressively finding tangible pathways to alleviate poverty in their jurisdictions subject to the parameters permitted by their laws and taking into account available but limited resources. With regard to specific challenges in the respective countries, it is submitted that the phenomenon of social exclusion presents a challenge of some sort.<sup>1317</sup> In South Africa the study revealed that many children are still not enjoying basic needs as envisaged in the 1996 Constitution. The phenomenon of exclusion is fed from multiple sources. To enumerate some from an open list: children living in rural areas, in child-headed households, with grandparents of advanced years, children affected by HIV/AIDS or with disabilities and refugee children dislodged from their original homes enlarge the ranks of children exposed to additional risk.<sup>1318</sup> The list is not exhaustive. The point this study is trying to underline is that all these classes of children add to the volume of children whose chances of realising child rights have become seriously compromised. In order to overcome these challenges the study suggested an inclusive preventive measure in the form of making CSG available to all. The study confirmed that it is important to include every child when dealing with social security aspects.

- In Kenya, challenges highlighted as standing on the way of the realisation of children's survival rights were mostly related to lack of access to health care provisions but also hampered by weak law enforcement. In health care the study revealed that access to health services was poor as health facilities are generally never situated in the rural areas but in city centres where health and other facilities are instantly available. During the investigation the key to the remedy to this challenge was seen as lying in strategies envisaged in the Kenya vision 2030. The

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<sup>1317</sup> Martin (note 677 above) 21.

<sup>1318</sup> Ibid.

point is that if the strategies were to be introduced and implemented properly, they might stand a chance to succeed.

With regard to weak law enforcement, the study suggested public awareness campaigns by which everybody would come to understand the purpose of human rights provisions and know how to approach the courts if their fundamental right to health, education or survival were infringed. The study found that the Kenyan government in turn could learn from South Africa in terms of justiciability of children's survival rights. In DRC, the single challenge highlighted was that child's survival rights have yet to be realised in that jurisdiction.<sup>1319</sup>

- DRC manifests extreme levels of poverty. The phenomenon of poverty feeds into the vicious cycle of malnutrition and other diseases. The study suggested the need to design, develop, monitor and evaluate policies in nutrition, health care and social security. The design and implementation of CSG was also proposed given the DRC over reliance on international donors. With more political will the DRC has the potential to place social security programmes in the service of its children on a sounder basis.
- Furthermore, in scrutinising the current situation in Kenya and DRC, the study found that Kenya also provides laws guaranteeing child survival rights in its 2010 Constitution, Children's Act 2001, and other statutes.<sup>1320</sup> Despite the challenges on health care services mentioned above, Kenya disposes of the 2015-2022 NPA which has prioritised the progressive realisation of children's rights. Kenya also operates a school nutrition and meals strategy programme. It has also initiated the Kenya Health policy 2014-2030. Furthermore in the area of social security, Kenya has inaugurated the cash transfer programme called CT-OVC.<sup>1321</sup> It has addressed the vulnerabilities of families and children exposed to poverty levels mostly caused by HIV/AIDS.<sup>1322</sup> The CT-OVC programmes offer financial support to families taking care of orphans by granting limited forms of social cash transfers.<sup>1323</sup>

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<sup>1319</sup> See Chapter four, section 4.2.

<sup>1320</sup> See Chapter four, section 4.2.1

<sup>1321</sup> Chapter four, section 4.2.3

<sup>1322</sup> Huang & others (note 706 above) 945.

<sup>1323</sup> Ibid.

- In the same vein, the DRC has enacted laws guaranteeing children's survival rights through the 2006 Constitution, the 2009 Child Protection law and other statutes.<sup>1324</sup> In respect of the realisation of the rights to basic nutrition, health and social security, the study revealed that UNICEF was playing a huge role in providing humanitarian assistance in DRC. Except for the National Agriculture Investment Plan and interventions by the International Rescue Committee, no programme or strategy was identified in the DRC.<sup>1325</sup>
- As far as comparative analysis is concerned, the study compared the realisation of children's survival rights in South Africa, Kenya and DRC. It demonstrated that although each of the three countries had promulgated laws in respect of children's survival rights, yet shortcomings and challenges in one way or another still bogged down each of the three countries under study. The lessons learnt from the comparative investigation indicated that South Africa is yet to extend the CSG to all segments of the population without delay. The investigation indicated that Norway implemented an automatic child support grant system from which all three countries could learn. Likewise Kenya should support social inclusion, the CT-OVC to include all children irrespective of prevailing financial status. In the case of the DRC the proposal was that the country needs to design, implement, evaluate and monitor the CSG. The best approach was to learn from the Kenyan experience where the pre-pilot, pilot, expansion phases were a success. These findings can now lead to the recommendations and guidelines of the study so as to facilitate improved realisation of children's survival rights.

### **6.3 Recommendations of the study**

Based on the finding of the study the following recommendations are suggested within each specific country:

- South Africa needs to review the National Health Act 61 of 2003 and clarify the correct meaning of the word 'health care services' in accordance with General

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<sup>1324</sup> Chapter four, section 4.3

<sup>1325</sup> Chapter four, section 4.3.2.1

Comment n<sup>o</sup>15 of the CRC which indicates that health care services include prevention, promotion, treatment, rehabilitation and palliative care services.<sup>1326</sup>

The South African government needs to remove barriers to accessing social security benefits and ensure that without exception, all children benefit from the grant and caregivers eligible for the benefits can access the benefits in an appropriate manner. An opportunity should be given to children and their caregivers to file a complaint in case of a rejection of an application.

There is also a need to improve awareness campaigns to facilitate active participation of children and their caregivers in the development, review, implementation, monitoring and evaluation of social security schemes pertaining to children.

- The government of Kenya needs to organise the training of professionals in order to comprehend the applicable laws, policies, regulations and guidelines.<sup>1327</sup> Kenya should adopt a comprehensive strategy, including awareness raising, to fully ensure the immediate and long-term protection of children and to address the root causes of violence they suffer. With respect to health care services, Kenya needs to increase the overall national and provincial budget to the health sector to move progressively to curb infectious diseases in order to strengthen the sustainability of the national health system.

There is also a need to intensify efforts to vaccinate all children under the age of one. In light of this the government of Kenya needs to fully implement free maternity health care service and combat discrimination against pregnant teenagers, adolescent mothers and their children.

Kenya should progressively expand the CT-OVC in order to cover the cost of the health care services of all beneficiaries including children identified to be at a special risk, such as those with disabilities, on the streets and those of refugees.

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<sup>1326</sup> CRC General comment (note 644 above) para 25.

<sup>1327</sup> Republic of Kenya Report (note 794 above) 22.



- The DRC needs to harmonise the national legislation and policies with the CRC, including adopting new legislation to give meaningful participation of children and the civil society's organisations. Specifically the country needs to develop and adopt a national comprehensive policy on children that encompasses all areas emphasised by the CRC. DRC needs to ensure that the human, technical and financial resources for implementation of its legislation providing the rights of children are adequate and effective.

The DRC government is urged to improve its health service to decrease infant and child mortality by providing better prevention interventions against disease. There is also a need of awareness on the methods of prevention as well as appropriate health care services to mothers and post natal care to infants and children. The country also needs to build sufficient health care centres and hospitals with appropriate human, technical and financial resources especially in the rural areas. The health care workers should also be trained. The DRC should also take preventive measures to address malnutrition which has continued to be a cause for concern in the country.

Furthermore the DRC government needs to allocate appropriate resources to eradicate child poverty as this fits the first goal of the sustainable Development Goals on implementing nationally appropriate social protection programmes.<sup>1328</sup> This research recommends that in order to realise the child survival rights and eradicate poverty the DRC needs to design, implement, monitor and evaluate the CSG primarily targeting ultra-poor families.

The following section indicates the areas for further research.

#### **6.4 Areas for further research**

Throughout this study, it should be noted that some issues were identified whose further investigation would benefit legal research. Wherever possible the study tried to indicate where further research appeared desirable. The areas for further scrutiny are two-fold:

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<sup>1328</sup> Sustainable development (note 44 above)

The first aspect is that children's rights belong to a broad topic which encompasses four areas of interest, namely survival rights, protection rights, development rights as well as participation rights. This study mainly focused on the realisation of children's survival rights.<sup>1329</sup> It explored the realisation of survival rights in South Africa, Kenya and the DRC. The protection rights, development rights and participation rights fell outside the purview of the present investigation. In consequence this study suggests further research in the areas of children's rights just mentioned.

The second aspect for further research falls under the universalisation of the child support grants throughout South Africa. As South Africa is in the process of universalising the CSG, further research comparing South Africa's social programme with that of Norway would benefit children's rights jurisprudence.

## **6.5 Concluding remarks**

The study compared the realisation of children's survival rights in South Africa, Kenya and the DRC. The similarities that the three countries share are that they are all signatories to the CRC. All have taken legislative measures to fulfil children's survival rights within their respective jurisdictions. The study revealed that the three countries have domesticated children's rights within their laws. Unfortunately a written law always runs the risk of losing meaning when it is not implemented or realised in the short term.

As a result the research has shown that despite the shortcomings highlighted in the study, South Africa has made significant progress to realise children's rights. Kenya as well is following in the right direction provided it strengthens its law enforcement and other resources.

Sadly, the same cannot be said in respect of the DRC compliance with CRC norms and standards when it comes to children's rights.

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<sup>1329</sup> See Chapter Two.

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## ANNEXURE

### CONVENTION ON THE RIGHTS OF THE CHILD<sup>1330</sup>

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

#### Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

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<sup>1330</sup> Available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>. Accessed on 18 December 2017.

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice

(The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and

Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of

international cooperation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

## **PART I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

#### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized 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 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

#### **Article 6**

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

## **Article 7**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

## **Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

## **Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.  
  
Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.



3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

## **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

## **Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

## **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

## **Article 13**

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a) For respect of the rights or reputations of others; or
  - b) For the protection of national security or of public order (ordre public), or of public health or morals.

## **Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

### **Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

## **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

## **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

## **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

## **Article 20**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

## **Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in

the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

## **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- a. To diminish infant and child mortality;
- b. To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- c. To combat disease and malnutrition, including within the framework of primary health care, though, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- d. To ensure appropriate pre-natal and post-natal health care for mothers;
- e. To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- f. To develop preventive health care, guidance for parents and family planning education and services.



3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

## **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

## **Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

## **Article 28**

1. States Parties recognize 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:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) Make educational and vocational information and guidance available and accessible to all children;
  - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 29**

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

## **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment;
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### **Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### **Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

### **Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

### **Article 37**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

## **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

## **Article 40**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - i) To be presumed innocent until proven guilty according to law;
    - ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other

appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

## **Article 41**

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or



(b) International law in force for that State.

## **PART II**

### **Article 42**

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

### **Article 43**

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually.
11. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
12. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
13. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

## **Article 44**

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
  - (a) Within two years of the entry into force of the Convention for the State Party concerned;
  - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

## **Article 45**

In order to foster the effective implementation of the Convention and to encourage international cooperation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the

Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General

Assembly, together with comments, if any, from States Parties.

### **PART III**

#### **Article 46**

The present Convention shall be open for signature by all States.

#### **Article 47**

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

## **Article 48**

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

## **Article 49**

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

## **Article 50**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

## **Article 51**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

## **Article 52**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

## **Article 53**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

## **Article 54**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.