

**THE ROLE OF INTERNATIONAL, REGIONAL AND DOMESTIC STANDARDS IN  
MONITORING CHILDREN'S RIGHTS**

**By**

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I declare that **THE ROLE OF INTERNATIONAL, REGIONAL AND DOMESTIC STANDARDS IN MONITORING CHILDREN'S RIGHTS** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

**Signature: Ms Sharon Omowunmi Oladiji**

**Date: June, 2012**

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## **Abstract**

The study provides a brief overview of the most important legal instruments in the international, regional and national framework on the development and promotion of children's rights. Basically, it examines the continuous and pervasive violation of children's rights despite the progressive instruments that have been adopted to ensure the proper and effective realization of these rights. It focuses on three different countries in Africa: South Africa, Ethiopia and Nigeria because of the value-laden nature of the progressive laws adopted by these countries in the protection of children's rights.

Specific roles and actions taken by international, regional and national monitoring bodies are highlighted to indicate their effectiveness in promoting and fulfilling rights for children. Country reports on the situation of children are examined in the context of realization of salient rights for children amidst the different judicial, political and socio-cultural settings. Emerging judgments and judicial developments that have limited and advanced the realization of rights for children in the specific country context were explored. Conclusions and recommendations are made.

## **KEY TERMS**

### **Title of thesis:**

**THE ROLE OF INTERNATIONAL, REGIONAL AND DOMESTIC STANDARDS IN  
MONITORING CHILDREN'S RIGHTS**

### **Key terms:**

Children's rights; Violation of child's rights, International treaties; Regional and National standards on child's rights; Monitoring bodies, Convention on the Rights of the Child, Committee of experts; Country periodic reports, Child's Law jurisprudence, Judicial developments.

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## Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRA	Child's Rights Act
CRC	Convention on the Rights of the Child
CSA	Central Statistics Agency
CSWA	Child Welfare South Africa
CYP	Children and Young Persons Law
ECOWAS	Economic Community of West Africa
FDRE	Federal Republic of Ethiopia
GHS	General Household Survey
FME	Federal Ministry of Education
EHRC	Ethiopian Human Rights Commission
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labor Organization
IMR	Infant Mortality Rate
IMCI	Integrated Management of Childhood Illnesses
MoH	Ministry of Health
NAPTIP	National Agency for the Prohibition of Traffic in Persons and Other Related Matters
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NHRI	National Programme of Action for Children
NPopC	National Population Commission
NBOD	National Burden of Disease Study
NER	Net Enrolment Rate
NTCPE	National Committee on Harmful Traditional Practices
UDHR	Universal Declaration of Human Rights
U5MR	Under-five mortality rate
UNESCO	United Nations Educational, Scientific and Cultural Organizations
UNFPA	United Nations Population Fund
VAC	Violence Against Children

# CHAPTER ONE

## Background

### 1.1 Introduction

The recognition of children's rights within the framework of the international community which sets out human rights as minimum standards of legal, civil and political freedom is of utmost importance for the translation of such rights into reality. These rights are entrenched in various international human rights instruments which also entail the development of internationally recognized standards as endorsed or negotiated in these instruments.<sup>1</sup> The main sources of the contemporary conception of human rights are the Universal Declaration of Human Rights<sup>2</sup> and the many human rights documents and treaties<sup>3</sup> developed by international organizations, for adoption by state parties, such as the United Nations, the Organization of American States and the African Union.<sup>4</sup>

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<sup>1</sup>United Nations Educational, Scientific and Cultural Organizations *A Guide to Human Rights Institutions, Standards, Procedure* (2001) UNESCO France.

<sup>2</sup>Adopted by the UN General Assembly on December 10, 1948 hereinafter referred to as "UDHR".

<sup>3</sup>Such as: International Covenant on Civil and Political Rights, hereinafter referred to as "ICCPR"; the International Covenant on Economic, Social and Cultural Rights, hereinafter referred to as "ICESCR"- were both adopted on December 16, 1966 by the United Nations General Assembly and entered into force respectively on March 23, 1976 and January 3, 1976; Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on September 3, 1981, hereinafter referred to as "CEDAW"; Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the UN General Assembly on June 26, 1987; Convention on the Rights of the Child adopted by UN General Assembly Resolution 44/25 on November 20, 1989 and entered into force on September 2, 1990; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, hereinafter referred to as "ILO No. 182", adopted by the UN General Assembly on November 19, 2000; Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted by the UN General Assembly on December 22, 2000; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted by the UN General Assembly on January 18, 2002; Optional Protocol on the involvement of Children in Armed Conflicts, adopted by the UN General Assembly on February 12, 2002; International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, adopted by the UN General Assembly on July 1, 2003; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children adopted by the UN General Assembly on September 9, 2003.

See also: United Nations Office of the High Commissioner for Human Rights *A compilation of International Instruments* (1997) UNHCHR New York and Geneva.

<sup>4</sup>Office of the United Nations High Commission for Human Rights accessed at <http://plato.stanford.edu/entries/rights-human/> on 6<sup>th</sup> January 2009.

Thus, the UDHR, despite its non-binding character, was meant and still continues to be used as an instrument that applies equally to all human beings including children. The adoption of international human rights treaties set out norms and standards that help to monitor human rights violations as well as protect all people everywhere including children from severe political, legal and social abuses. International concern for the welfare of children and the recognition of rights for children are critical global issues of the twentieth century. Recognition for children came up in view of the fact that so many children are being denied opportunities to grow up, develop and live in a safe, secure and healthy environment. The abuse, violence and exploitation suffered by children and the effectiveness or ineffectiveness of governments, institutions, and international communities to ensure that children are provided with these opportunities in spite of the various standards set for their protection, is the focus of this research.

Protecting the rights of children needed a fuller and more precise definition than was provided by the UDHR. After several years of preparation, the General Assembly of the United Nations approved and adopted the Convention on the Rights of the Child on November 20, 1989.<sup>5</sup> It was opened for signature and ratification by member countries and entered into force on September 2, 1990. Currently, 191 countries have ratified or acceded to the Convention, making it the most ratified human rights treaty ever. The United States of America has signed but not yet ratified. Only Somalia, which lacks a functioning government capable of taking a decision on this matter, has neither signed nor ratified.

The human rights of children and the standards, to which all governments must aspire in realizing these rights, are most concisely articulated especially in the preamble to the CRC.<sup>6</sup>

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<sup>5</sup>Hereinafter referred to as the "CRC" adopted by UN General Assembly Resolution 44/25 on November 20, 1989. It entered into force on September 2, 1990.

<sup>6</sup>...."Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".... "*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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.....; "*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 co-operation for improving the living conditions of children in every country, in particular in the developing countries",

It is the most universally accepted human rights instrument in history that has placed children at center-stage in the quest for the universal application of human rights. Built on varied legal systems and cultural traditions, the CRC is a universally agreed set of standards and obligations. Article 1 of the Convention defines a child as:

“any human being below the age of eighteen years ‘unless,’ under the law applicable to the child, majority is attained earlier”.

It stipulates that every child has a right to their childhood<sup>7</sup> – a hopeful existence free of exploitation, violence, neglect, and extreme poverty,<sup>8</sup> that children need education,<sup>9</sup> health services,<sup>10</sup> consistent support systems as well as love, hope and encouragement.<sup>11</sup> The CRC further requires State parties to commit themselves to the respect and promotion of children’s rights.<sup>12</sup> It mandates States to submit country periodic reports to the Committee on the Rights of the Child.<sup>13</sup> The Committee was established for the purpose of examining the progress made by State parties, in achieving the realization of the obligation undertaken in the Convention.<sup>14</sup> The obligation to report is a means of promoting such implementation and of assessing the progress made by each State party on realization of rights for children. Failure to report in a regular, thorough and timely manner constitutes a violation of an international obligation. By ratifying this instrument, State parties/national governments have committed themselves to protecting and ensuring children’s rights. They have agreed to hold themselves accountable for this commitment before the international community.

To indicate the importance attached to the issues of children and standards set for the realization of their rights, significant instruments or treaties for the protection and enforcement of specific rights for children were formulated for ratification by countries after the entry into force

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the United Nations General Assembly, on November 20, 1989 (resolution 44/25), adopted the Convention on the Rights of the Child which entered into force on September 2, 1990.

<sup>7</sup>Article 6.

<sup>8</sup>Articles 34, 35, 36 and 37.

<sup>9</sup>Articles 28, 29 and 31.

<sup>10</sup>Articles 23, 24, 26 and 27.

<sup>11</sup>Article 19.

<sup>12</sup>Article 2.

<sup>13</sup>Article 44.

<sup>14</sup>Article 43.

of the CRC.<sup>15</sup> Furthermore, some regional instruments also with specific focus on protecting the rights of children and women were adopted by the African Union to be ratified by African countries, to supplement the United Nations system. These are African [Banjul] Charter on Human and Peoples' Rights,<sup>16</sup> African Charter on the Rights and Welfare of the Child,<sup>17</sup> which entered into force on November 29, 1999 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which also entered into force on November 25, 2005.<sup>18</sup>

By ratifying these international and regional treaties, governments agree to actively observe and implement the provisions therein. Governments are subjected to regular reviews by the relevant treaty-monitoring bodies with respect to their implementation record. However State parties having ratified the Convention are at liberty to lodge 'reservations' with the Secretary General of the United Nations. They are to state their intention not to be bound by certain of its provisions and the scope of their obligations are thus limited.<sup>19</sup> The Committee on the Rights of the Child regularly asks governments to withdraw reservations, pointing out that the whole purpose of the

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<sup>15</sup>Such as: Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, adopted by the UN General Assembly on November 19, 2000; Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted by the UN General Assembly on December 22, 2000; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; adopted by the UN General Assembly on January 18, 2002; Optional Protocol on the involvement of Children in armed Conflicts, adopted by the UN General Assembly on February 12, 2002; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children adopted by the UN General Assembly on September 9, 2003.

<sup>16</sup>Adopted on June 28, 1981 by the Organization of African Unity (OAU), the African Charter on Human and Peoples' Rights entered into force on October 21, 1986.

<sup>17</sup>The Preamble states that: ..... "Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.I) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from July 17 to 20 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child"..... "Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality. the child should grow up in a family environment in an atmosphere of happiness, love and understanding"....."Recognizing the critical situation of most African children and the fact that children require particular care with regard to health, physical, moral and mental development and legal protection", the Organization of African Unity, in July 11, 1990, adopted the African Charter on the Rights and Welfare of the Child. It entered into force on November 29, 1999 hereinafter referred to as "ACRWC". See further discussions in chapter 2, section 2.4.

<sup>18</sup>Adopted by the African Union on July 11, 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, entered into force on November 25, 2005.

<sup>19</sup>Article 51.

Convention is to establish a universally applicable minimum standard for the care and protection of children.<sup>20</sup>

At the international level, treaty bodies are the committee of experts which monitor implementation of the provision of core human rights and children's rights treaties by States parties. The Committees are created in accordance with the provisions of the treaty they monitor.<sup>21</sup> When a country accepts one of the human right treaties, through accession and ratification, it assumes a legal obligation to implement the rights set out in that treaty. Such countries are expected to put in place necessary measures to ensure the enjoyment of the rights provided in the treaty by everyone within the State, including children.

The treaty bodies set standards to monitor how treaties are being implemented by state parties. They receive reports from countries and issue guidelines on how such reports should be written. Some treaty bodies consider complaints or communications from individuals alleging that their rights have been violated by a State party. At the national and country level, human rights commissions, non-governmental organizations and the judiciary are some of the monitoring bodies and institutions that ensure compliance of State parties to their international obligations as set out in the ratified treaties. They are also to ensure realization of rights for children at the national/country level.

Despite the ratified treaties and standards set for the protection of children, as well as established monitoring bodies at the international, regional and national levels, millions of children and young people around the world are still exploited and abused in different ways. Children are forced to work in factories, in backrooms, on the street, and in the sex trade. They are sold as slaves or even drafted to fight in wars. The violation of children's rights has been pervasive throughout many countries and fuels struggling economies. Alarming, children are too often the recipients of violence in their own home, where a high percentage of sexual, physical, emotional, and psychological abuses takes place.

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<sup>20</sup>Schabas WA, 'Reservations to the Convention on the Rights of the Child' (1996) Volume 81 No 2, *Human Rights Quarterly*, 472-491.

<sup>21</sup>Office of the United Nations High Commissioner for Human Rights accessed at <http://www2.ohchr.org/english/bodies/treaty/index.htm>, on the 16th January 2009.

## 1.2 Aims and objectives

The broad aim of this study is to examine the continuous and pervasive violation of rights of children in three different countries in Africa: South Africa, Ethiopia and Nigeria, in spite of ratified treaties and domestic/national legal frameworks, set to protect children.

On a more specific note, the study seeks to:

- highlight the regional/international dimensions of responses to violations of rights of children in spite of protective constitutional provisions.
- investigate the constitutional and legislative reforms and the extent to which the rights of children are enforced within the identified legal systems.
- examine the roles and actions taken by established monitoring bodies towards indicating their effectiveness or otherwise in ensuring protection of rights for children, and
- explore the roles of government and the judiciary in the context of realization of rights for children amidst the different judicial, political and socio-cultural settings of each country.

### 1.2.1 *Justification for selected countries*

Three countries from the continent of Africa with diversities, similarities and contrasts existing in their judicial, political and socio-cultural settings including the geographical and demographic settings were selected. The countries were selected to document the level of realization of rights for the African child amidst such diversities. Particularly, Ethiopia is situated in the Eastern part of Africa, Nigeria is in West Africa and South Africa is in the Southern tip of the African map. While Ethiopia is a Federal Republic under her 1994 Constitution<sup>22</sup> whose legal system is based on civil law, it currently operates a transitional mix of national and regional courts. Similarly, Nigeria is a Federal Republic under her 1999 Constitution,<sup>23</sup> with four distinct systems of law:

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<sup>22</sup>The Constitution of the Federal Republic of Ethiopia, 1994, hereinafter referred to as the “FDRE” Constitution.

<sup>23</sup>The Constitution of the Federal Republic of Nigeria, 1999, hereinafter referred to as the “1999 Constitution”.

English, Common law, Customary and Sharia Laws. South Africa on the other hand is a Democratic Republic, bound with a Constitution,<sup>24</sup> a mixed legal system and a bicameral Parliament.

Amidst these multiple diversities and settings, the three countries have substantially ratified most of the international and regional treaties set as standards to ensure protection and realisation of rights for children. For example, all the three countries have ratified the international Convention on the Rights of the Child,<sup>25</sup> the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, ILO 182<sup>26</sup> and the Convention on Elimination of All Forms of Discrimination Against Women.<sup>27</sup> Ethiopia did not assent to the United Nations Convention Against Transnational Organized Crime, but Nigeria ratified this on 28 June 2001, and South Africa did on 20 February 2004. Similarly the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime was ratified by Nigeria on 27 September, 2001 and by South Africa on 20 February, 2004. At the regional level, all the three countries have ratified the African [Banjul] Charter on Human and Peoples' Rights,<sup>28</sup> and African Charter on the Rights and Welfare of the Child.<sup>29</sup> None of the three countries has ratified the - Optional Protocol to the Convention on the Rights of the Child - on the Sale of Children, Child Prostitution and Child Pornography, Optional Protocol on the involvement of Children in armed Conflicts, as well as the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

Given the three countries' diversities and the level of compliance with the standards set both in the ratified and non – ratified treaties, the research documents the level of compliance with the regional and international treaties to which they are parties. The appropriate legislative, administrative and other measures taken for the implementation of enshrined rights in the

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<sup>24</sup>The Constitution of the Republic of South Africa, 1996, hereinafter referred to as the "South African Constitution".

<sup>25</sup>Nigeria ratified on April 19, 1991; Ethiopia did on May 14, 1991 and South Africa on June 16, 1995.

<sup>26</sup>Nigeria ratified on October 2, 2002, Ethiopia did on September 2, 2003; and South Africa on June 7, 2000.

<sup>27</sup>Adopted by the UN General assembly on September 3, 1981, it was ratified by Nigeria on June 13, 1985, by Ethiopia on December 10, 1981 and by South Africa on December 15, 1995.

<sup>28</sup>Nigeria did on July 22, 2003; Ethiopia on June 15, 1998; and South Africa on June 9, 2006.

<sup>29</sup>Nigeria ratified on June 23, 2001; Ethiopia on October 2, 2002; and South Africa on January 7, 2000.

ratified treaties are documented. The roles of the monitoring bodies, in ensuring that the three countries fulfill their national, regional and international obligations to protect the rights of children were examined. Similarly, scholarly literature and judicial decisions on the subjects of rights of children were also examined, within the context of these countries.<sup>30</sup>

### 1.3 Statement of the problem

The international and regional conventions by their provisions oblige State parties who have ratified the instruments to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized for children. Given this commitment, one would expect governments and civil societies and communities to appreciate the incapacity and inability of children to fend for or protect themselves. But globally, available data shows that approximately 126 million children aged 5-17 are believed to be engaged in hazardous work, excluding child domestic labor;<sup>31</sup> more than 1 million children worldwide are detained by law enforcement officials;<sup>32</sup> more than 250,000 children are currently serving as child soldiers; and about 14 million adolescents between 15 and 19 give birth each year.<sup>33</sup> Girls in this age group are twice as likely to die during pregnancy or child births as women in their twenties,<sup>34</sup> some 62% of the world's young people are infected with HIV and about 80% of the children orphaned

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<sup>30</sup>Such as: Adeyemi AA, 'The Rights of the Nigerian Child under the Law' (1993) Volume 7 No 5 *Justice: A Journal of Contemporary Legal Problems* 6-23; Ayua IA and Okagbue IE, (eds) *The Rights of the Child in Nigeria* (1996) Nigerian Institute of Advanced Legal Studies Lagos; Covell K and Brian Howe R, *Children, Families and Violence: Challenges for Children's Rights* (2008) (Jessica Kingsley Publishers; Humphreys C and Stanley N (eds) *Domestic Violence and Child Protection: Direction for Good Practices* (2006) Jessica Kingsley Publishers; Chernet T, 'Overview of Services for Orphans and Vulnerable Children in Ethiopia' accessed at [www.crin.org/docs/overview](http://www.crin.org/docs/overview), on 16th January 2009; United Nations Children's Fund *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal systems* (2007) UNICEF New York; and Stewart L, (Jansenn van Rensburg) 'The Child's Right to Social Security- South Africa's Non Compliance with Its Constitutional and International Duties' accessed at [hnrjvr@puknet.puk.ac.za](mailto:hnrjvr@puknet.puk.ac.za), on 14th January 2009.

<sup>31</sup>International Labor Office *The End of Child Labor Within Reach* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work International Labor Conference (2006) ILO Geneva.

<sup>32</sup>Defense for children International 'No kids behind Bars: A global campaign on justice for children in conflict with the law', accessed at [www.kidsbehindbars.org](http://www.kidsbehindbars.org), on 21<sup>st</sup> January 2009.

<sup>33</sup>United Nations Children's Fund Child Protection Information Sheet, accessed at [http://www.unicef.org/protection/files/child\\_Protection](http://www.unicef.org/protection/files/child_Protection), on 21st January 2009.

<sup>34</sup>United Nations Population Fund *The Promise of Equality: Gender Equity, Reproductive Health and the Millennium Development Goals*, State of World Population (2005) UNFPA New York.

by AIDS live in sub-Saharan Africa.<sup>35</sup> An estimated 300 million children worldwide are subjected to violence, exploitation and abuse. This includes the worst forms of child labor in communities, schools and institutions; during armed conflict; and to harmful practices such as female genital mutilation/cutting and child marriage.<sup>36</sup> Millions more, not yet victims, also remain without adequate protection.

The list and information are endless. Various challenges and limitations regarding the full and equal enjoyments of the rights of children exists not only globally, but specifically in the three countries examined in this research.

### 1.3.1 Nigeria

An appraisal of the situation of women and children in Nigeria shows that little progress has been made with regard to protection of their rights as indicated in the country's Constitution. There are odious customary laws and harmful traditional practices affecting and impacting negatively on children. Children in Nigeria are victims of domestic violence and the cynicism of law enforcement agencies. Drug abuse, trafficking and abduction and the weaknesses and contradictions in the juvenile justice system amongst other things are some of the hindrances to the realization of protection rights of the child.<sup>37</sup> There are various challenges and discriminatory practices facing children with disabilities, street children, children affected by conflicts and violent outbreaks in restive communities all over the country. This is in spite of the Constitution of the Federal Republic of Nigeria, 1999 under chapter IV, and specifically in section 42(1)<sup>38</sup> which provides for non-discrimination on the basis of gender, religion, ethnicity, age or circumstances of birth against any citizens including children.

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<sup>35</sup>Joint United Nations Programme on HIV AIDS *Report on the Global AIDS Epidemic* (2004) UNAIDS Geneva.

<sup>36</sup>United Nations Children's Fund *Facts on Children* accessed at [http://www.unicef.org/media/media\\_45451.html](http://www.unicef.org/media/media_45451.html), on 21<sup>st</sup> January 2009.

<sup>37</sup>United Nations Children's Fund *Situation Assessment and Analysis of Women and Children in Nigeria* (2007) UNICEF.

<sup>38</sup>Section 42(1) of the 1999 Constitution states that: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, circumstances of birth, sex, religion or political opinion shall not by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, circumstances of birth, sex, religious or political opinions are not made subject to'.

### 1.3.2 Ethiopia

Article 36<sup>39</sup> of the Constitution of the Federal Democratic Republic of Ethiopia, 1994, specifically stipulates rights of children to life, name and nationality, to be cared for by his/her parents or legal guardians, not to be subject to exploitative practices, and to be free of corporal punishment. It further stipulates that in all actions concerning children undertaken by public and private welfare, institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child. Juvenile offenders admitted to corrective or rehabilitative institutions and juveniles who become wards of the state or who are placed in public or private orphanages are to be kept separately from adults. The state shall accord special protection to orphans and shall encourage the establishment of institutions that ensure and promote their adoption and advance their welfare, and education.

In spite of the constitutional provisions, protecting children's fundamental rights remain a major challenge in Ethiopia, as poverty and inaction of governments deprives children in their early years of life to adequate food, clean water and medicine.<sup>40</sup> Violence against children in Ethiopia remains pervasive, where children regularly face humiliating physical punishment and psychological abuse at home, in school and in the community-at-large. Children endure painful and harmful acts against them, primarily, and ironically, committed by those closest to them - parents, family members, neighbors, schoolteachers and peers. Violent acts against children in Ethiopia comes in all shapes and forms, including rape, beatings, bullying, sexual harassment, verbal abuse, abduction, early marriage, female genital mutilation, committing children to

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<sup>39</sup>Article 36 of the Constitution of FDRE states that : Every child has the right:(1)To life; (2) To a name and nationality; (3) To know and be cared for by his or her parents or legal guardians; (4) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being; (5) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children; (6) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child; (7) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults; (8) Children born out of wedlock shall have the same rights as children born of wedlock; and (9)The State shall accord special protection to orphans and shall encourage the establishment of institutions that ensure and promote their adoption and advance their welfare, and education.

<sup>40</sup>Accessed at <http://www.unicef.org/ethiopia/children>, on 12th July 2008.

abusive and exploitative labor, trafficking, and the use of children as weapons and targets of war.<sup>41</sup>

### 1.3.3 South Africa

The Constitution of the Republic of South Africa, 1996 specifically states that every child has the right to a name and nationality, to family care or appropriate alternative care, to basic nutrition, shelter, basic health care services and social services.<sup>42</sup> It further states that every child must be protected from exploitative labor practices, not to be detained except as a measure of last resort and that a child shall not be used in armed conflict and shall be protected in times of armed conflict. The child's best interests are of paramount importance in every matter concerning the child. However, almost 18 Million of South Africa's present population of approximately 49 million people are children, 9 million of whom are girls. The majority of these children live in different degree of want - lack of shelter, food, clothing, and proper education - because of unemployment, poverty crime and child abuse. Their lives are in constant state of uncertainty and insecurity, hardship and suffering, neglect and little time for fun and enjoyment.<sup>43</sup>

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<sup>41</sup> *Violence Against Children in Ethiopia In Their Words* The African Child Policy Forum and Save the Children (2006) Sweden. The African Child Policy Forum in collaboration with Save the Children Sweden, conducted a research to collect information on violence against children across Ethiopia. The study is written from the child's view point, looking at how physical, psychological and sexual violence affects them. As well as being respondents, the children also participated as advisors and co-researchers. In the Preface to the study, it was stated that "Violence against children remains a pervasive, but largely ignored issue in many parts of the world, particularly in Africa. This is certainly the case in Ethiopia, where children regularly face humiliating physical punishment and psychological abuse at home, in school and in the community-at-large. Children endure painful and harmful acts against them, primarily, and ironically, committed by those closest to them - parents, family members, neighbors, schoolteachers and peers. Violence comes in all shapes and forms including rape, beatings, bullying, sexual harassment, verbal abuse, abduction, early marriage, female genital cutting, committing children to abusive and exploitative labor, trafficking, and the use of children as weapons and targets of war".

<sup>42</sup> Section 28 of the Constitution of South Africa states that: 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 health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labor practices- not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

<sup>43</sup> Accessed at <http://www.childrensmovement.org.za>, on 14<sup>th</sup> July 2008.

Despite the domestic legal frameworks, the Constitutional provisions and the ratified regional and international treaties existing for the protection of children across the three countries, children remain victims of discrimination, abuse, violence and exploitation. Violations of children's rights remains pervasive notwithstanding the existence of international and regional monitoring bodies, including national monitoring bodies like the human right commissions.

#### **1.4 The research design or methodology**

Review of existing international and regional treaties, ratified and domesticated into local or national laws to protect the rights of children, is conducted. The extent of compliance with the treaties and standards focusing on - judicial decisions, different Constitutions and legal frameworks<sup>44</sup> and legislation existing for the protection of children was undertaken. The research examines specific roles of the national, regional and international monitoring bodies and documents their level of effectiveness and efficiency in ensuring that countries fulfill their national, regional and international obligations in protecting the rights of children. The limitations facing the national and external monitoring bodies, especially in the area of enhanced effectiveness to promote and protect the rights of children are documented.

Jurisprudential issues and various decisions, demonstrating compatibility of the different constitutional provisions and legal frameworks with the principles enshrined in international and regional treaties or instruments are examined. The role of judges and different legal systems, in ensuring realization of rights for children are highlighted. Significant statements and judicial decisions for the advancement of the rights of children, to ensure freedom from abuse, violence or exploitation and to enforce principles enshrined in International Conventions especially, the 'best interest principle' are documented. The presence or lack of cohesiveness to enforce implementation of treaty obligations by the three countries is examined and recommendations proffered. Various internet sites were consulted for relevant data and information. Instances where judicial decisions have been prescribed for the advancement of the rights of children and otherwise are stated.

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<sup>44</sup>Such as: Children's Act No 38 of 2005; Child's Rights Act No 26 of 2003; and Criminal Code of the Federal Democratic Republic of Ethiopia, 2005.

## **1.5 Assumptions underlying the study**

It is assumed for the purposes of this study that, international and regional legal frameworks are to shape domestic legislation and constitutional provisions, in the realization and protection of rights of children. Governments' insensitivity to the plight of children also indicates that constitutional provisions respecting the rights of children are not properly implemented. Specific constitutional provisions are therefore examined, to measure compliance and fulfillment of international obligations in the selected countries. It is also assumed that Parliamentarians/legislative arm of government should be amongst the key champions to respect, promote and fulfill the rights of children. This is because these have the capacity not only to influence the decisions and actions of government, but also to connect with communities and constituencies and influence opinion and actions in favor of realization of rights for children. Of utmost importance is the role of parliamentarians to work towards incorporating children's rights into domestic laws, including detailed statutes that protect children to ensure the promotion of their rights. Hence, important actions of the government and legislators that have influenced promotion or subversion of rights for children have been documented.

## **1.6 Limitations of the study**

Given the diversities of the selected countries, it is important to state that each country has numerous organizations, communities, councils, municipal government, various states and Local Government Areas. (Nigeria alone has 36 States and 774 Local Government Areas and can count on thousands of Non-Governmental Organizations). Moreover, there are different tiers of government, different legal and judicial systems, insufficient courts dealing with child rights issues, lack of comprehensive data and reports on violation of children rights and multiple actors serving as monitoring bodies. This translates into existence of multiple institutions and actors playing different roles either to subvert the rights of children, or to monitor enforcement and realization of rights of children. These are too numerous to capture.

Furthermore, a major limitation in this thesis is the dearth of judicial decisions promoting children's rights in Ethiopian courts and legal systems. There is insufficient record of decided or adjudicated cases - written in English language - to enable understanding of where the courts have made specific reference to and applied ratified international treaties to promote realization

of rights for children. Limited literature is thus indicated on Ethiopian jurisprudence and domestic legal systems as it affects children. Similarly, few but important court's proceedings have been evaluated to track development of justiciability of human rights, entrenched in the Nigerian Constitution and domestic legislation as it affects children's rights. This is in comparison with South African courts where plethora of decided cases abounds.

This research is also limited to documenting strictly, the roles of specific institutions particularly that of the institutions supporting constitutional democracy (Human Rights Commissions) and their contributions to the realization of rights of children, or otherwise.

### **1.7 Sequence of chapters**

Chapter one deals with the introduction and the background of the research problem and discusses the methodology employed to achieve the stated objectives.

Chapter two features the theoretical framework on the historical development of children's rights and the extent to which the developed legislative framework assist the monitoring bodies in the execution of their mandate.

Chapter three examines the roles, norms and standards set by the international, regional and national monitoring bodies in ensuring the proper implementation of children's rights. The level of effectiveness of the monitoring bodies in ensuring realization of rights for children based on the established norms and standards set by the international communities and domestic prescripts is documented.

Chapter four focuses on jurisprudential issues, judicial developments and decisions made for the advancement of the rights of children, to demonstrate the level of compatibility of constitutional provisions with the principles of international and regional instruments.

Chapter five draws relevant conclusions and proffers recommendations.

## CHAPTER TWO

### The theoretical framework for the historical development of children's rights

#### 2.1 Introduction

This chapter provides the theoretical framework on the historical development of international and regional standards set for the promotion of children's rights. There is a historical acknowledgement of children's rights with particular attention to the rights of special protection and care afforded to the young people. The recognition of children's rights dates back to the 1200s and earlier, stating that young people need to be protected from the adult centric world, including the decisions and responsibilities of that world.<sup>1</sup> The international community motivated by non-governmental international organizations,<sup>2</sup> responded by adopting various instruments articulating the set of rights and values in the promotion of children's rights. These international and regional instruments and standards set particularly for the protection and enforcement of rights of children were adopted for ratification by countries.<sup>3</sup>

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<sup>1</sup>Starr RH, 'Children's Rights: Countering the Opposition', unpublished paper presented at the 83rd Annual Meeting of the American Psychological Association in Chicago, Illinois, August 30-September 3, 1975.

<sup>2</sup>Such as: Save the Children UK, an international organization helping children in need around the world. It was established in the United Kingdom in 1919; Amnesty International was founded in 1961. This international organization undertakes research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity and promote realization of all human rights; Human Rights Watch was formerly known as Helsinki Watch, was founded in 1978 (adopted current name in 1988), as an international non-governmental organization that conducts research and advocacy on human rights. Children's Rights Information Network was established in 1995. It empowers the global child rights community through the exchange of information and the promotion of children's rights.

<sup>3</sup>At the international scene, we have: the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on September 3, 1981; The Convention on the Rights of the Child, was adopted by UN General Assembly Resolution 44/25 on November 20, 1989 and entered into force on September 2, 1990; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), was adopted by the UN General Assembly on November 19, 2000; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, was adopted by the UN General Assembly on January 18, 2002; Optional Protocol on the involvement of Children in armed Conflicts, was adopted by the UN General Assembly on February 12, 2002; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children was adopted by the UN General Assembly on September 9, 2003. At the regional community, we have the African Charter on the Rights and Welfare of the Child which entered into force on November 29, 1999.

The main source of articulating these human rights norms and standards for special groups such as the children - was the Universal Declaration of Human Rights.<sup>4</sup> The UDHR was followed by the many human rights documents and treaties developed by international and regional organizations. These instruments indicate the importance attached to the issues of children and standards set for the realization of their rights. The most comprehensive piece is the United Nations Convention on the Rights of the Child. The CRC in its preamble<sup>5</sup> made references to the UDHR proclamation that childhood is entitled to special care and assistance. The preamble recognizes the extensive right to protection, care and development of children and affirms the responsibilities of member states in ensuring that the standards set in the Convention becomes a reality for children.

This chapter then provides a brief overview of the most important legal instruments in the international, regional and national framework on the development and promotion of children's rights. Particular emphasis is placed on the CRC as it provides a comprehensive set of standards against which ratifying states may measure the extent to which they fulfill the rights of children. The objective here is to examine the contents of child specific international and regional instruments, including areas of differences, linkages and convergence. This is followed by a critique and perspectives of scholars regarding children's rights. Efforts by the government of the three selected countries (South Africa, Ethiopia and Nigeria) and the extent to which they have substantively translated into reality, the ratified international and regional treaties at the national or domestic levels is scrutinized.

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<sup>4</sup>Adopted by the UN General Assembly on December 10, 1948. Hereinafter referred to as the "UDHR".

<sup>5</sup>"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".... 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"....."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 co-operation for improving the living conditions of children in every country, in particular in the developing countries", the United Nations General Assembly on November 20, 1989 (resolution 44/25) adopted the Convention on the Rights of the Child which entered into force on September 2, 1990.

## 2.2 Historical development of children's rights

Prior to the Convention on the Rights of the Child, human rights standards applicable to all members of the human family had been expressed in legal instruments such as Covenants, Conventions and Declarations.<sup>6</sup> The international community progressed slowly down the path leading to the Convention on the Rights of the Child.<sup>7</sup> Throughout the 1900s, children's rights activists created substantial awareness for and organized better living standards for homeless children through public education. The initial stages of this process were largely in the domain of the Non-Governmental Organizations that came into being in the early part of that century with the specific goal of improving the lives of children. Foremost among these was the International Save the Children U.K,<sup>8</sup> founded in 1919 following the inspiration of an English woman, Eglantyne Jebb.

At the end of the First World War in 1914, there was an unprecedented casualty level, with eight and a half million members of armed services dead, an estimated 21 million wounded, and approximately 10 million civilian deaths<sup>9</sup> including children. Ms Jebb who had become involved in the Charity Organization Society, turned from raising funds to save homeless and orphaned children to another issue, that of children's rights. The result was the production of the document, drafted by Ms Jebb – which asserted the rights of children and the duty of the international community to put children's rights in the forefront of planning. Five points were presented to the League of Nations.<sup>10</sup>

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<sup>6</sup>Such as the First Declaration of the Rights of the Child known as the 'Geneva Declaration of the Rights of the Child', adopted in September 26, 1924 by the League of Nations; the Universal Declaration of Human Rights adopted by the UN General Assembly on December 10, 1948; and also the Third Declaration of the Child Proclaimed by United Nations General Assembly; Resolution 1386 (XIV) of 20 November 20, 1959. See note 3 above for other Covenants and Conventions.

<sup>7</sup>The evolution of the principles of the rights of the child is attributed to a number of factors which included the role played by International NGO's who have been strikingly influential in placing human rights issues on the regional and global agendas. These NGOs promoted the international standards on protection of human rights including that of women and children. They created appropriate conditions, in which those standards were developed and came up with new ideas and proposals for implementing those standards. Foremost amongst these is the International Save the Children in UK, founded in 1919 following the inspiration of Ms Eglantyne Jebb, hereinafter referred to as Ms Jebb.

<sup>8</sup>Save the Children UK is a non-profit organization working to create positive, lasting change for disadvantaged children in the UK as well as more than 70 countries worldwide, accessed at <http://www.savethechildren.or.uk/en/28.htm>, on 21<sup>st</sup> March, 2009.

<sup>9</sup>George G, *The League of Nations: From 1929 to 1946* (1996) Avery Publishing Group.

<sup>10</sup>Such as: (1) The child must be given the means requisite for its normal development, both materially and spiritually; (2)The child that is hungry must be fed, the child that is sick must be nursed, the child that

The League of Nations at this time was an inter-governmental organization founded as a result of the Treaty of Versailles in 1919–1920, immediately after the First World War and was the forerunner to the United Nations. The League's primary goals are stated especially in Article 23 of its Covenant.<sup>11</sup> In fulfilling its goals for children in particular, the League of Nations on September 26, 1924 adopted Ms. Jebb's five point document as the First Declaration of the Rights of the Child or the Declaration of Geneva as it came to be known.<sup>12</sup> This First Declaration on the Rights of the Child contained five basic principles.<sup>13</sup> Upon the good intention of the members of the League of Nations, a cursory look at the fourth and fifth principle of the Declaration indicated that, the child's capacity was not particularly taken into consideration, stating that:

“The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; and fifth - “The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men”.

The Declaration was brief and only aspirational, since it invited member states to be guided by its principles. It was further shown that the understanding of the international community was not to protect the rights of the child, but only to recognize what mankind owes to the child especially as stated in its preamble.<sup>14</sup> The Declaration was made at a time when most children/minors were victims of gross abuse and molestation. Given the terms of the Declaration, the situation of most children during that period was quite pitiable as recalled by

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is backward must be helped, the delinquent child must be exclaimd, and the orphan and the waif must be sheltered and succored; (3) The child must be the first to receive relief in times of distress; (4) The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; (5) The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

<sup>11</sup>The League of Nations (LoN) was an inter-governmental organization founded as a result of the Treaty of Versailles in 1919–1920 with set goals articulated in her Covenant. Article 23 (a) for example state as follows: Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations.

<sup>12</sup>Commonly referred to as Geneva Declaration of the Rights of the Child, it was adopted on September 26, 1924 by the League of Nations.

<sup>13</sup>See (note 10) above.

<sup>14</sup>By the present Declaration of the Rights of the Child, commonly known as Declaration of Geneva, “men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed”.

different scholars. Hart<sup>15</sup> reiterated that “until modern times, childhood was an almost universally grim experience”. For hundreds of years, children were treated primarily as chattels. They were bought, sold, cared for, and abandoned in much the same way as a pair of shoes”. Pappas<sup>16</sup> also noted that children were commonly “neglected, abandoned, abused “(sexually and otherwise”) sold into slavery, mutilated and even killed with impunity”.<sup>17</sup>

Reflections on the fate of one newborn brother of Henry IV of France for example was summarized thus, ‘he was dropped and killed while being thrown from one window to another during - a round of infant tossing - a common 16<sup>th</sup> Century game played for the amusement of adults. DeMause on the other hand recalled that, “From antiquity to the 18<sup>th</sup> century, almost every child-rearing treatise has advocated corporal punishment – which was sometimes extreme - for children.....” Indeed, some individuals, charged with the care and upbringing of children made meticulous records of their “exemplary” disciplinary measures.<sup>18</sup> According to DeMause, “it took centuries of progress in parent-child relations before the West could begin to overcome its apparent need to abuse its children”.<sup>19</sup>

As the facts and situation of children at these times poignantly illustrate, childhood in those times was not always a blissful time. It is however sad to say that from current statistics it seems the situation of children across the globe, has not improved so much especially in Africa as this research would portray in the preceding chapters. The issues surrounding the rights of children continue to provoke series of arguments on whether children have rights or not and what kind of treatment should be meted out to children. The level of abuse suffered by children at that age and generation persisted during the Second World War in spite of the existing 1924 Declaration. The world in a global military conflict between 1939 and 1945, which involved most of the world's nations, experienced the Second World War. Over seventy million people, the majority being civilians (including children) were killed, making it the deadliest conflict in human history.<sup>20</sup>

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<sup>15</sup>Hart SN, ‘From Property to Person Status: Historical Perspective on Children’s Rights’ (1991) Volume 46, *American Psychologist*, 53-59, at 55.

<sup>16</sup>Pappas AM, (ed) *Law and the Status of the Child* (1983) New York, United Nations Institute for Training and Research at xxvii-iv.

<sup>17</sup>*Ibid* at xxviii.

<sup>18</sup> DeMause L, ‘Our forbears made childhood a nightmare’ (1975) Volume 8, *Psychology Today*, 85-88.

<sup>19</sup>*Ibid*, at 85.

<sup>20</sup>Donald S, *The Complete Illustrated History of World War Two* (2008) An Authoritative Account of the Deadliest Conflict in Human History with Analysis of Decisive Encounters and Landmark Engagements Lorenz Books at 5.

In 1948, the General Assembly adopted a Second Declaration of the Rights of the Child as a brief, seven - point statement that derived from the 1924 Declaration. It followed closely the five points set out in the 1924 declaration with two additions, which took into account the experiences of the Second World War, stating that:

“The child must be protected beyond and above all considerations of race, nationality or creed”; and...“The child must be cared for with due respect for the family as an entity”.

This Second Declaration on the ‘Rights of the Child’ was adopted after the Second World War between 1939 and 1945. It served to further reinforce the UDHR adopted by the UN General Assembly on 10<sup>th</sup> December 1948, primarily to avoid a recurrence of the horrors experienced during the World War II especially by women and children. The UDHR was meant to apply equally to all human beings, children as well as adults. It also contained two provisions that made specific reference to children, its Article 25, paragraph 2, provided that:

“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.

Since the Declaration was universally adopted, the rights declared by the UDHR formally applied to children and young people. However, because children had and still have less power in society, children across the globe are still left even more disempowered and victimized by human rights violations than the average citizen. As a result, the General Assembly of the United Nations adopted the Third Declaration of the Rights of the Child on 20<sup>th</sup> November, 1959.<sup>21</sup> The General Assembly of the United Nations approved the ten-point - United Nations Declaration of the Rights of the Child and noted in its preamble<sup>22</sup> that children are entitled to have a happy childhood. This was a longer document containing ten principles, but again it had the limited status of a declaration. It did not attempt to claim that the ‘rights’ listed constituted legal obligations. Instead states were merely required to take note of the principles contained

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<sup>21</sup>Proclaimed by United Nations General Assembly; Resolution 1386(XIV) of November 20, 1959.

<sup>22</sup>The General Assembly: Proclaims this Declaration of the Rights of the Child to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles.

therein, on the basis that they were universally accepted as being applicable to all children. However, the importance of the 1959 Declaration lies in the fact that it embodies the first serious attempt to describe in a reasonably detailed manner what constitutes children's overriding claims and entitlements.

The Declaration was not framed in a manner that carries the international obligations of the rights of children. The principles postulated in the UDHR also pervaded the ten principles and its Preamble.<sup>23</sup> These principles included the first principle of non-discrimination with respect to the entitlement of the rights of the child enshrined in the Declaration. The preamble indicated that the child be regarded as needing special safeguards and care, '*by reason of his physical and mental immaturity*'. The principles were an extension of the former two Declarations, calling on men and women as individuals and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures. Perhaps the generality of the 1959 Declaration and the fact that it carried no legally binding obligation, led to a general tendency by many nations to continue to ignore the appalling conditions being suffered by large numbers of children. This is in spite of the fact that this declaration contained such principles acknowledging that children were entitled to human rights like adults, are to be free from oppression, discrimination and do have rights to human dignity.

In this Third Declaration, for the first time, the 'it - character' of the child disappeared from the language used and was replaced by 'he' and 'his'. In contrast to the formulations of 1924, the child was now clearly acknowledged as a *subject of law (own emphasis)* with specific rights. The concept of the child having basic rights and needing protection prevailed. For example in the first, second and third principles,<sup>24</sup> due probably to a greater knowledge of childhood, several aspects have been added, as compared to the Declaration of 1924 and 1948.

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<sup>23</sup> *Ibid.*

<sup>24</sup> 1<sup>st</sup> Principle: "The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family".

2<sup>nd</sup> and 3<sup>rd</sup> Principles: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interests of the child* shall be the paramount consideration"; and "The child shall be entitled from his birth to a name and a nationality".

A crucial formulation is the phrase “the best interest of the child”. This formula has become a yardstick in many application of child care, as well as in legal contexts. It remains a tool for the actual interpretation of children’s rights.<sup>25</sup>

In contrast to the 1924 Declaration, children should be “*among the first to receive protection and relief*” making the priority for children less absolute or ‘more realistic’. Other forms of protection included protection against neglect, cruelty and exploitation; protection against practices which foster discrimination; and protection against work which jeopardizes the child’s health or education. It stipulated a minimum age is required for employment.<sup>26</sup> It also ensured that children are protected before as well as after birth, recognizing their need for adequate pre and post natal care.<sup>27</sup> Other rights ensured the child access to and provision of health services and care, social security, an atmosphere of affection and of moral and material security; equal opportunity to quality education and to play and recreation which should be directed to the same purpose as education.<sup>28</sup> The entitlement to a name and nationality<sup>29</sup> is the first trace of a civil right in the context of children’s rights in international law. It is remarkable that this is exactly the right affirming the child’s legal identity.

### **2.3 Convention on the Rights of the Child**

The universal set of standards and principles<sup>30</sup> enshrined in the CRC and articulated as the rights to be enjoyed by all children can be placed in four clusters or baskets of rights - survival, development, protection and participation. It drew extensively from the indivisible and interdependent principles illustrated in the First, Second and Third Declarations of the Child. Since the ‘rights’ listed in these Declarations do not constitute legal obligations and instead states were merely required to take note of the principles contained therein, the CRC combined

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<sup>25</sup>Alston P, (ed) *The Best Interests of the Child. Reconciling Culture and Human Rights* (1994) Oxford University Press, Oxford, at 4-5.

<sup>26</sup>Principle 9.

<sup>27</sup>Principle 4.

<sup>28</sup>Principle 7.

<sup>29</sup>Principle 3.

<sup>30</sup>Article 2 - Non-discrimination. Article 3- Best Interest of the Child, Article 6- Survival and Development and Article 12 as Participation rights.

and applied the principles in the Declarations and transformed them to legally binding human rights treaty or instruments.<sup>31</sup>

In 1979, the United Nations Commission on Human Rights formed a working group to formulate what became the 54 substantive articles of the Convention on the Rights of the Child. The standards in the CRC were negotiated by governments, non-governmental organizations, human rights advocates, lawyers, health specialist, social workers, advocates, child development experts, and religious leaders from all over the world over a 10 year period. The result is a consensus document that constitutes a common reference against which progress in meeting human right standard for children can be assessed and results compared. The UN General Assembly on November 20, 1989 unanimously adopted the Convention on the Rights of the Child, as it became legally binding on State Parties. It became the first treaty to deal with the specific rights of children. As of date, 191 countries have ratified or acceded to the Convention, making it the most ratified human rights treaty ever.

Further, the Convention in reference and conformity to the first principle of the Third Declaration<sup>32</sup> noted in Article 2 that possible discrimination of the child's parents, legal guardians or family members also has a discriminatory effect on the child. Hence the CRC is sensitive to this phenomenon of discrimination and obliges state parties to take appropriate measures to provide protection against this tendency. The provisions of the CRC are also indivisible and its articles are interdependent. This time around, the Convention mentioned under the rights to protection - specifically - categories of children that need protection. These objectives show that the traditional goal of protection has remained but is now sided with the right to self-determination in a wide sense and specifications are made for special circumstances of children.

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<sup>31</sup>Survival and Developments rights of the CRC applied to the 1<sup>st</sup> Principle of the First Declaration; 7<sup>th</sup> Principle of the Second Declaration; and 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Principles of the Third Declaration. Protection and Participation Rights applied to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Principle of the First Declaration; 6<sup>th</sup> Principle of the Second Declaration and 2<sup>nd</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Principles of the Third Declaration..

<sup>32</sup>1st principle of the Third declaration states that: Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family; and Article 2 of the CRC in the same note states as follows: 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.

The protective rights of children are extended to various situations entitling children to food, health care, education, play, facilities and social insurance. These rights are especially significant to children in difficult circumstances.<sup>33</sup> Other rights introduced included - right to preservation of identity, which means that states are obliged to protect, and if necessary, re-establish the basic aspects of a child's identity. This include right to a name, nationality and family ties and in addition, the rights of indigenous children to enjoy their own culture, to profess and practice their own religion or to use their own language.<sup>34</sup> Still in the field of protection, the Convention provides for refinement and takes account of additional areas. It recognizes the particular vulnerabilities of children. Article 22 addresses the situation of child refugees. Article 23 provides for care of children with disabilities. The care for children with disabilities also includes obligation to work towards their fullest possible social integration. In article 25, children placed in institutions for reasons of care, protection or treatment has to be periodically reviewed in order to determine whether such placements are still appropriate.

Articles 30 and 32-40 guarantees special protection measures for children. They emphasize the prevention of abuse and neglect in *intra* family circumstances and firmer adoption safeguards and protection from the use of narcotics, psychotropic drugs and from being involved in their production or distribution.<sup>35</sup> Even in schools, children will be more protected when 'school discipline' has to be administered in a manner consistent with the child's dignity.<sup>36</sup> Provisions to protect children from economic exploitation, drug abuse, sexual exploitation, abduction, sale or trafficking are explicitly set out. Articles 32 and 38 reasserts states' obligations in protecting children from exploitative labor and armed conflict under international humanitarian law and requires them neither to recruit nor, where possible, utilize children less than 15 years of age as soldiers in conflict. The problems of involvement of children in armed conflict, and of sale of children, child prostitution and child pornography, are covered in more details in the two optional protocols to the Convention, adopted in 2000.

To further complement the protection rights for children, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor was

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<sup>33</sup>Such as: Orphaned children, institutionalized children, adopted children, children in prison, refugee children, minority children and children in armed conflicts.

<sup>34</sup>Article 8 and 14 of the CRC.

<sup>35</sup>See articles 19, 21 and 33 of the CRC.

<sup>36</sup>See article 28(2) of the CRC.

adopted by the UN General Assembly on November 19, 2000<sup>37</sup> and has a strong bearing with the 9<sup>th</sup> Principle of the Third Declaration of children stating that:

“The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development”.

The ILO Convention in its preamble<sup>38</sup> observes the need to adopt new instruments for the prohibition and elimination of the worst forms of child labor, as the main priority for national and international action and complements specific provisions of the CRC. Foremost of which is the provisions of article 32 (1) and (2) of the CRC. Given the closeness in both Conventions - time of adoption and manner of ratification by countries - one could infer a close relation between the two systems (CRC and ILO Convention) as shown in the added value of this ILO Convention.

The overview of the ILO Convention covers *all girls and boys under the age of 18*<sup>39</sup> in line with the definition of the child under the CRC. It calls for “*immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency*”<sup>40</sup> (own emphasis). In addition, it’s article 3<sup>41</sup> made specific reference to the problems of involvement of children in armed conflict, and of sale of children, child prostitution and child

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<sup>37</sup>The ILO Convention was unanimously adopted June 17, 1999, by the ILO Member States at the 87th annual International Labor Conference. It came into force on November 19, 2000, hereinafter referred to as the “ILO Convention”.

<sup>38</sup>The General Conference of the International Labor Organization: Considers the need to adopt new instruments for the prohibition and elimination of the worst forms of child labor, as the main priority for national and international action, including international cooperation and assistance, to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973, which remain fundamental instruments on child labor.

<sup>39</sup>Article 2 of the ILO Convention.

<sup>40</sup>Article 1 of the ILO Convention.

<sup>41</sup>Article 3 of the ILO Convention- For the purposes of this Convention, the term ‘*the worst forms of child labor*’ comprises (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 labor, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; and (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; and (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 children”.

pornography, which as earlier stated have been covered in the two optional protocols to the CRC.

To further reiterate the assertion that the CRC did provide sufficient legal backing to the principles in the three Declarations of the Child, new obligations are established for states under the survival and development rights. The CRC sets out the standards and measures to ensure survival and development of children. Particular provisions cover the child's right to identity,<sup>42</sup> separation from parents and family reunification,<sup>43</sup> illicit transfer of children<sup>44</sup> and right to highest attainment of health.<sup>45</sup> It includes right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development<sup>46</sup> and right to education and protection from abuse and exploitation.<sup>47</sup> A good parallel may be drawn between these provisions of the CRC and the third Principle of the Third Declaration of the Child.<sup>48</sup>

Beyond the provisions which assert child's rights in terms of protection, survival and development rights, the CRC also broke new ground by elaborating the children's perspective with regard to rights to participation. While specific participation rights may be inferred most importantly from the 5<sup>th</sup> principle of the First Declaration of the Child,<sup>49</sup> the CRC ensures, children have full rights to freedom of expression, to freedom of thought, conscience and religion, to free association and peaceful assembly. Right to privacy, access to information, as well as to health, social security, and right to an adequate standard of living are also prescribed. Participation is considered to be the most innovative recognition of the Convention.

It specifically refers to the rights of children to participate in society; to act in certain circumstances and to be involved in decision making. Children by specific provisions of the CRC are to take part in decisions affecting their own destiny by discussing and being heard on issues

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<sup>42</sup>Articles 7 and 8 of the CRC.

<sup>43</sup>Articles 9 and 10 of the CRC.

<sup>44</sup>Article 11 of the CRC.

<sup>45</sup>Article 24 and 27 of the CRC.

<sup>46</sup>Article 19 of the CRC.

<sup>47</sup>Articles 21, 28, 29 and 34 of the CRC.

<sup>48</sup>The 3<sup>rd</sup> principle of the Third Declaration of the child states as follows: The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

<sup>49</sup>The 5<sup>th</sup> principle of the First Declaration of the Child states as follows: The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

which matter to them and to their surroundings.<sup>50</sup> It includes forming and expressing an opinion,<sup>51</sup> the freedom of religion and the right to association and receiving adequate information.<sup>52</sup> It is clear from these clusters of rights that information and participation rights are closely linked. With these provisions, it shows that the CRC contains rights for children globally, holistically and it's really a comprehensive instrument for rights of children.

To ensure realization of prescribed rights for children, the Convention further requires all States parties to report regularly to the United Nations Committee on the Rights of the Child,<sup>53</sup> which it established to monitor implementation of the Convention's provisions. In addition to their obligation to implement the substantive provisions of the CRC, each State party is under an obligation to submit regular reports to the UNCRC on how children's rights are being implemented. Reporting to this treaty - body is the measure put in place by the international community to monitor compliance of State parties to their international obligation and the realization of rights for children as enshrined in the CRC. The implementation of the provisions of the CRC is monitored by the UNCRC through a variety of procedures. They review implementation through consideration of reports submitted by States parties in the presence of states representatives, following which conclusions, containing recommendations for further action are put forward. The idea of monitoring human rights through review of reports originated in a 1956 resolution of the Economic and Social Council which requested United Nations Member States to submit periodic reports on progress made in the advancement of human rights.<sup>54</sup>

The UNCRC perform a number of functions aimed at monitoring how the treaty is being implemented. They issue guidelines to assist State parties with the preparation of their reports, elaborate general comments interpreting the treaty provisions and organize discussions on themes related to the treaties. The UNCRC has provided guidance to State parties and others on the content of the rights in the Convention and steps required for full implementation. It was recognized by the international community that State parties would require encouragement and

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<sup>50</sup> Article 12 of the CRC.

<sup>51</sup> Articles 14 and 15 of the CRC.

<sup>52</sup> Article 17 of the CRC.

<sup>53</sup> Hereinafter referred to as "UNCRC".

<sup>54</sup> See E/Res/624 B (XXII), 1 August 1956.

assistance in meeting their international obligations. Necessary measures to ensure the enjoyment of the rights provided in the CRC for children are expected to be enforced.

State parties are encouraged to see the process of preparing their reports<sup>55</sup> for the treaty bodies, not only as the fulfillment of an international obligation, but also as an opportunity to take stock of the state of human rights protection within their jurisdiction. Reports after being submitted are defended before the Committee.<sup>56</sup> This procedure is not adversarial and the Committee does not pass judgment on the State party. Rather the aim is to engage in a constructive dialogue in order to assist the government in its efforts to implement the treaty as fully and effectively as possible. The notion of constructive dialogue reflects the fact that the UNCRC is not a judicial body, but was created to monitor the implementation of the Convention and provide encouragement and advice to States.

Article 44<sup>57</sup> of the CRC provides for the obligation of State parties to submit reports to the UNCRC. The reports should contain sufficient information on the implementation of the

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<sup>55</sup>The report preparation process offers an occasion for each State party to: (a) Conduct a comprehensive review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party; (b) Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general; (c) Identify problems and shortcomings in its approach to the implementation of the treaties; (d) Assess future needs and goals for more effective implementation of the treaties; and (e) Plan and develop appropriate policies to achieve these goals.

<sup>56</sup>The process starts with the submission of the initial report after 2 years of the State party ratification of the Convention. The report after being submitted is then processed and scheduled for consideration by the Committee at one of its regular sessions. Before the session to consider the report, the Committee draws up a list of issues and questions which is submitted to the State party. The list of issues provides an opportunity for the Committee to request from the State party any additional information which may have been omitted in the report, or which members consider necessary for the Committee to assess the state of implementation of the treaty in the country concerned. The list of issues also allows the Committee to begin the process of questioning the State party in more detail on specific issues raised by the report which are of particular concern to members. Many States parties find the list of issues a useful guide to the line of questioning they are likely to face when their report is formally considered. This allows the State party delegation to prepare itself and makes the dialogue between it and the Committee more constructive, informed and concrete. The State party submits its responses to the list of issues and questions in written form. The written responses form a supplement to the report. In addition to the State party's report, the treaty bodies may receive information on a country's human rights situation from other sources, including UN agencies, other intergovernmental organizations, non-governmental organizations (both international and national), academic institutions and the press. State party then send delegates to attend the session at which the Committee is considering their report in order to allow them to respond to members' questions and provide additional information on their efforts to implement the provisions of the relevant treaty.

<sup>57</sup>Article 44 of the CRC states as follows: (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

Convention, to provide the UNCRC with a comprehensive understanding of its implementation. It should include factors and difficulties encountered in fulfilling the treaty obligation. The reports must set out the legal, administrative and judicial measures taken by the State to give effect to the treaty provisions. Each State party must submit a comprehensive initial report usually within two years of the treaty entering into force for that State. It must then continue to report periodically in accordance with the specific provisions of the treaty (usually every five years). This is called – Country Periodic Reports.

The examination of the report culminates in the adoption of ‘Concluding Observations’ intended to give the reporting State, practical advice and encouragement on further steps to implement the rights contained in the treaty. In their Concluding Observations, the UNCRC as a treaty/monitoring body acknowledge the positive steps taken by the State, but also identify areas where more needs to be done to ensure effective realisation of the rights as entrenched in the provisions. The monitoring body seeks to make their recommendations as concrete and practicable as possible. States are asked to publicize the Concluding Observations within the country so as to inform public debate on how to move forward with implementation of the Conventions’ provisions. The adoption of the Concluding Observation by the committee concludes the formal consideration of the report.

Given the general principles, prescribed standards and provisions for monitoring bodies enshrined in the CRC, the international body can be seen to have transformed mere declarations into legally binding human rights treaty or instruments. The CRC can also be regarded as an international expression of the universal principles and rights which apply to all children and in all circumstances. Children occupy a unique status in our society. While they are

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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 fulfillment 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 submit 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.

entitled to the basic rights prescribed in their nations' Constitutions, their status, as minors, renders them vulnerable and in need of safeguards to ensure their protection. In recognition of children's special status, the United Nations has not only developed this inclusive, legally-binding human rights treaty for all the world's children, but has prescribed monitoring bodies to ensure realization of these rights.

## **2.4 Adoption of the AU Charter on the Rights and Welfare of the Child**

In addition to actions taken by the United Nations, regional instruments with specific focus on protecting the rights of children and women were adopted and ratified by countries within the African Union. Foremost were the African [Banjul] Charter on Human and Peoples' Rights<sup>58</sup> and the AU Charter on the Rights and Welfare of the Child.<sup>59</sup> This portion will focus mainly on the ACRWC. The African Member States of the Organization of African Unity were parties to the adoption of the African Charter on the Rights and Welfare of the Child. In assenting to the ACRWC, the state parties noted that the situation of most African children remained critical, due to unique factors of their socio-economic, cultural, traditional and developmental circumstances.<sup>60</sup> Children in Africa are affected by different types of abuses, ranging from economic and sexual exploitation, to gender discrimination, leading to unequal access to education and health care and involvement in armed conflict. Other factors affecting African children include displacement and migration, child marriage, and unequal disparity between

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<sup>58</sup>Adopted on June 28, 1981 by the Organization of African Unity (OAU), the African Charter on Human and Peoples' Rights entered into force on October 21, 1986.

<sup>59</sup>The Preamble states that: .....”Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.I) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from July 17- 20, 1979 recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child..... Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.....Recognizing the critical situation of most African children and the fact that children require particular care with regard to health, physical, moral and mental development and legal protection”...the Organization of African Unity, in July 11, 1990 adopted the African Charter on the Rights and Welfare of the Child. It entered into force on 29 November 1999, hereinafter referred to as “ACRWC”.

<sup>60</sup>Such developmental circumstances include, natural disasters, armed conflicts, exploitation and hunger; and on account of the child's physical and mental immaturity, he/she needs special safeguards and care.

urban and rural areas, child-headed households, street children and poverty. African children are trapped by poverty, disease, war and insufficient aid.<sup>61</sup>

To ensure a protective environment for children in Africa, article 1 of the ACRWC enjoins state parties to:

“recognize the rights, freedoms and duties enshrined in the Charter and to undertake and take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter”.

The ACRWC defines a "child" as a human being below the age of 18 years. It articulates in 31 different articles - all the rights that every African child is entitled to enjoy. The universal set of standards and principles enshrined in the CRC and the rights to be enjoyed by all children, situated in the four clusters/baskets- survival, development, protection and participation are all articulated in the ACRWC.<sup>62</sup> It recognizes the child's unique and privileged place in the African society and that the African child need protection and special care. It also acknowledges that children are entitled to the enjoyment of freedom of expression, association, peaceful assembly, thought, religion, and conscience. It's article 15 and 16 aims to protect the private life of the child and safeguard the child against all forms of economic exploitation. It protects children against work that is hazardous, or that interferes with the child's education, or compromises his or her health or physical, social, mental, spiritual, and moral development.

In articles 14, 26, 27 and 28, children are to be protected against abuse and bad treatment, negative social and cultural practices, all forms of exploitation or sexual abuse, including commercial sexual exploitation, and illegal drug use. It aims to prevent the sale and trafficking of children, kidnapping, and begging by children in article 29.

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<sup>61</sup>Fleshman M, 'A troubled decade for Africa's children trapped by poverty, disease, war and insufficient aid' (2002) Volume 16 No 1, at 6 (April Edition) *Africa Recovery* - now called *Africa Renewal*.

<sup>62</sup>See the ACRWC: Article 3 - Non Discrimination. Article 4 - Best Interest of the Child, Article 5 - Survival and Development and Articles 7, 8, 9 and 10 as Participation rights.

## 2.5 The Interdependence of ACRWC with the CRC

The ACRWC uses the language of the provisions of the CRC in great details in framing the content of the rights, with striking similarities. An attempt is thus made here to identify the points of convergence and interdependence in the provisions of both treaties and instruments. The CRC and the ACRWC establish the overarching legal framework with reference to children and youth in Africa. The CRC was adopted in November 1989 by the General Assembly of the United Nations; it came into force in September 1990. Less than one year after its adoption, it became the most widely and most rapidly ratified international Convention ever. Many African States were among the first to sign and ratify it. Of the first 20 ratifications that helped the CRC come into force, nine were African States being - Benin, Egypt, Ghana, Guinea, Kenya, Mauritius, Senegal, Sierra Leone, and Togo.<sup>63</sup> The rapid pace, of which ratifications have taken place, raises doubts about the seriousness of the states' commitment. The fear of losing international prestige - highly sensitive in the case of children - might well be a motive for ratification.<sup>64</sup>

In contrast, the ACRWC was adopted by the Organization of African Unity in 1990 and came into force only in 2000, with a whopping 10 years gap. While African Union member countries' enthusiasm in ratifying the CRC is commendable, it is striking that it took ten years for the ACRWC to come into force, given the difficulty in obtaining 15 States to ratify as required by Article 47 of the ACRWC. Various hypotheses have been advanced to explain this difference in speed of ratification. According to Lloyd,<sup>65</sup> the difference is due to the most demanding nature of the ACRWC which goes beyond the CRC in many respects. De Waal<sup>66</sup> has a different interpretation. He proposes that the slow speed of the ACRWC's ratification was due to 'the likelihood that some states acceded to the Convention without their leaders genuinely acknowledging the commitments they were making, or simply in bad faith, without a real intention to carry out its demand and required commitment'.

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<sup>63</sup>Ngokwey N, 'Children's Rights in the Central Africa Sub-Region: Poverty, Conflicts and HIV/AIDS as Context' (2004) Volume 12, *The International Journal of Children's Rights*, 183–216 at 183.

<sup>64</sup>Koren M, *Tell me! The right of the Child to Information* (1996) NBLC Uitgeverij Den Haag at 177.

<sup>65</sup>Lloyd A, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' (2002) Volume 10, *The International Journal of Children's Rights*, 179–198.

<sup>66</sup>De Waal A, and Argenti N, (eds) *Young Africa: Realizing the Rights of Children and Youth* (2002) Trenton NJ, Africa World Press Inc.

A more utilitarian hypothesis is that the rush of African States to ratify the CRC stems from their assumption that funding would result from ratification or that ratification could become a condition for developmental assistance, even on a non-formal basis. There is also the fact that the ACRWC did not have the international advocacy machinery the CRC had. UNICEF country offices, for example, did not support the ratification of the ACRWC as enthusiastically as they did the CRC.<sup>67</sup> However, the coming into force of the CRC and the ACRWC heralded a new era: the era of the rights of the child. This era is characterized by a paradigm shift on how children's issues are approached and acted upon. The passage leading from a focus on children's needs to children's rights and entitlements implies a passage from charity to obligation. It is no longer (or not only) out of sympathy or to keep promises that leaders or States deal with children's issues, but it is out of duty and a need to fulfill obligations. This change of perspective is so radical that Jonsson calls it a "revolution in the rights of the child".<sup>68</sup>

It has been contended that the ACRWC was born out of the understanding by African member-states, that the CRC missed important socio-cultural and economic realities of the African experience.<sup>69</sup> It must however be recognized that the ACRWC is not opposed to the CRC, rather, the two pieces of legislation are complementary and both provide the legal frameworks through which children and their welfare are increasingly discussed in Africa. Whereas the CRC generally makes it clear that children are independent subjects and have rights, the ACRWC stresses the need to include African cultural values and experience in considering issues pertaining to the rights of the child in Africa.<sup>70</sup> The two instruments contain substantially the same provisions. Article 2 affirms the CRC's definition of a child as every human being below the age of 18. It has provisions for non-discrimination, best interest of the child, survival and development, name and nationality, rights to participation, education, leisure, cultural activities and health.<sup>71</sup>

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<sup>67</sup> See (note 63) above at page 183.

<sup>68</sup> Jonsson U, *Human Rights Approach to Development Programming* (2003) UNICEF Nairobi.

<sup>69</sup> Viljoen F, *The African Charter on the Rights and Welfare of the Child*, in Davel CJ (ed.) *Introduction to Child Law in South Africa* (2000) Lansdowne, Juta & Co Ltd.

<sup>70</sup> Olowu D, 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) Volume 10, *The International Journal of Children's Rights*, 127–136.

<sup>71</sup> Articles 5-10 of the ACRWC provides as follows: Article 5: Every child has an inherent right to life. This right shall be protected by law.

The ACRWC complements the provisions of the CRC and the ILO Convention by prohibiting child labor, abuse, torture, sexual exploitation, sale and trafficking or abduction of children and use of children in armed conflicts.<sup>72</sup> In safeguarding the welfare and interests of the child, the ACRWC contains provisions on the right to education,<sup>73</sup> the right to leisure, recreation and cultural activities,<sup>74</sup> the right to health and health services,<sup>75</sup> the right to care and support for

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Article 6: (1). Every child shall have the right from his birth to a name; (2). Every child shall be registered immediately after birth; (3). Every child has the right to acquire a nationality.

Article 7: Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 8: Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

Article 9: (1). Every child shall have the right to freedom of thought conscience and religion; (2). Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child; (3) States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Article 10: No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honor or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

<sup>72</sup>Article 15 (1): Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

Article 16 (1): States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.

Article 22 (1): States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child. (2). States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

Article 27 (1). States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; and (c) the use of children in pornographic activities, performances and materials.

Article 28: States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

Article 29 (a): States Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child; and (b) the use of children in all forms of begging.

<sup>73</sup>While Article 11 of the ACRWC states that: Every child shall have the right to an education; Article 28 (1) of the CRC also provides that: State 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.

<sup>74</sup>Article 12 of the ACWRC provides that: 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

handicapped children,<sup>76</sup> the right to protection from economic exploitation,<sup>77</sup> and the right to protection from all forms of torture, inhuman and degrading treatment.<sup>78</sup>

It should be noted however, that both the ACRWC as well as the CRC acknowledged the right of parents to provide guidance and direction to the child in the enjoyment of the right to freedom of religion.<sup>79</sup> With respect to child abuse, the ACRWC obliges state parties to “take all appropriate measures including legal, 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 parents or guardians”.<sup>80</sup>

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cultural life and the arts; Article 31 (1) of the CRC also provides as follows: 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.

<sup>75</sup>Article 14 (1) of the ACRWC provides that: Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health; Article 24 of the CRC also states that: 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.

<sup>76</sup>The ACRWC in Article 13 states that :Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community; Article 23 of the CRC also reflect that: 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.

<sup>77</sup>Article 15 of the ACRWC provides that: Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development; Article 32 of the CRC also stipulates that: 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.

<sup>78</sup>Article 16 of the ACRWC states as follows: States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child; Article 37 (1) (a) of the CRC also provides that 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.

<sup>79</sup>Article 9 of the ACWRC states that: Every child shall have the right to freedom of thought conscience and religion; Article 14 of the CRC also provides that. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

<sup>80</sup>Articles 16 (1) of the ACRWC indicates that: States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse; and article 19 of the CRC also stipulate that: 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

On the treatment of juvenile offenders, the ACRWC provides for elaborate pre-trial and trial rights for arrested, detained or accused children.<sup>81</sup> Article 17 of the ACRWC in conforming with article 40 of the CRC sets the standards on the administration of juvenile justice as it concerns children in conflict with the Law. Articles 18, 19, 20, 24 and 31 enjoins protection and parental care and responsibilities for the child, placement of the child within a family, with special protection stipulated for adopted children, those with disability and refugee children. Article 30 provides for protection children of imprisoned mothers.

Under both instruments, a child is defined as a human being under the age of eighteen years. The CRC contains a proviso to the effect that the definition of a child may be adjusted to accommodate laws under which a child attains majority at an earlier age. There is no such qualification in the ACRWC, so that under its terms, all juvenile offenders less than eighteen years of age are entitled to the special protection offered to juveniles.<sup>82</sup> This is commendable in view of the divergent criminal justice systems in Africa and the ACRWC has a clearer definition of the child. In giving the African children a regional perspective for the enjoyment of rights, its article 31 went beyond the rights to prescribe the responsibility for children.<sup>83</sup>

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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.

<sup>81</sup>Article 17 of the ACRWC states as follows: Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others; .and Article 37 (d) of the CRC also reflect that: 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.

<sup>82</sup>Article 2 of the ACRWC states that: For the purposes of this Charter, a child means every human being below the age of 18 years; Article 1 of the CRC also states as follows: 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.

<sup>83</sup>Article 31 of the ACRWC states that: Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability and such limitations as may be contained in the present Charter.

## **2.6 Normative and structural limitations of the ACRWC and the CRC: critic's perspectives**

The ACRWC however could be said to have some draw backs, because it does not protect children from life imprisonment without the possibility of release. When dealing with criminal activities, there is no provision for alternative measures such as community rehabilitation. There was no mention of the rights such as to remain silent, to be protected from retroactive legislation, to challenge detention, or to be compensated for miscarriages of justice. Article 20(1)(c) states that parents are “to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child” but this provision can be construed as supporting physical punishment by parents as “domestic discipline” is not clearly defined. In the same vein, article 31 stipulates children’s responsibilities, where children are required to respect parents, superiors and elders at all times. This in practice, could conflict with the child’s right to participate in decisions that affect them.

While both the CRC and ACRWC recognized the child’s right to life, neither of them has any provision for the protection of the unborn child. Considering the undisputed vulnerability of the unborn child and the hazards which modern society increasingly poses to unborn children, this silence is anomalous.<sup>84</sup> Scholars like Viljoen<sup>85</sup> and an expert on the African human rights system have also identified other potential limitations in the operation of the ACRWC, particularly the omission of a provision, which requires countries to fully commit the use of their resources towards the implementation process. This in essence meant that there is no way of ensuring or forcing States to provide resources to ensure the realization of rights for the African child. This is coupled with another grievous omission on children with disability. Even though, the ACRWC stipulates special protection measures for children with disability,<sup>86</sup> it failed to expressly include disability as a prohibited ground of discrimination.<sup>87</sup> Children with disability

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<sup>84</sup>Olowu (note 70 above) at page 131.

<sup>85</sup>Viljoen (note 69 above) at page 214-215.

<sup>86</sup>Article 13 of the ACRWC: Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

<sup>87</sup>Article 3 of the ACRWC: Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

continue to be stigmatized and excluded in spite of the broad provisions on the rights to protection. In addition, unlike the CRC, which specifically ascribes rights to children of minorities, there is no similar provision in the African Charter. It was not taken into consideration that many countries in the region have significant populations of minority and indigenous groups.

In spite of the manifest omissions reiterated above, the ACRWC, remains a potent weapon for children's rights activism in the region of Africa, that will be applied in public interest cases involving children. While the pace of ratification of the Charter by African States has been remarkably slow, the Charter remains nonetheless a veritable tool for the advancement of children's rights in Africa.<sup>88</sup>

Series of criticisms and seemingly structural limitations were also recorded against the CRC. This is in spite of the fact that the CRC provides a framework for implementation through government policies and not through interference with individual families.<sup>89</sup> It had a startling success in so far as it was quickly ratified by every country in the world barring Somalia and United States of America. While Somalia does not have a governmental structure to ratify an international treaty, the American opposition to ratifying the Convention was based on an incorrect interpretation of its provisions and of its underlying aims. The opposition persisted at such high quarters when important personalities such as Clinton<sup>90</sup> stated that children's rights were a "slogan in need of a definition". She further argued that children should be granted rights only appropriate to their maturational abilities. The definition of what those rights are and should be, became difficult to enforce. No wonder then, that till date the American government has still not ratified the Convention.

Limitations of the CRC are indicated by the barrage of criticisms it attracted. The criticisms levied are captured based on definitions of children's rights, the four baskets of rights and the principles-already referred to extensively while discussing the contents of the CRC and the

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<sup>88</sup>Olowu (note 70 above) at page 134.

<sup>89</sup>Kilbourne S, 'The Wayward Americans-Why the US has not Ratified the UN Convention on the Rights of the Child' (1998) Volume 10, *Child and Family Law Quarterly*, 243.

<sup>90</sup>Rodham H, 'Children under the Law' (1973) Volume 43, *Harvard Educational Review*, 487-514. She was then Hillary Rodham, but now Hillary Clinton, an attorney and former first lady and wife of the President of the United States of America and now Secretary of State - United States of America.

three Declarations of the Child.<sup>91</sup> Starting with Wellman,<sup>92</sup> he persuasively argues that there is danger that a proliferation of the language of rights devalues the CRC appeal. Then Fortin<sup>93</sup> raised two sets of criticisms also against the language of rights in the Convention. The first is the theoretical and the second practical. Fortin explained the first in the context of establishing a theoretical justification for the concept of children's rights. She opined that though the rights seems acceptable as moral claims, but many of the rights listed by the Convention are far too vague to be translated into international or domestic law. Fortin further argued that by listing 40 substantive legal rights, the Convention certainly contributes to this process of rights devaluation and that among those 40, there are many that are in reality, no more than aspirations regarding what should happen if governments were to take children's needs seriously.<sup>94</sup> Fortin in expressing the limitations of the survival and development rights made reference particularly to article 24 and 27<sup>95</sup> of the CRC, which requires government to recognize the child's rights to enforcement of the highest attainable standard of health. She opined that these provisions could never be translated into genuine legal rights. Fortin's criticisms remains relevant as shown by the way the health situation and environment of children in most countries remain pathetic especially in the face of HIV and AIDS pandemic as shown in Chapter three.

Under the participation rights, Fortin went further to show that there is also an obvious tension between the position adopted by article 5<sup>96</sup> which respects the parents right to direct and guide their children, with that adopted by other provision which promote a child's capacity for independence as shown in article 12<sup>97</sup>. Fortin stated that the fact that article 12(1) ends with the

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<sup>91</sup>See (notes 31 and 32) above.

<sup>92</sup>Wellman C, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (1999) Westview Press.

<sup>93</sup>Fortin J, *Children's Rights and the Developing Law* (2003) Cambridge University Press 2<sup>nd</sup>ed. Fortin's write up was extensively relied upon in this segment.

<sup>94</sup>*Ibid*, at page 49.

<sup>95</sup>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.

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.

<sup>96</sup>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.

<sup>97</sup>Article 12: 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.

phrase “the views of the child being given due weight in accordance with the age and maturity of the child” provides some scope for a paternalistic restriction of the underlying aims of the article.<sup>98</sup> Other critics like Van Bueren have also raised issues in agreement with Fortin. It’s been observed that the wording of article 5 itself is fraught with difficulty, since those obliged to fulfill it are the very individuals who may have a personal interest in ensuring that children do not exercise their rights.<sup>99</sup>

Still on participatory rights, critical references have also been made to the scanty participation of third world countries. The relatively limited attention paid to the special circumstances and difficulties children are experiencing in those countries are noted, despite the universal ratification. An intrinsic criticism is further directed towards the requirement of children’s participation enshrined still in article 12 complemented by article 13.<sup>100</sup> One of the serious flaws of the Convention then is that, whereas provisions on the broad rights to participation include rights to freedom of expression, to freedom of thought, conscience and religion, to free association and peaceful assembly, to privacy and access to information,<sup>101</sup> it does not give children a voice in the international implementation process.<sup>102</sup>

In considering the second more practical and more fundamental weakness, Fortin opined that the Convention has no direct method of formal enforcement of any of its provisions, either

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<sup>98</sup>Fortin (note 93 above) at page 42.

<sup>99</sup>Professor Van Bueren G, is one of the original drafters of the United Nations Convention on the Rights of the Child and also helped draft the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the UNHCR Guidelines on Refugee Children and the United Nations Programme of Action on Children in the Criminal Justice System. See also Van Bueren G, *The International Law on the Rights of the Child* (1995) Nijhoff, Dordrecht, Kluwer.

<sup>100</sup>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.

<sup>101</sup>Article 14 (1): States Parties shall respect the right of the child to freedom of thought, conscience and religion.

Article 15 (1): States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

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.

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.

<sup>102</sup>Goodman D, ‘Analysis of the First Session of the Committee on the Rights of the Child’ (1992) Volume 10 No I, *Netherlands Quarterly of Human Rights*, 47.

available to the right-holders themselves, or the UN Committee on the Rights of the Child. She stated that there are no courts which can assess claims that the provisions of the Convention have been infringed. That government is merely directed to undertake “all appropriate legislative, administrative and other measures to implement the rights contained in the Convention.”<sup>103</sup> In practical terms, Fortin’s opinion is quite correct as this is further deliberated upon in the next Chapter. There must be a stricter mechanism to enforce the provisions of the Convention, which remains weak till date.

However in the midst of these criticisms the Committee on the Rights of the Child mandated to enforce the CRC provisions, has also criticized attempts to exploit the phrase which dilutes children’s participation rights, and that is all the Committee could do - raise criticisms.<sup>104</sup> Considering this weak position of the Committee it could be argued that governments’ attitude to implementing the broad provisions not only of the participation rights of children as shown above, will continue to be apathetic if the enforcement procedures are not improved.

The next argument is against the principle of the ‘best interest of the child’.<sup>105</sup> Despite the principle’s existence in a variety of domestic legal systems, the best interests of the child has been given very diverse interpretations and is yet to acquire much specific content. Alston<sup>106</sup> argues that indeterminacy is a characteristic feature of human rights norms generally and suggests that the CRC ‘as a whole goes at least some of the way towards providing the broad ethical or value framework,’ giving ‘a greater degree of certainty to the content of the best interests principle’.<sup>107</sup> The rights encompassed by the CRC provide a starting point for distinguishing ‘primary’ interests from other interests.<sup>108</sup> The best interest principle has been

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<sup>103</sup>Article 4 of the CRC: ‘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’

<sup>104</sup>The effectiveness and ineffectiveness of the UN Committee on the Rights of the Child is fully discussed in Chapter 3, Section 3.4.

<sup>105</sup>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.

<sup>106</sup> Alston P, (ed) *The Best Interests of the Child. Reconciling Culture and Human Rights* (1994) Oxford University Press, Oxford, at 4-5.

<sup>107</sup> *Ibid*, at page 19.

<sup>108</sup> *Ibid*, at page 11–12.

heavily criticized for its indeterminacy.<sup>109</sup> The Committee on the Rights of the Child has stated that in the asylum context, determination of a child's 'best interests' requires 'a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs'. Notwithstanding this, writers like Alston, Tuitt and Grover<sup>110</sup> have expressed concern that the principle is open to different cultural interpretations which may undermine the basic consensus that the CRC seeks to protect and that the language used in some of the articles around the best interest principles is quite limiting.

In discussing the *limiting* nature of some of the provisions of the CRC, Grover also in an insightful article examined the limiting language in article 1 of the CRC and its accompanying optional protocol. She commented on how that language serves to circumscribe the universal rights of the child. She based her argument<sup>111</sup> on the fact that the limiting language exempts states parties from the obligations of the CRC where the age of majority is less than 18 by reason of the definition of a child which states as follows:

“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*”.

She reiterated that, article 1 places a limit on who will be afforded its protections depending on the age of majority in the law applicable to the child in the home country. She commented that the article specifies that certain children will be removed from the protections provided by particular articles of the CRC while others will not. Those countries would be depending on what is the national law in their home country regarding age of majority, thus leading to a host of contradictions.

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<sup>109</sup>Tuitt P, 'The State, the Family and the Child Refugee' in Fottrell D, (ed) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000) The Hague, Kluwer Law International.

<sup>110</sup>Grover S, 'On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child' (2004) Volume 12, *The International Journal of Children's Rights*, 259–271, hereinafter referred to as "Grover". However, in Chapter 4, the principle of the 'best interest of the child' was applied in sundry cases and judicial decisions especially in South Africa. The principle was entrenched in South Africa's legal systems and established to promote and enforce the 'best interests' of children contrary to opinions and criticisms expounded by Grover and others.

<sup>111</sup>*Ibid*, at page 259.

Furthermore, the best interest principle, when read in conjunction with article 2<sup>112</sup> on the principle of non-discrimination has also been heavily criticized by Grover. She states that, article 2 ostensibly prohibits discrimination on any ground including national origin while at the same time being qualified by the discriminatory premise in article 1, where children in particular circumstances are or will be subjected to the national laws. The wording of article 2 regarding ensuring rights “to each *child*” then allows some states parties, not to afford protection in regard to certain areas, to all persons under eighteen. This is the case in that not all states parties may classify such persons as children in respect of a particular matter as is permitted under article 1. Nevertheless, states parties have no legal obligation to have the best interests of young people as the primary guiding principle in decision-making concerning this group, where certain such persons under 18 are not defined as children.<sup>113</sup> Grover concluded by saying that an amendment to the Convention on the Rights of the Child is essential, if it is to be brought in line with the principles espoused in the Universal Declaration of Human Rights. That, if this is done, all other limiting language in the remaining articles which undermine children’s universal rights via direct or indirect reference to exemptions under national law would also be removed.<sup>114</sup>

Apart from Grover’s assertion, recognition of rights for children or definition of who is a child has provoked diverse opinions from different scholars and a lack of consensus on the meaning of children’s rights.

The term - children’s rights evoke different meanings for different people at different ages. Evidently for some, the focus was on rights granted to children by society. For others, the emphasis was on rights possessed by children, in which those children were free to use and express themselves as they wished. Children's rights are the human rights of children with particular attention to the rights of special protection and care afforded to the young. These include their right to association with both biological parents, human identity as well as the provision of basic needs for food. It includes free and compulsory universally state-paid basic

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<sup>112</sup>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, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

<sup>113</sup>Grover (note 110 above) at page 261.

<sup>114</sup>*Ibid*, at page 269.

education and health care; application and administration of criminal laws apposite for the age and development of the child.<sup>115</sup>

Interpretations of children's rights range from allowing children the capacity for autonomous action to the enforcement of children being physically, mentally and emotionally free from abuse. Other definitions include the rights to care and nurturing.<sup>116</sup> Children's rights are defined in numerous ways, including a wide spectrum of civil, cultural, economic, social and political rights. Rights tend to be perceived in terms of two general types. Those advocating for children as autonomous persons under the law and those placing a claim on society for protection from harms perpetrated against children because of their dependency. These perceptions have been labeled as the right of empowerment and as the right to protection.<sup>117</sup> Amnesty International<sup>118</sup> openly advocates four particular children's rights, including putting an end: to juvenile incarceration without parole; to the recruitment of children for military use, to death penalty for people under 21, and raising awareness of human rights in the classroom. Human Rights

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<sup>115</sup>Articles 9, 10, 24, 28 and 40 of the CRC provides as follows: 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.

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.

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.

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.

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.

<sup>116</sup>Bandman B, *Children's Rights to Freedom, Care, and Enlightenment* (1999) Routledge, at page 67.

<sup>117</sup>Mangold SV, *Transgressing the Border between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System* (2002) New England School of Law.

<sup>118</sup>'Children's Rights', Amnesty International accessed at [www.amnesty.org/](http://www.amnesty.org/), on 4<sup>th</sup> March, 2009.

Watch,<sup>119</sup> an international advocacy organization, includes child labor, juvenile justice, orphans and abandoned children, refugees, street children and corporal punishment in its own list.

One scholarly study<sup>120</sup> identified the following individual rights - freedom of speech, freedom of thought, freedom from fear, freedom of choice and the right to make decisions and ownership over one's body - and emphasized that these *individual* rights "allow children to grow up healthy and free". Another scholar<sup>121</sup> describes rights as "just claims or entitlements that derive from moral and/or legal rules".

From the above statements and definitions, it can be inferred that the term children's rights in evoking different meanings were all made in reference to articulations in the Convention of the Rights of the Child by the international community. The rights listed by these international advocacy organizations and protagonists' cover the broad spectrum of children's rights and aspirations stipulated in most of the international and regional covenants. It shows that there is a concern to ensure that children should be accorded substantive rights, civil rights, political, economic and social rights. It further shows that children are entitled to special measures of protection that they require as children. The definitions indicate that children are human beings that should be accorded special rights to enable them grow into responsible adults.

In the same vein, there have been philosophical considerations of what kind of rights children have, if they do have rights at all. The various debates shed light on both the nature and value of rights and on moral status of children. Some have asked - should children have rights? There are those who claim that children should have all the rights that adults presently have. These are called 'liberationists' and include scholars like - Holt, Farson and Cohen.<sup>122</sup> They saw the demand for equal rights for children as a means of drawing attention to the discrimination that children suffer, in comparison to how adults were treated. They sought to improve the children's condition. The liberationist viewed children as equals of adults, and argued from the point of

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<sup>119</sup>Children's Rights', Human Rights Watch accessed at [www.hrw.org/](http://www.hrw.org/), on 4<sup>th</sup> March, 2009.

<sup>120</sup>Calkins CF, 'Reviewed Work: Children's Rights: Toward the Liberation of the Child' by Paul Adams (1972) Volume 49 No 4, *Peabody Journal of Education*, 327.

<sup>121</sup>Freeman M, *Human Rights An Interdisciplinary Approach* (2002) Cambridge Polity Press at page 6.

<sup>122</sup>Holt JC, *Escape from childhood: The Needs and Rights of Children* (1975) Hammondspport, Penguin; Farson R, *Birthrights* (1974) London, Collier Macmillan; and Cohen H, *Equal Rights for Children* (1980) Totowa NJ, Littlefield, Adams and Co.

view of discrimination suffered by children. The issue surrounding discrimination against children was further brought out by Freeman<sup>123</sup> who reiterated that:

“Children are discriminated against and are especially vulnerable because they have fewer resources - materials, psychological, relational - upon which to call in situations of adversity. They are usually blameless, and certainly did not ask to come into the world. “For too long they have been regarded as objects of concern (sometimes, worse, as objects), rather than as persons, and even to-day they remain voiceless, even invisible, and it matters not that the dispute is about them”.<sup>124</sup>

In agreement with Freeman and the liberationists, Besson<sup>125</sup> noted the level of vulnerability faced by children and also postulated that:

“children require special measures of protection that take into account their particular *vulnerability vis-à-vis* the State, but also *vis-à-vis* their families and other individuals, and that children may indeed be discriminated against because of actions that their parents or family members have engaged in and hence in a way that is mediated through their parents”.<sup>126</sup>

The liberationists may be said to have perceived children’s rights from the perspective of protecting children from discrimination. Besson’s and Freeman’s opinions are closely connected to the perspectives of the international community who have devoted considerable attention to problems of discrimination in specific International and Regional treaties.<sup>127</sup> State parties are

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<sup>123</sup>Freeman M, ‘Why it Remains Important to Take children's Rights Seriously’ (2007) Volume 15, *The International Journal of Children's Rights*, 5-23.

<sup>124</sup>*Ibid*, at page 17.

<sup>125</sup>Besson B, ‘The Principle of Non-Discrimination in the Convention on the Rights of the Child’ (2005) Volume 13, *The International Journal of Children's Rights*, 433–461.

<sup>126</sup>*Ibid*, at page 443.

<sup>127</sup>Especially Article 2 (1) of the CRC which stipulates that: 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, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; CEDAW in Articles 2 and 3 which provides that : States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women; (3) States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full

called upon to prohibit discriminatory practices against children and women. The extent to which children around the world are seriously affected by discriminatory practice continues to be gravely overlooked.

Conversely, there are those who think that children should have some but not all the rights which adults have. These groups are sceptical about attributing rights to children, arguing that children are not qualified as adults are, to have rights. Notwithstanding the lack of rights, children could be assured of adequate moral protection by other means<sup>128</sup> but not by being accorded any appreciable rights like adults. Purdy<sup>129</sup> for example falls into this category. Her writing postulated a stand against children's liberationist. She argued that:

“.....an acceptance of the ‘liberationist demand’ would, ‘resign’ us to a world where ‘many people function worse, and take less account of the needs of others’. She sees the roots of children’s liberation as lying in ‘overly–individualistic theories’, and libertarianism cannot make room for the kind of cooperation and sacrifice necessary for a decent world, nor can children be provided with the ‘intellectual and emotional pre-requisites for that kind of cooperation and sacrifice in the libertarian society’”.<sup>130</sup>

Purdy here in antagonizing the liberationist, was intently standing against the possibilities of according rights to children. She was quite unsparing in her views and seemed not at all an advocate of children's rights.

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development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men; and Article 3 of the ACRWC also, which states as follows: Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

<sup>128</sup>Brighouse H, 'What Rights (If Any) Do Children Have?' in Archard D and Macleod C. (eds) *The Moral and Political Status of Children* (2002) Oxford University Press, Oxford at 31–52.

<sup>129</sup>Purdy L, 'Why Children Shouldn't Have Equal Rights' (1994) Volume 2, *International Journal of Children's Rights*, 223–258.

<sup>130</sup>*Ibid*, at page 237.

Brennan's<sup>131</sup> approach on the other hand is more novel, even though she was also anti-liberationist. To her, the model that makes most sense is 'the gradualist one' where children pass through a process in which initially they are 'creatures' whose interests are protected by rights to being persons 'whose rights protect their choices'.<sup>132</sup> The main reason for not acknowledging that children have autonomy, as she saw it, was that 'often children did not choose well or wisely'.<sup>133</sup>

Arneil<sup>134</sup> however, took a different approach and could also be categorized as an antagonist of children's rights. She argued that we had put too much faith in the power of rights and rights discourse and that this has had bad consequences for children. Arneil's view articulated the ethics of care, emphasizing responsibilities over rights, offering a better way of answering children's needs than relying on rights to achieve this or that. In her view, 'rights theories do not see children as children'.<sup>135</sup>

It is not surprising to see Freeman, a staunch liberationist and advocate of children's rights disagree with Arneil's vision and critiqued that her assertions, were neither new nor different, but could be evaluated as an idea to unite the 'New Right', communitarians and feminists, as well as many on the left. In his write up,<sup>136</sup> he asserted that a number of responses could be inferred from Arneil's views in that it describes/prescribes a future so far from present realities that one wonders whether it is attainable. He further stated that, Arneil's purported views envision, as so often, the child as an object of concern rather than a subject or a participant. That she oversimplifies the distinction between adults and children, perhaps neglecting even Brennan's 'gradualist' model. He opined that she fails to see the importance of rights where relationships, for whatever reason, are poor. He further stated that Arneil underestimates the part that a rights agenda can play, in forging relationships and that she overlooks the asymmetry of relationships where rights, and therefore power, is on one side only.

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<sup>131</sup>Brennan S, 'Children's Choices or Children's Interests: Which Do Their Rights Protect?' in Archard D and Macleod C. (eds) *The Moral and Political Status of Children* (2002) Oxford University Press, Oxford at 53–69.

<sup>132</sup>*Ibid*, at page 54.

<sup>133</sup>*Ibid*, at page 59.

<sup>134</sup>Arneil B, 'Becoming versus Being: A Critical Analysis of the Child in Liberal Theory' in Archard, D and Macleod, C. (eds) *The Moral and Political Status of Children* (2002) Oxford University Press, Oxford at 70–94.

<sup>135</sup>*Ibid*, at page 93.

<sup>136</sup>Freeman (note 123 above) at page 19.

Given the views of liberationists like Freeman and antagonists like Purdy and Arneil, in another extreme are 'sceptics', who think that children should not have any rights at all and are very sceptical about attributing rights to children. This level of opposition to children's rights far outdates any current trend in society, with recorded statements against the rights of children dating to the 1200s and earlier.<sup>137</sup> Opponents to children's rights believe that young people need to be protected from the adultcentric world, including the decisions and responsibilities of that world.<sup>138</sup> The majority of opposition stems from concerns related to national sovereignty, states' rights and the parent-child relationship and in the adult society, childhood is idealized as a time of innocence, a time free of responsibility and conflict, and a time dominated by play.<sup>139</sup> Financial constraints and the "undercurrent of traditional values in opposition to children's rights" are cited, as well.<sup>140</sup> Griffin<sup>141</sup> for example, argued that human rights are best reserved for 'agents' and infants are not capable of agency, though children are. He therefore sees children as acquiring rights in stages. Griffin asserts that:

"There is something very strange about thinking of children as bearers of rights. The further an agent departs from the liberal model of the competent rational person, the less appropriate it seems to be to attribute rights'. It goes without saying that it was once thought odd to attribute rights to women, who were certainly thought to fall short of the 'liberal' model".

Brighthouse on the other hand does not have difficulty with seeing children as bearers of welfare rights but, like Griffin, he has problems with agency rights, at least as far as 'young children' are concerned.

From the above philosophical thoughts, in engaging with both proponents and opponents of children's rights, one can say that - everyone concedes that children must have some rights as

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<sup>137</sup>See (note 1) above.

<sup>138</sup>DeLamater JD, *Handbook of Social Psychology* (2003) Springer at 150.

<sup>139</sup>Lansdown G, 'Children's Rights', in B. Mayall (ed.) *Children's Childhood: Observed and experienced* (1994) The Falmer Press London at 33-34.

<sup>140</sup>Covell k and Brian Howe R, *The Challenge of Children's Rights for Canada* (2001) Wilfrid Laurier University Press at 158.

<sup>141</sup>Griffin J, 'Do Children Have Rights' in Archard D and Macleod C, (eds) *The Moral and Political Status of Children* (2002) Oxford University Press, Oxford at 19–30.

we have not seen any purported defenses of the torture of children. But many of the opponents of children's rights either cannot see the point in talking about children's rights, or are prepared to identify only the most limited range of rights so far as children are concerned.

Thus, Goldstein, Freud and Solnit,<sup>142</sup> for example, identified only three rights which they believe should be available to children: to autonomous parents, to be represented by parents and to parents who care. Goldstein, Freud and Solnit's assertions can be linked with Guggenheim's<sup>143</sup> who offers a trenchant analysis of the most significant debates in the children's rights movement, particularly those that treat children's interests as antagonistic to those of their parents. He argues that "children's rights" can serve as a screen for the interests of adults who may have more to gain than the children for whom they claim to speak.

More importantly, Guggenheim in his book suggests that children's interests are not the only ones or the primary ones to which adults should attend and that a 'best interest of the child's' standard often fails as a meaningful test for determining how best to decide disputes about children. He seems to offer children only one right and that is the right 'to be raised by parents who are minimally fit and who are unlikely to make significant mistakes in judgment in childrearing'.<sup>144</sup> Guggenheim, like Goldstein, Freud and Solnit before him, are defending parents' rights, not children's rights, which he is candid enough to admit is an inconvenience which obstruct the greater good.

It may be prudent to borrow from Freeman's words, that:

..... "these are just some of the most prominent arguments of those who reject the case to take children's rights seriously. It is important that the debate should be kept alive and healthy. The opponents have not yet toppled political initiatives of which the UN Convention is only the best-known example. The case for children's rights will prevail. We

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<sup>142</sup>Goldstein J, Freud A and Solnit AJ, *Beyond The Best Interests of The Child* (1973) New York, Free Press; Goldstein J, Freud A and Solnit AJ, *Before The Best Interests of The Child* (1980) New York, Free Press; and Goldstein J, Freud A and Solnit AJ, *The Best Interests of The Child* (1996) New York, Free Press.

<sup>143</sup>Guggenheim M, *What's wrong with children's Rights* (2005) Cambridge Massachusetts, Harvard University Press.

<sup>144</sup>*Ibid*, at page 45.

have to believe this because out of it will emerge a better world for children and this will redound to the benefit not only of children but of all of us".<sup>145</sup>

To wrap up this section, we find those attributing rights to children, those who opposed the proposition that children have rights and those advocating limited rights for children. But as will be shown later in the write up, we find an emerging child's law jurisprudence especially in South Africa, where the views of child's rights opponents are debunked by courageous judges affirming and enforcing specific rights in favour of children. We find judgements approving Freeman's assertions by causing *children's rights to prevail* and at the same time opposing Guggenheim's opinions. Children's rights have been upheld contrary to parental and conjugal rights.

## **2.7 National legislative and administrative measures adopted by selected countries**

In the face of the seeming limitations expounded upon by the critics on the rights and principles of the Conventions, it is important to state that the adoption of the Convention has brought to fore the way all children must be treated and the expectation from Governments. It is also significant to state that, but for its supposed and entire faults raised by these critics, which does not invalidate the contextual framework and its universality, the Convention to me remains a remarkable document. It has provided a comprehensive set of standards against which ratifying states may measure the extent to which they fulfill children's rights. Notwithstanding the criticisms, and the perceived limitations, State parties are mandated to adopt and implement its salient provisions. States are to ensure fulfillment of rights for children and periodically review and analyze their domestic legislation to ensure its conformity with the human rights standards set in this same Convention. The CRC outlines the human rights to be respected and protected for every child under the age of 18 years, and requires that these rights are implemented in the light of the Convention's guiding principles. Article 4<sup>146</sup> of the Convention enjoins State parties to take all appropriate legislative, administrative and other measures for the implementation of the

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<sup>145</sup>Freeman (note 123 above) at page 19-20. In confirmation of Freeman's assertions, we find the courts, especially in South Africa allowing children's rights to prevail above that of the parents. For example, in *P and Another v P and Another* discussed in chapter 4, the court was courageous and impassionate and chose to disrupt the biological bond between the child and her parent, found undesirable restoration of effective custody to the biological parents and enforced the child's rights as opposed to the parents' rights.

<sup>146</sup>See (note 103) above.

rights recognized in the CRC. This section therefore, examines the extent to which the three selected countries have translated into reality, the standards set by these international and regional treaties at the national and domestic level.

Detailed situation of children at the national/domestic is brought up in chapters three and four to confirm the assertions of scholars like Hart<sup>147</sup> who had written that childhood was an almost universally grim experience. Pappas,<sup>148</sup> also noted that children were commonly “neglected, abandoned, abused “(sexually and otherwise”), sold into slavery, mutilated and even killed with impunity”. From the available data and information documented in the ensuing chapters, these assertions are proven to be true. The situation of children reported herein, further corroborates earlier assertions of situation of children in Africa.<sup>149</sup> It is to show that African Children are still affected by different types of abuses, ranging from economic and sexual exploitation, to gender discrimination leading to unequal access to education and health care, and involvement in armed conflict.

To this extent, Nigeria for example, having ratified the CRC and ACRWC has integrated some of the human right principles in her 1999 Constitution and other legal frameworks to protect the rights of children. Particularly, the Constitution of the Federal Republic of Nigeria, 1999 in its Preamble<sup>150</sup> guarantees certain fundamental rights to everyone including children. These rights are contained in chapter IV of the Constitution, and specifically its section 42<sup>151</sup> which encapsulates the right to freedom from discrimination and provided for non-discrimination on the basis of gender, religion, ethnicity, age or circumstances of birth against any citizens including children. Section 12<sup>152</sup> of the 1999 Constitution of Nigeria stipulates the provision for ratification of international treaties by the national assembly. In compliance, a draft Child’s Rights Bill aimed

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<sup>147</sup>Hart (note 15) above at page 55.

<sup>148</sup>Pappas (note 16) above at page xxviii.

<sup>149</sup>Fleshman (note 61) above at page 6.

<sup>150</sup>The people resolved: “.....To provide for a Constitution for the purpose of promoting the good government and welfare of all persons (underlined by me) in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people.....”

<sup>151</sup>See also chapter 1, section 1.3.1.

<sup>152</sup>Section 12 (1) of the 1999 Constitution states that: (1) No treaty between the Federation and any other country shall have the force of Law except to the extent to which any such treaty has been enacted into law by the National Assembly.

at principally enacting into Law in Nigeria the principles enshrined in - the CRC, ACRWC and ILO 182 was promulgated by the national assembly in July 2003.<sup>153</sup>

South Africa ratified the CRC, shortly after the advent of democratic rule, in June 1995. In the process leading to the formulation of the National Programme of Action that followed ratification, the matter of law reform for children was identified as an important priority. The Constitution of South Africa in section 28<sup>154</sup> affirms the provisions of the CRC, the ACRWC and the ILO Convention on the child's right to nationality, family care, basic health, protection from exploitative labor including that the best interest of the child should be of paramount importance. Following advocacy undertaken by the AIDS Law Project,<sup>155</sup> Human Rights Watch and many other civil society organizations, the Children's Act No. 38 2005 domesticating the CRC and other international and regional instruments in South Africa<sup>156</sup> was enacted in June 2006. It sets

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<sup>153</sup>The Bill was assented to by the President of the Federal Republic of Nigeria in September 2003 and promulgated as the Child's Rights Act 2003, hereinafter referred to as the "CRA". The structure of the CRA has been informed by the mandate to provide a legislation which incorporates and consolidates on the National sphere, various legislation relating to children into one single legislation, such as the Nigerian Labor Law, the Criminal Code of the Southern Part and the Penal Code of the Northern part; and the CRC, ACRWC and ILO Conventions at the International and Regional levels. The CRA specifies rights and responsibilities of children as well as the duties and obligations of government, parents, other authorities, organizations and bodies. Within the context of this structure, the Act was divided into 277 Sections, 24 parts and 11 schedules. The various parts address broad rights and responsibilities, including provisions on Non-discrimination and Participation Rights, Survival Rights, Rights and Responsibilities of the Child, Protection Rights, Provisions on the Establishment of Family Courts and the Child Justice Administration, Promotion of the Welfare of the Child in Need of Care and in Institutions, and Establishment of Child Rights Implementation Committees. The Act stipulates within its miscellaneous sections, duties and responsibilities of specific government institutions for children. The schedules for their own parts deal with rules, regulations, procedures and specified forms for applications and decisions.

<sup>154</sup>Section 28 (1)(a-f) of the Constitution of South Africa states as follows: 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 health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labor practices; (f) not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

<sup>155</sup>The AIDS Law Project is a human rights organization that seeks to influence, develop and use the law to address the human rights implications of HIV/AIDS in South Africa, regionally and internationally, accessed at [alp.org.za](http://alp.org.za), on 12<sup>th</sup> April 2009.

<sup>156</sup>The Preface to the Children's Act No. 38 2005, stated the need to extend particular care to the child as stated in the Geneva Declaration on the rights of the Child, in the African Charter on the Rights and Welfare of the Child and as recognized in the Universal Declaration of Human Rights, hereinafter referred to as the "Children's Act".

out the general principles as stipulated in the CRC especially on the best interest of the child,<sup>157</sup> child's participation,<sup>158</sup> social cultural and religious practices, health care, and access to court, enforcement of rights and responsibilities of children.<sup>159</sup> The provisions emphasized prioritization of the best interest of the child, the right of the child to being able to participate in any matter concerning that child, children living with disability or chronic illness and a child's right of access to court. The Children's Act of South Africa like the CRA of Nigeria consolidates and prescribes similar provisions relating to the welfare and protection of children.<sup>160</sup>

The Children's Act also clarifies the grey area that currently exists in relation to the age of adulthood, affirms the provision of the Constitution of South Africa, the African Charter on the Rights and Welfare of the Child and that of the CRC on the definition of a child by defining a child as someone under the age of 18.<sup>161</sup> Section 26<sup>162</sup> of the South African Constitution provides everyone, including children, the right of access to adequate housing. Therefore, every measure taken to realize section 26 is indirectly applicable to the realization of children's right to basic nutrition, shelter, basic health care services and social services shelter as stipulated in section 28(1)(c).<sup>163</sup>

Unlike South Africa and Nigeria that have attempted to consolidate all laws, in relation to children into the CRA and the Children's Act, Ethiopia in ratifying the CRC have several and

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<sup>157</sup>The Children's Act, section 7(1)(a) states that: Whenever a provision of this Act requires the 'best interests of the child' standard to be applied, the following factors must be taken into consideration where relevant, namely (a) the nature of the personal relationship between: (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances.

<sup>158</sup>Child's participation rights are articulated in section 10 of the Children's Act and state as follows: Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

<sup>159</sup>Section 16 of the Children's Act: Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

<sup>160</sup>For example the provision on 'best interest principle' are articulated in section 1 of the CRA, 'child's participation' provision is captured in section 6 and 'Rights and Responsibilities of the Nigerian Children' are stated in section 19 of the CRA.

<sup>161</sup>Section 17 of the Children's Act states that: 'A child, whether male or female, becomes a major upon reaching the age of 18 years'.

<sup>162</sup>Section 26 of the South African Constitution states: (1). Everyone has the right to have access to adequate housing; (2). The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right; and (3). No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

<sup>163</sup>See (note 154) above.

varied legislation and Proclamations for the protection of her children.<sup>164</sup> Ethiopia domesticated the CRC through a national legislation tagged Proclamation No 10 of 1992, while other Conventions such as the ACRWC and the ILO Convention 182 on the Worst Forms of Child Labor were ratified by the government through the Ratification Proclamation No.283 of 2002. Further, article 36<sup>165</sup> of the Constitution of the Federal Republic of Ethiopia provides the umbrella articles for the protection of the rights of the child as it relates to the rights that have been enshrined in the CRC. The Constitution provides the basis for the protection of children, domesticates all international human right instruments, which Ethiopia has ratified and states in Article 9(4) that:

“All international agreements ratified by Ethiopia are an integral part of the law of the land”.

It is however necessary to mention that, the Ethiopian Government has been revising legislation that does not conform to the provisions of the Convention especially the Ethiopian Penal Code and Family Code. The Preface to the Penal Code<sup>166</sup> and the Preamble to the Family Code<sup>167</sup> provided the reasons for the revision premised on international agreements ratified by Ethiopia.

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<sup>164</sup>Such as: The Constitution of the Federal Democratic Republic of Ethiopia 1994; Penal Law 1957 replaced by the Revised Penal Law.2004; The Criminal Procedure Code of Ethiopia. Proclamation No.185 of 1961; The Civil Code of Ethiopia. Proclamation No. 165 of 1960; The Revised Family Code of Ethiopia. Proclamation No. 213 of 2000; and the Labor Proclamation No. 377 of 2003.

<sup>165</sup>Article 36 of the Constitution of FDRE states that : Every child has the right:(1)To life; (2) To a name and nationality; (3) To know and be cared for by his or her parents or legal guardians; (4) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being; (5) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children; (6) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child; (7) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults; (8) Children born out of wedlock shall have the same rights as children born of wedlock; and (9)The State shall accord special protection to orphans and shall encourage the establishment of institutions that ensure and promote their adoption and advance their welfare and education.

<sup>166</sup>The Preface to the Penal Code reads as follows: “It is nearly half a century since the 1957 Penal Code entered into operation. During this period, radical political, economic and social changes have taken place in Ethiopia. Among the major changes are the recognition by the Constitution and international agreements ratified by Ethiopia of the equality between religions, nations, nationalities and peoples, the democratic rights and freedoms of citizens and residents, human rights, and most of all, the rights of social groups like women and children. After all these phenomena have taken place, it would be inappropriate to allow the continuance of the enforcement of the 1949 Penal Code”.

In addition, the three countries in compliance with Article 4 of the CRC, apart from establishing the legal frameworks, did put in place institutional and administrative measures for the implementation of the various international treaties. Promoting realization of rights for children has not been entrusted to one institution since protecting children forms part of a broader framework for the implementation of the CRC. Thus in Ethiopia for example, an inter-ministerial committee was formed in 1994 to monitor and guide CRC implementation.<sup>168</sup> There are also CRC Committees at regional, zonal and woreda (local administration) levels. Violence Against Children (VAC) is one of the thematic areas, which the committees are engaged with. The national committee on child abuse and sexual exploitation is the other committee dealing with major forms of violence against children. Outside of these coordinated efforts, institutions such as the police, the Ministry of Justice, the Child Affairs department of the Ministry of Labor and Social Affairs, are all tasked with different responsibilities that address child rights issues in the country. Civil Society Organizations in the country are playing critical role in awareness raising as well as provision of care and are also getting more involved in research and advocacy activities.<sup>169</sup>

In Nigeria, following the ratification of the CRC in 1991 and in compliance with its articles 4 and 41, the Social Welfare Department in the then Federal Ministry of Social Development and Culture was established and mandated to deal on issues relating to childcare and juvenile justice. In 1993 as a result of the movement for the advancement of women's rights and as a consequence of the Children's Summit of 1990, a Child Development Department (CDD) was created in the National Commission for Women, to cater solely for issues concerning children. The Commission later evolved into the Ministry of Women Affairs and Youth Development in 1996, and has since then pursued the promotion and protection of children's rights at all levels. As a result, the 36 States of Nigeria now have specific ministries charged with women and children's affairs. The Federal Capital Territory, Abuja, also has a department charged with the responsibility of child rights protection and promotion, along the same lines.

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<sup>167</sup>The Preamble to the Family Code states that...“It has become necessary to amend the existing law in such a way that it gives priority to the well-being, upbringing and protection of children in accordance with the Constitution and International Instruments which Ethiopia has ratified”.

<sup>168</sup>See Federal Democratic Republic of Ethiopia Country Response to the Questionnaire on Violence Against Children by The Federal Ministry of Labor and Social Affairs - Submitted to: The UN Secretary General's Independent Expert on the Study on Violence Against Children in May 2005 accessed at [www2.ohchr.org/english/bodies/CRC/docs/study/responses/Ethiopia](http://www2.ohchr.org/english/bodies/CRC/docs/study/responses/Ethiopia) on 15<sup>th</sup> March 2010.

<sup>169</sup>*Ibid*, at page 6.

Like what operated in Ethiopia, the government of Nigeria also constituted the National Child's Rights Implementation Committee in October 1994, as the administrative body saddled with the responsibility of ensuring timely reporting of all treaties and Conventions ratified by Nigeria. The NCRIC is also mandated by the CRA to oversee the implementation and monitoring of the provisions of the CRC and CRA. In addition, the National Human Rights Commission has a Special Rapporteur on Children charged with the responsibility of ensuring that children's rights are effectively promoted and protected in Nigeria.

By ratifying the CRC, South Africa has committed itself to implementing the principle of a first call for children whereby the needs of children are considered paramount throughout the government's programmes, services and development strategies. The National Programme of Action for Children is the instrument by which these commitments to children are being carried out. It is a mechanism for identifying all plans for children developed by government departments, non-governmental organizations and other child-related structures. A National Steering Committee has been established to oversee the coordination, implementation, and monitoring of the National Programme of Action for Children, as well as to ensure that it accords with the commitments to the United Nations Committee on Child Rights. The establishment of the South African Human Rights Commission is another legal measure that is put in place to promote the observance of fundamental human rights at all levels of society, including the right of children.<sup>170</sup> To improve the level of education, there was the enactment of the South Africa Schools Act No 84 1996, the introduction of an integrated National Primary School Nutrition Programme, and the launching of "Curriculum 2005" which is intended, inter alia, to correct the disparities in access to education.<sup>171</sup>

Furthermore, the Ministry for Women, Children and People with Disabilities, was created as a clear demonstration of South Africa's government's commitment and political will to ensure that human rights, empowerment, equality, and human dignity for women, children and people with

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<sup>170</sup>The South African Human Rights Commission is the national institution established to support constitutional democracy. It is committed to promote respect for, observance of and protection of human rights for everyone *including children* (own emphasis) without fear or favor. The South African Constitution in chapter 9, section 184 (1) prescribes the mandates of the Commission as follows: The South African Human Rights Commission must (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.

<sup>171</sup>Convention on the Rights of the Child, CRC/C/51/Add.2. 22<sup>nd</sup> May 1998 at para 173.

disabilities are advanced, promoted, protected and developed. The Ministry is therefore mandated to coordinate and monitor compliance with country and global obligations and to address challenges regarding social justice and marginalization of the three targeted groups through the establishment of a Department for Women, Children and People with Disabilities. The intention is towards making the concerns and experiences of women, children and people with disabilities an integral part of the design, implementation, monitoring and evaluation of legislation, policies and programmes, and to assess the impact of these on the lives of the vulnerable and targeted groups to ensure a better life for all.<sup>172</sup>

## **2.8 Summary**

This chapter provides the historical development of international and regional treaties promoting the rights of children. Different definitions of children's rights, views and opinions of international non - governmental organizations, including that of protagonists and opponents of children's rights have been examined. A consideration of the different views has been made to highlight how their respective contributions has limited or promoted realization of rights for children. In reviewing the articulated rights of children as adopted by the international community, areas of linkages and convergence with the treaties were observed to draw attention to their complementarity with the Convention on the Rights of the Child. The human rights of children and the standard, to which all governments must aspire in realizing these rights, are most concisely and fully articulated. The Convention has been shown to be the most universally accepted human rights instrument in history that has placed children at the center- stage in the quest for the universal application of human rights. Considerable efforts by the governments to put in place legislative, institutional and administrative measures, for the implementation of the ratified Conventions have been shown. The extent to which the countries have translated into reality, the standards set by the international and regional treaties at the national or domestic level have been scrutinized. In the next chapter, the roles of international, regional and national monitoring bodies in ensuring that countries fulfill these obligations will be examined, including in the light of their effectiveness or ineffectiveness.

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<sup>172</sup> Accessed at [www.dwcpcd.gov.za/about/background](http://www.dwcpcd.gov.za/about/background), on 7<sup>th</sup> February 2012.

## CHAPTER THREE

### The role of international, regional and national monitoring bodies in promoting children's rights

#### 3.1 Introduction

It has been shown that the three countries have made considerable efforts in ensuring legislative, institutional and administrative measures are in place for the implementation of the ratified international and regional conventions. This chapter opens with presenting substantive issues relating to children's survival and development rights, to indicate the status of deprivations and violations of these rights. The extent of selected country's violations of these rights is *juxtaposed* against information reported in the Country's Periodic Reports. The roles of international, regional and national monitoring bodies are examined within this context. Specific roles of the United Nations Committee on the Rights of the Child<sup>1</sup> at the international level and that of the Expert Committee of the African Union Charter on the Rights and Welfare of the

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<sup>1</sup>Hereinafter referred to as the "UNCRC". At the center of a process to monitor State's implementation of the Convention is the Committee on the Rights of the Child, an elected committee of international experts that was established in 1991 in accordance with Article 43 of the Convention on the Rights of the Child. The Committee is made up of 10 members from different countries and legal systems that are of 'high moral standing' and experts in the field of human rights. Apart from its main activity – the examination of States' reports – the Committee also undertakes activities towards the promotion of international co-operation among multilateral agencies, donor countries and developing countries. Every two years, the Committee reports on its activities to the UN General Assembly through the UN Economic and Social Council. The treaty body system constitutes a key instance in which States are obliged to engage, at an international forum, in a rigorous, but constructive, dialogue on the state of human rights implementation in their countries. The Committee has issued guidelines for States preparing initial and periodic reports. In cases where states fail to follow the committee's guidelines in preparing their reports, or provide insufficient information, the committee will return the report and request resubmission of a comprehensive report. The Committee may request additional information/reports where the State party's report lacks sufficient information about the implementation of the provisions of the Convention or where the information previously submitted is no longer appropriate. The request for information is to prevent the occurrence of violations of children's right or the deterioration of the situation of children's right. The Committee may also suggest a visit to any country where the report seems unsatisfactory. These initiatives are intended to enable the state party to provide the Committee (in the spirit of dialogue and co-operation that guides the reporting process) with a comprehensive understanding of the implementation of the Convention and in particular on those provisions where a specific concern was expressed. Article 45 of the Convention also empowers the Committee to invite specialized agencies, like UNICEF and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities. It can also invite other competent bodies, including Civil Society Organizations (CSOs) to provide it with expert advice on areas falling within their respective mandates.

Child are examined at the regional level. At the national level, the role of National Human Right Commissions and their added value to the work of both Committees in fulfilling their mandates of promoting and protecting the rights of children are considered. The objective is to determine the impact of the monitoring bodies on the promotion of children's rights.

### **3.2 Demographic situation and survival rights of children in selected states**

In spite of prescribed roles for monitoring bodies, the real situation of children is dismal and translation of survival rights of children into reality remains a challenge in the three selected countries. Apart from the poverty of the countries and that of parents, resulting in poor medical facilities and then deaths of children, the common causes of deaths and of high infant mortality and morbidity among the children are noted. These are attributed mainly to malnutrition/poor nutritional status, neonatal diseases, malaria, pneumonia, diarrheal diseases, measles and other vaccine preventable diseases. Rates at which children are dying due to these diseases across the selected countries are alarming. The infant mortality rate is the probability of a child not surviving but dying before his/her first birthday. The under-five mortality rate is the probability of a child dying before his/her fifth birthday.

Nigeria with a population of over 140 million is the most populous nation in Africa. The under-five child population alone is currently over 20 million and population growth is estimated at 3.5% annually.<sup>2</sup> The infant mortality rate is estimated at 75 deaths per thousand live births, while the under-five mortality rate is 157 deaths per thousand live births. This translates to about one in every six children born in Nigeria dying before their fifth birthday.<sup>3</sup> The Nigerian male child has greater probability of dying as an infant or as under-five than his female counterpart- 92 *versus* 79 per 1000 at infant and 144 *versus* 131 per 1000 live births at under-five, respectively.<sup>4</sup> Over one in four children under age five in Nigeria are underweight, that is, too thin for their respective ages and 8.3% are classified as severely underweight. More than one in three is stunted or too short for their age.<sup>5</sup>

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<sup>2</sup>National Population Commission (NPopC) *Median Variant Projections* (2006) Nigerian Census.

<sup>3</sup>Demographic Health Survey (2008) Nigeria.

<sup>4</sup>Multiple Indicator Cluster Survey 3 (2007) Nigeria Preliminary Report.

<sup>5</sup>*Ibid*, at page 7.

In terms of population growth, Ethiopia is ranked next to Nigeria. She is estimated to be 71 million with under-15 age group accounting for 44 per cent of the total population. In Ethiopia as well as the two other countries, the effects of poverty are particularly harsh on women and children. Both groups suffer from social and political marginalization, malnutrition, poor health, and lack of opportunities to gain an education and earn a living.<sup>6</sup> Further, 47% of children at age five are under weight for their age as a result of being severely malnourished. The mortality rate for children under five is 169 per 1000. Abject poverty, rapid urbanization, drought and famine, armed conflict, destabilization of families have left thousands of children in Ethiopia destitute, orphaned, displaced, unaccompanied, homeless, disabled and abused. According to the Ethiopian Ministry of Labor and Social Affairs 2004 figures, an estimated 4 million children live in especially difficult circumstances and 100, 000 are at risk to becoming street children. The Central Statistics Agency of Ethiopia also estimates that 0.8 percent of children are bereft of their parents; 15 percent do not live with their biological mothers and nearly 8 percent reside in single-adult households. All in all, almost 24 percent of Ethiopian children live in especially difficult circumstances. When the number of children orphaned by AIDS, estimated at 1.2 million, is considered, the final figure is staggering.<sup>7</sup>

The same trend is indicated in South Africa, with a population of 44 million. Of that figure, there are approximately 20 million children under the age of 18, a figure which constitutes almost half the population. Two thirds of these children live in fairly remote areas, half of these children do not possess birth certificates and 75% of children population live in poverty. The current situation of South African children living in extreme poverty indicates that 3 in every 5 children live in poor households, mostly in rural areas, with 48 infants in every 1000 dying before their first birthday, many of them due to avoidable diseases. One in 10 pre-school age children are underweight due to chronic malnutrition, and only between 11% and 18% of pre-school age children are in organized programmes of any kind.<sup>8</sup> The numbers of child deaths per annum, already unacceptably high, are increasing. According to the 1998 South African Demographic and Health Survey, the infant mortality rate was 45 per 1,000 live births and the under-five mortality was 59 per 1,000 live births.

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<sup>6</sup>CIA (2000) *The World Fact Book*.

<sup>7</sup>Demographic Health Survey Central Statistics Agency, *AIDS in Ethiopia* (2002) Fourth Edition MoH.

<sup>8</sup>Children's Situation in South Africa accessed at [www.childrensmovement.org.za/situationtop](http://www.childrensmovement.org.za/situationtop), on 7th October, 2009.

The estimated rates for 2000, based on the South African National Burden of Disease Study have been calculated at 60 per 1,000 live births and the under-five mortality rate at 95 per 1,000 live births. More than 100,000 children die annually according to these statistics. National estimates indicate that childhood deaths are likely to continue to rise as a consequence of HIV/AIDS, diseases of poverty and trauma.<sup>9</sup> More than half of all deaths of young children in South Africa are due to communicable diseases - such as pneumonia, diarrhea, measles and malaria, all of which are preventable and treatable. Under-nourishment/malnutrition accounted for more than half - 53% of all deaths of children under the age of five years.<sup>10</sup> The same trend was recorded in Nigeria, where 53% of children die of malnutrition, 26% from neo-natal diseases; Malaria killed 24%, Pneumonia 20%, diarrhoea 16%, measles 6% and others - 10%.<sup>11</sup>

The AIDS epidemic in Nigeria has plunged into orphan-hood a huge number of children without primary care providers. There were 7 million orphans in Nigeria in 2003, 1.8 million of whom were due to AIDS.<sup>12</sup> Currently about 14 million children in Nigeria could be classified as Orphans and Vulnerable Children.<sup>13</sup> South Africa is the country hardest hit by HIV/AIDS in the world and HIV/AIDS remains another major and the leading cause of deaths amongst children under five years of age nationally and across all provinces. This is primarily due to vertical transmission of the virus (from mother to child during pregnancy). It is estimated that by 2010, there will be more than 2 million children in South Africa under the age 16 who have been orphaned by HIV/AIDS, many of whom are living in child-headed households.<sup>14</sup> In Ethiopia as well, the Ministry of Health<sup>15</sup> estimated that about 2.2 million people in the country are currently infected with the HIV/AIDS pandemic, including 2 million adults and 200,000 children. The report indicated that one devastating effect of the pandemic is the number of orphan children bereft of their parents.

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<sup>9</sup>Abrahams K, *Making a case for child survival in South Africa's 'Age of Hope'* (2006) A Children's Institute Working Paper Number 4 Cape Town Children's Institute University of Cape Town.

<sup>10</sup>*Ibid* at page 5.

<sup>11</sup>Federal Ministry of Health Report (2006) Nigeria.

<sup>12</sup>United Nations Children's Fund Annual Report (2004) Nigeria.

<sup>13</sup>*Situation Assessment and Analysis of Orphans and Vulnerable in Nigeria* (2008) Federal Ministry of Women Affairs and Social Development.

<sup>14</sup>Sloth-Nielsen J, *Realizing the rights of children growing up in child-headed households. A guide to laws, policies and social advocacy* (2004) Cape Town Creda Communications.

<sup>15</sup>Ministry of Health *AIDS in Ethiopia* Fourth Edition Addis Ababa (2002) Disease Prevention and Control Department MoH at 18.

The report further projected that the number of AIDS orphans will increase from 2.2 million in 2001 to 2.6 million by 2006, rising to 2.9 million in 2010.<sup>16</sup> The most widespread diseases killing infants in Ethiopia is also related to or caused by malnutrition and the lack of environmental health-care services. The prevalence of fever is a major cause of deaths of children in Ethiopia and varies by the age of the child. Dehydration from diarrhea is another major cause of infancy and childhood mortality causing deaths of 23% of the Ethiopian children's population.<sup>17</sup>

From the above analysis and enumerations, actualization of survival and development rights for children in the three countries largely remains difficult, with children in the countries dying mostly from vaccine preventable diseases. Across the countries, where children's rights have been held in such high regard given the legislative and institutional frameworks, the statistics suggests a significant regression in combating avoidable child's deaths.

Another dimension to realization of survival rights for children is the fact that many of the children do not have their births registered and are without birth certificates. The implication for children not registered at birth means in legal terms that they do not exist. Their right to an identity, name and nationality is denied and their access to basic services is threatened. In South Africa, according to the South Africa's CRC report submitted to the United Nations Child's Rights Implementation Committee in 1999,<sup>18</sup> there are still large numbers of children in South Africa whose births are not registered and an increasing number of late registrations. However, according to a 2007 report,<sup>19</sup> the completeness of current birth registration increased from less than 25% in 1998 to 72% in 2005.

The overall estimate of total under - five births registered in Nigeria, as at 2008 was 30% compared with the figure from South Africa. About 70% of the five million children born annually

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<sup>16</sup>*Ibid* at page 23.

<sup>17</sup>Demography and Health Survey (2000) Ethiopia.

<sup>18</sup>Convention on the Rights of the Child, CRC/C/51/Add.2. 22<sup>nd</sup> May 1998 at para 147, page 31.

<sup>19</sup>See Report 03-06-01 (2007) *The coverage and quality of birth registration data in South Africa*. The report examines the birth registration process with special reference to South Africa and focus on the content, coverage and the quality of the register. It estimates the completeness of the birth register for the nine provinces and the country as a whole. It also provides estimates of fertility based on data from register and compare those with estimates from Census. The report describes the levels and trends in birth registration over time. Lastly, it estimates patterns of future registrations and adjustment factors that could be used to make the register more robust for analysis purposes. Published in 2007.

in Nigeria are not registered at birth and do not possess any birth certificate.<sup>20</sup> Ethiopia's situation is worse off compared with South Africa and Nigeria. This is because there is no national system to register children or record their births in Ethiopia.<sup>21</sup> Although the Ethiopian Civil Code requires a child to be registered within 90 days after birth, the legal framework neither specifies the responsibilities of the central government nor identifies relevant administrative structures to undertake registration. The absence of national, municipal and local civil registration mechanisms hinders the collection of accurate and reliable demographic data.

For millions of children born in the three countries, with no records of their birth, it becomes hard to verify their age and to ensure school enrolment or exposure to other basic needs and services. These children are further exposed to under-age recruitment, child labor, child marriage or being trafficked.

Countries are expected to articulate in periodic reports, substantive issues relating to children and the various challenges and limitations affecting the full and equal enjoyment of these rights. However, such challenges and limitations as shown above on the realization of survival and development rights are never completely encapsulated in most country periodic reports, including that of the selected countries being scrutinized.

### **3.3 Development of country periodic reports and fulfilment of rights for children**

This segment is thus presented to further highlight salient inadequacies and challenges affecting realization of rights for children as reported by each focus country's report. It is to draw vivid attention to limitation of country's legal and administrative structures to promote realization of rights for children and the ineffectiveness of monitoring bodies receiving these reports. Specific provisions of the CRC<sup>22</sup> stipulates that countries comply with their international

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<sup>20</sup>Demographic and Health Survey (2008) Nigeria.

<sup>21</sup>*Gender Statistics and the Status of Civil Registration and Vital Statistics in Ethiopia* (2007) Central Statistics Agency Ethiopia.

<sup>22</sup>Article 44 of the CRC states as follows: (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 fulfillment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the committee with a comprehensive understanding of the

obligation and are required to submit reports on the extent to which they have complied with significant provisions of those international instruments. Thus a summary of the Country's Periodic reports<sup>23</sup> are presented. Distinctive features were first of all discussed and then followed by the common features of the three country periodic reports examined. Responses of the UNCRC to each periodic country report being the Concluding Observations<sup>24</sup> are reported to demonstrate the level of their effectiveness and most significantly their ineffectiveness in monitoring the rights of children.

In abiding with the reporting guidelines, all the selected countries in their different reports provided an overview of measures taken by their government. The South African country report built on the work previously undertaken by the civil society, to meet the requirements of the Convention on the Rights of the Child. One distinctive feature of the South African report is the consistent use of "context and implementation" and "a way forward". The report commenced by spelling out the constitutional rights of the child. Legislative measures were listed, including pending legislation yet to be passed into law, details of international conventions ratified, policy developments and research projects affecting children. It also described the reporting process, like the steps taken by the country to ensure coordination and some budgetary considerations.<sup>25</sup> On measures of implementation - the structures, mechanisms and processes of the Inter-Ministerial Committee and the National Programme of Action as vehicles for implementation were briefly described.<sup>26</sup>

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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 submit 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.

<sup>23</sup>Detailed information of each country report cannot be reported. South African report had 605 paragraphs and 103 pages. Nigerian report had 138 pages and Ethiopia had 234 paragraphs and 76 pages. In spite of these details, the country reports does not articulate sufficiently evidence based data, information and reports on the reality of the situation of their children. Hence information on situation of children are first reported in section 3.2, to highlight, emphasize, stress and draw attention to massive deprivation of survival and development rights of children.

<sup>24</sup>The UNCRC's Concluding Observations are examined in the light of each countries submitted report. Concluding Observations for Nigeria had 96 paragraphs, Ethiopia had 84 and South Africa - 43 paragraphs. Providing full details of each paragraph of the Concluding Observations is not feasible.

<sup>25</sup>Convention on the Rights of the Child, CRC/C/51/Add.2. 22<sup>nd</sup> May 1998 at paragraphs 1-20, hereinafter referred to as the "South African report".

<sup>26</sup>*ibid*, para 21 at page 3.

The implementation of development rights are described under education, sport, leisure and cultural activities component of the report. The legacy of disadvantage was described in some detail to provide some context for what follows the apartheid regime, particularly with regard to the South African Schools Act No 84 of 1996. The White Paper on Education<sup>27</sup> states that: “millions of South African children and youth are learning in school conditions which resemble those in the most impoverished States”.<sup>28</sup> The component on implementation measures under protection rights referred to the fragmentation of legislation on children,<sup>29</sup> with responsibility spread across various government departments.<sup>30</sup> Attention was given to the status of refugee and asylum seeking children and the problems they face under the ‘Children in States of Emergency’. The various programmes available to assist refugee children are described, as well as the legislative framework which currently governs the countries response to the refugee question.

Under children in armed conflict, an attempt was made to provide a background against which the majority of children lived their lives in the apartheid years. The role of children in the liberation struggle, their oppression under states of emergency, and the conscription of white male youth are briefly described. Apartheid has left South Africa with a culture of violence, particularly at local community level. Generations of children have been caught in the crossfire from an early age. Many children have seen death by violence at first hand and developed the impression that violence is the only acceptable means to resolving conflict.<sup>31</sup> Under children involved with the system of administration of juvenile justice, some considerable attention was

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<sup>27</sup>The ‘White Paper’ on Education and Training was published by the South African Department of Education in March 15, 1995. It describes the first steps in policy formation by the Ministry of Education in the Government of National Unity. It locates education and training within the national Reconstruction and Development Programme, and outlines the new priorities, values and principles for the education and training system; previews important developmental initiatives on which the Ministry of Education is engaged; discusses the implications of the new Constitution for the education system, especially in respect to Fundamental Rights; discusses the division of functions between national and provincial governments in the field of education and training; and provides information about how the national and provincial departments of education are being established amongst other issues.

<sup>28</sup>See South African Report, para 381 at page 69.

<sup>29</sup>The South African report in para 459 at page 79 specifically stated thus: “South African legislation relating to children is fragmented, with responsibility spread across several government departments. No composite piece of legislation exists. In addition to this, portions of existing legislation are incompatible with the principles of the Constitution and the Convention on the Rights of the Child. New policy had to be developed in almost all departments and spheres of government to meet the requirements of the Convention”.

<sup>30</sup>*Ibid*, para 462 at page 89.

<sup>31</sup>*Ibid*, para 477 and 478, at page 82.

given to the constitutional requirements and attempts to conform to this in practice. The component included legal and administrative measures in place on the administration of justice, indicating that at the time of the report, there was no separate justice system for young people in South Africa.<sup>32</sup> In addition, the report stated how the HIV/AIDS epidemic sweeping the country was of profound significance to the wellbeing of children, but that there are no accurate data reflecting the number of children with disabilities.<sup>33</sup> Under sexual exploitation and sexual abuse, the situation of sexually abused children was described, as well as the increasing problem of the commercial sexual exploitation of children. Detailed examination was given to this area as one requiring urgent attention.<sup>34</sup> Under sale, trafficking and abduction, South Africa's adoption of the Hague Convention on Civil Aspects of International Child Abduction was referred. It highlighted the enormous challenges of meeting the requirements identified in the Reconstruction and Development Programme and provided some detail on attention given by Government to language and religious groups. It also highlighted the protection extended by the Constitution to children belonging to minority groups.<sup>35</sup>

Ethiopia's periodic report on the other hand, covered the period 1999-2003/04 and was also prepared pursuant to the provision of article 44, paragraph 1, of the CRC.<sup>36</sup> Ethiopia reported that 'of direct relevance to the CRC has been the formulation and implementation of the two National Plans of Action for Children, spanning the period 1996-2000 and 2003-2010 and beyond'.<sup>37</sup> The right of the child to education/development in Ethiopia falls within the context of the Education Sector Development Plan of the nation. Structure, available school facilities, status of the education, improvement in the number of children accessing text books and pupil/teacher ratio, were reported including the enjoyment of the right to education by all children without discrimination.<sup>38</sup> Further, challenges limiting full implementation and realization for rights by the Ethiopian child, including the lack of meaningful local action to surmount social and cultural barriers to education, especially for girls was recorded. Other challenges included inadequate community participation in education, weak programme management and urban-

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<sup>32</sup> *Ibid*, para 503 at page 85.

<sup>33</sup> *Ibid*, para 238 and 254, at page 46-48.

<sup>34</sup> *Ibid*, para 552 at page 92.

<sup>35</sup> *Ibid*, paras 589, 592-593 at page 97- 98.

<sup>36</sup> See Convention on the Rights of the Child, CRC/C/129/Add.8. 28 October 2005, hereinafter referred to as the "Ethiopian report".

<sup>37</sup> *Ibid*, para 34 at page 12.

<sup>38</sup> *Ibid*, para 183-193 at page 49-51.

rural disparities regarding access to preschool education.<sup>39</sup> It was reported that given the extreme level of impoverishment prevailing in the country, about 15.5 million of the 18.13 million children are working either in the household or outside. In other words, only 14 per cent of the Ethiopian children in the age cohort of 5-17 are not working. In addition, poverty, rural-urban migration, family breakdown, early marriage and displacement are the major issues contributing to the rapid increase in sexual abuse and child prostitution.<sup>40</sup> The Ethiopian report further related these gory details on the situation of some of her children:

“Child trafficking is being carried out both internally and externally. Cases of inhuman exploitation and brutal treatment have come to light; murder, insanity and inflicted disability were some of the outcomes of external trafficking. The abuse and neglect of children takes two forms in Ethiopia; viz, harmful traditional practices and (urbanized) child abuse and exploitation. A preponderant majority of the abused children, numbering 1,707, were female. Addis Ababa had the biggest share, with 1,634 of the abused children drawn from the metropolitan area”.<sup>41</sup>

The same trend was reported for Nigeria. Nigeria’s 3<sup>rd</sup> and 4<sup>th</sup> report covered the period 2004-2008.<sup>42</sup> The report *did not* (own emphasis) spell out sufficiently the factors and difficulties the country encountered in the implementation process. The Nigerian report within the same context with Ethiopia focused on the drafting of a comprehensive, rights-based National Plan of Action with the time frame up to 2011.<sup>43</sup> The report featured detailed implementation measures covering, legal, administrative and huge budgetary allocations. Rosy picture and elaborate measures for the improvement of the quality of education, for the promotion and even distribution of schools and educational facilities, were reported, including prohibition of corporal punishment in schools. It was however reported that a substantial proportion of the primary school age population<sup>44</sup> nationwide, was not enrolled in primary schools. This represents

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<sup>39</sup>*Ibid*, para 202 (a) – (n) at page 53.

<sup>40</sup>*Ibid*, para 203 and 207 at page 54-55.

<sup>41</sup>*Ibid*, para 118, 120, 129 and 130 at page 28-30.

<sup>42</sup>Convention on the Rights of the Child, CRC/C/NGA/3-4. 5<sup>th</sup> Jan 2009 at page 12, hereinafter referred to as the “Nigerian report”. The UNCRC considered the third and fourth periodic reports of Nigeria (CRC/C/NGA/3-4) on 26 May, 2010. The report was submitted since 19 May, 2008.

<sup>43</sup>*Ibid*, para 1.2.3, at page 27.

<sup>44</sup>The Nigerian Report in para 7.1.9 (a) at page 114 specifically states thus: “In 2006 National School Census revealed a Net Enrolment Rate of 80.60% suggesting that a substantial proportion [19%] of the primary school age population [6–11 years] nationwide is not enrolled in primary schools”.

4.7million Nigerian children aged 6 to 11, do not have access to primary education.<sup>45</sup> The report also stated that up to two - thirds of all child offenders experience some form of physical, verbal and emotional abuse during arrest or detention by the police. Child offenders are not often prepared for life after detention due to the inadequacy of vocational and educational facilities, counseling services, and after-care services that should assist in their rehabilitation and reintegration into society.<sup>46</sup> The Nigerian report further indicated existence of violence against children. It was reported that 'the nature of family-related violence and the economic dependency of the victims on the perpetrators (usually parents, guardians, other adult relatives, or employers) discourage victims from complaining or taking up legal action. Such violent acts are perpetrated within the confines of the home and are hidden from public view'.<sup>47</sup>

Apart from the *distinctive features* (own emphasis) of the three country reports, all the three countries noted the measures taken to make the Convention widely known and outlined their list of achievements. All provided a "definition" of childhood, especially the: legal age of marriage, guardianship and custody of the children of minors. The age of criminal capacity, military service, employment, -age of schooling and compulsory education, voting age, and the age at which a license for a firearm may be acquired was reported.<sup>48</sup> Under the "Principle of non-discrimination", the legal and constitutional context are outlined. The considerable achievements of the three governments were spelt out. There remains both in law and in practice, widespread discrimination against children, especially the girl-child.<sup>49</sup> At the time the South Africa report was submitted to the UNCRC, discrimination was based on institutionalized racism, making this area a particularly important and difficult challenge. In Nigeria children with disability experience continuous discrimination limiting their participation on issues that concerns them,<sup>50</sup> while in Ethiopia, stigmatization and discrimination inflicts a heavy psychological blow on People Living with AIDS or AIDS orphans.<sup>51</sup>

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<sup>45</sup> *Ibid*, at page 114.

<sup>46</sup> *Ibid*, para 8.3.0. at page 122.

<sup>47</sup> *Ibid*, para 5.6.4 at page 74.

<sup>48</sup> South African report (note 25 above) para 51-90, at page 18-23; Ethiopian report (note 36 above) para 57-61, at page 17-18; and Nigerian report (note 42 above) para 2.1 and 2.1.1, at page 33-34.

<sup>49</sup> South African report, para 95, at page 25.

<sup>50</sup> Nigerian report, para 3.1.2, at page 35.

<sup>51</sup> Ethiopian report, para 71 at page 19.

On the “Best interests of the child”, both Nigeria<sup>52</sup> and Ethiopian government<sup>53</sup> provided the legislative and administrative measures in place concerning the best interest of the child as well as the measures taken to deal with cultural and other practices affecting children. South Africa’s report drew attention to the significant research of the South African Law Commission, as well as projects and implementation undertaken by Government to secure conformity with the best interest principle. Specific actions of government focusing on children in conflict with the law, on child abuse and neglect, refugee children, adoption matters and on children on drugs were reported.<sup>54</sup> The different country reports featured specific implementation measures on “Right to life, survival and development” of their children. It covered both the legal and constitutional changes and describes measures taken by the Governments.<sup>55</sup> Various pieces of legislation aimed at fulfilling participation rights for children tagged “Respect for the views of the child” are highlighted. The Ethiopian government reported that a formidable obstacle that is undermining the efforts to promote respect for the views of the child is the extreme level of poverty prevailing in the nation.<sup>56</sup>

Under the implementation of survival rights, the various programmes aimed at improving the health and welfare of children are described, within the context of the overall process of health restructuring. Malnutrition of children and poor nutritional status is the highest cause of deaths of children in Nigeria.<sup>57</sup> The Ethiopian government formulated a 20-year Health Sector Development Plan spanning 1997-2017. It was reported that despite this encouraging beginning, a significant proportion of the population, including children, are still left out of the modern health-care system of the country. In addition, the socio-economic and institutional setup highly discriminates against children with disabilities.<sup>58</sup> Similarly, malnutrition appears widespread, with 51 per cent of the children under - five being stunted.<sup>59</sup>

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<sup>52</sup>Nigerian report, para 3.2.1 and 3.2.2 at page 36.

<sup>53</sup>Ethiopian report, para 73 at page 20.

<sup>54</sup>South African report, para 107-119 at page 26-28.

<sup>55</sup>Nigerian report, para 3.3 at page 36; and Ethiopian report, para 73-76, at page 20.

<sup>56</sup>Ethiopian report, para 83 at page 22.

<sup>57</sup>Nigerian report, para 3.3.3 (i) and 6.5.2 (c), at pages 39 and 92.

<sup>58</sup>Ethiopian report, para 134-136 at page 34.

<sup>59</sup>*Ibid*, para 8 at page 9.

On the 'Family Environment and Alternative Care'<sup>60</sup> component, the areas covered were: 'Parental guidance and responsibilities', 'Separation of children from parents', 'Family reunification, Illicit transfer and non-return of children', 'Recovery of maintenance for children' and 'Children deprived of family environment'. Under each component, the legal and constitutional framework is provided, together with a description of measures taken and programmes developed. Discrepancies, legal inconsistencies and measures that still need to be taken are described. For example, in Nigeria, there is a paucity of data on the number of child abuse cases reported, because most cases of child abuse occur in family settings and mostly go unreported.<sup>61</sup> In Ethiopia, given the absence of a systematic data gathering mechanisms, the exact figure of abandoned and displaced children could not be obtained. As a result, countless instances of abandonment and displacement occasioned by war, drought, broken families and unwanted pregnancies are still left unaccounted for.<sup>62</sup>

### **3.4 Role of the UNCRC and response to country periodic reports**

The respective Country Period reports depicting the above gruesome situation of children were submitted to the UNCRC for consideration. It can be inferred from the analyzed features of the three country reports that each conducts a review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party. The UNCRC did examine each report which culminated in the adoption of the 'Concluding Observations'. The UNCRC acknowledged the positive steps taken by selected countries and also identified areas where more needs to be done to give full effect to the implementation of the CRC. These are all encapsulated in the Concluding Observations. After due consideration of the reports, the Concluding Observations is prepared, completed and presented to each country.

The Concluding Observations is made in a simplistic form devoid of any complications or force. It opens with expressing appreciation to the efforts of State party; the presence of a high-

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<sup>60</sup>The 'Family Environment and Alternative Care' component of the focus country reports is copiously articulated. For example this component is highlighted in Cluster 5 of the Nigerian report spanning some 30 pages (54-84). The same component was captured in 89 paragraphs (i.e para 291-380) and 14 pages of the South African report. Same component of the Ethiopian report was highlighted in 9 pages and 30 separate paragraphs (i.e para 103-133).

<sup>61</sup>Nigerian report, para 5.6.4 at page 74.

<sup>62</sup>Ethiopian report, para 132 at page 31.

ranking delegation directly involved in the implementation of the Convention and recalled the positive development of each country. It noted specific measures taken on each head of the report and then makes its recommendation calling on States to ensure implementation of the recommendation. Concluding Observations on state reports are targeted in the first place at identifying shortcomings in state policy and practice (expressed as 'concerns' of the Committee) and at making recommendations to remedy these. Yet care is always taken to start with a number of positive observations with respect to measures taken and progress made. The Concluding Observations on state reports does not normally use the language of 'violations'. They express 'concerns'. The Committee established a certain hierarchy in their observations by occasionally using the term 'great concern' or 'deeply concerned' and make certain recommendations 'as a matter of priority'. The level of ineffectiveness is measured against the fact that the UNCRC have no means of enforcing their Concluding Observations and there is gross weakness and inaction usually demonstrated when a country fails to report as at when due.

In reality, Nigeria and Ethiopia ratified the CRC in 1991. Both countries were expected to submit their initial reports in 1993, the 1<sup>st</sup> Country report in 1998, the 2<sup>nd</sup> Report in 2003, the 3<sup>rd</sup> Report in 2008 and the 4<sup>th</sup> is due in 2013. Nigeria submitted the initial report rather in 1996; her 1<sup>st</sup> report was submitted in 2002 with manifest flaws as the UNCRC guidelines were not followed. Her report was returned and in 2003, the Country submitted a combined 1<sup>st</sup> and 2<sup>nd</sup> Country Report, and for the first time since ratification of the treaty in 1991, Nigeria as a country succeeded in submitting its combined 3<sup>rd</sup> and 4<sup>th</sup> Country Periodic Report, *at least* (own emphasis) according to the requirement of the UNCRC<sup>63</sup> at the prescribed time in 2008.<sup>64</sup>

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<sup>63</sup>The UNCRC considered the first and second periodic report of Nigeria (CRC/C/70/Add.24) at its 1023<sup>rd</sup> and 1024<sup>th</sup> meetings (see CRC/C/SR.1023 and 1024), held on 26 January 2005, adopted the Concluding Observation at the 1025<sup>th</sup> meeting on 28 January, 2005 and prescribed when the next country report will be due in paragraph 86 stating as follows: *The Committee invites the State party to submit its third and fourth periodic reports in one consolidated report by 18 May 2008, i.e. the due date of the fourth periodic report. The Committee expects the State party to report thereafter every five years, as foreseen by the Convention*). The UNCRC again, in considering the combined third and fourth reports at its 1505<sup>th</sup> and 1507<sup>th</sup> meetings (CRC/C/SR.1505-1507) held on May 26, 2010 adopted the Concluding Observation at its 1541 meeting (held on 11 June, 2010) also recommended when the next country report will be due in paragraph 95, as follows: *The Committee invites the State party to submit its combined fifth to eighth periodic report by 18 November 2016* (all emphasis mine).

<sup>64</sup>See (note 42 above) at page 11-12.

The Nigerian government complied with this recommendation and submitted its 3<sup>rd</sup> and 4<sup>th</sup> as prescribed by May 2008, even though the 4<sup>th</sup> report is due by 2013. The UNCRC again, in considering the combined 3<sup>rd</sup> and 4<sup>th</sup> reports recommended to the Nigerian government to submit its combined 5<sup>th</sup> to 8<sup>th</sup> report by year 2016. There is no plausible explanation for this apparent lapse in the reasoning of the UNCRC as shown by their requesting for the combined report by 2016, when submission of reports should have followed this sequence: initial report - 1993, 1<sup>st</sup> report-1998, 2<sup>nd</sup> report- 2003, 3<sup>rd</sup> report- 2008, 4<sup>th</sup> report-2013, 5<sup>th</sup> report-2018, 6<sup>th</sup> report- 2023, 7<sup>th</sup> report-2028, etc. This clearly demonstrates gross ineffectiveness on the part of the UNCRC, as there would be a likelihood of not reporting efficiently and effectively such measures and developments taken to realize rights for children in an appropriate time frame and manner. It is clear that enforcement of rights for Nigerian children by this foremost international monitoring body remains a mirage.

Similarly, Ethiopia in complying with her reporting duty in article 44 of the CRC, did submit its initial report as well as its 1<sup>st</sup> to 3<sup>rd</sup> periodic report to the Committee on the Rights of the Child. But the initial report was submitted much later than its due date. It was submitted in September 1995 when it was to be presented in 1993, i.e. two years after accession to the Convention of May 1991. The 1<sup>st</sup> periodic report was duly submitted in September 1998 and considered by the Committee in March 2000. The 2<sup>nd</sup> periodic report due by June 2003, was submitted in the autumn of 2004. Ethiopia submitted her 3<sup>rd</sup> periodic report to the UNCRC in April 2005. This 3<sup>rd</sup> report assesses the measures taken to implement the Convention on the Rights of the Child in Ethiopia between 1999 and November 2005.

Before the governments of Nigeria and Ethiopia fulfilled their international obligations to submit the country periodic reports, the UNCRC did not take any action to ensure fulfillment of their obligations. Apparently, the UNCRC appreciated the fact that reporting is a time consuming, labor intensive, expensive and specialized process. In recognizing that reporting involves input and participation from a wide spectrum of both governmental and non-governmental role player, the UNCRC has remained passive towards any enforcement. The South African experience

shows that this has indeed been the case with the UNCRC and that the current state of reporting is far from running smoothly<sup>65</sup> and will attract no sanctions.

The CRC was ratified by South Africa in 1995. South Africa's initial compulsory report was due on 17 July 1997 and was submitted in December 1997. The UNCRC *commended South Africa for the timely submission of its initial report* (own emphasis) when it was considered in January 2000.<sup>66</sup> In its Concluding Observations to South Africa, the Committee *welcomed* positive aspects such as the law reform which has taken place since the adoption of the South African Constitution to cement the protection of children in the South African legal system.<sup>67</sup> The Committee *appreciated* the establishment of various bodies to oversee the implementation of the CRC, such as the National Programme of Action and its steering committee. The legacy of apartheid is acknowledged as a factor impeding the full implementation of the CRC.<sup>68</sup> The Committee *welcomed* the submission of the State party's initial report which followed the established guidelines and provided a critical assessment of the situation of children *and also welcomed the efforts of the State party to ensure that its initial report was submitted on time*<sup>69</sup> (all emphasis mine). As far as the Committee was concerned the initial report was submitted on time. No reprimand was made. No reference was made to the delegates that the report due in July was submitted in December.

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<sup>65</sup>Olivier M, 'Compliance with reporting obligations under international law: Where does SA stand?' (2006) Volume 31, *South African Yearbook of International Law* 179-194 at 182.

<sup>66</sup>See Concluding Observations of the Committee on the Rights of the Child, South Africa, U.N. Doc. CRC/C/15/Add.122 (2000). At its 609th, 610th and 611th meetings (see CRC/C/SR.609, 610 and 611), held on 25 and 26 January 2000, the UNCRC considered the Initial Report of South Africa (CRC/C/51/Add.2) which was submitted on 4 December 1997, and adopted the Concluding Observation, at the 615th meeting, held on 28 January 2000. Its paragraphs 2 stated as follows: "*The Committee welcomes the submission of the State party's initial report which followed the established guidelines and provided a critical assessment of the situation of children. The Committee also welcomes the efforts of the State party to ensure that its initial report was submitted on time. The Committee takes note of the written replies to its list of issues (CRC/C/Q/SAFR.1). The Committee is encouraged by the constructive, open and frank dialogue it had with the State party and welcomes the positive reactions to the suggestions and recommendations made during the discussion. The Committee acknowledges that the presence of a high-ranking delegation directly involved in the implementation of the Convention allowed for a fuller assessment of the situation of the rights of children in the State party*" (own emphasis).

<sup>67</sup>See Concluding Observations of the Committee on the Rights of the Child, South Africa, U.N. Doc. CRC/C/15/Add.122 (2000) at para 3 and 4.

<sup>68</sup>*Ibid*, para 11 and 12.

<sup>69</sup>*Ibid*, para 1-7.

The disturbing trend of inaction remains persistent in view of the fact that South Africa's 1<sup>st</sup> report was due in 2002, the 2<sup>nd</sup> Report was due in 2007 and the 3<sup>rd</sup> in 2012, but till date, South Africa has not submitted any other report after the initial report was considered in 2000 and the UNCRC have neglected and failed to take any action against South Africa. The Committee however was concerned at the absence of a clear procedure to register and address complaints from children concerning violation of their rights under the Convention. It recommended that a system of data collection should be developed to cover particularly vulnerable children. It recommended that efforts be increased to ensure implementation of the principle of non-discrimination particularly as it relates to vulnerable groups. It encouraged prioritization of budgetary allocations to ensure implementation of the CRC provisions.<sup>70</sup>

The Committee further recommended: an expansion of the Child Support Grant Programme for children up to the age of 18 years who are still at school, establishment of proper monitoring procedures for both domestic and inter country adoptions; and the introduction of adequate measures to curb the abuse of the practice of traditional informal adoptions.<sup>71</sup> It recommended development of a comprehensive strategy to prevent and combat domestic violence and adoption of effective measures to prohibit by law corporal punishment in care institutions.<sup>72</sup>

Allocation of resources and the development of policies and programmes to improve the health of children were recommended.<sup>73</sup> Promotion and facilitation of school attendance, particularly among previously disadvantaged children, girls, and children from economically disadvantaged families should be given priority.<sup>74</sup> Effective measures should be undertaken to make free primary education available to all. The Country was asked to improve monitoring and enforcement of child labor laws and the protection of children from sexual exploitation<sup>75</sup> and protection of the cultural, religious and language rights of children belonging to minority groups.<sup>76</sup> Additional steps were regarded as necessary to implement a juvenile justice system in

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<sup>70</sup> *Ibid*, para 14, 15, 32 and 33.

<sup>71</sup> *Ibid*, para 21, 22, 24 and 26.

<sup>72</sup> *Ibid*, paras 27 and 28.

<sup>73</sup> *Ibid*, para 29.

<sup>74</sup> *Ibid*, para 31, 32, 33 and 34.

<sup>75</sup> *Ibid*, para 35, 36, 37, 38-40.

<sup>76</sup> *Ibid*, para 41.

conformity with the Convention.<sup>77</sup> If all the necessary steps have been taken by South Africa, this has not been reported to the UNCRC till date.

The inaction or failure to act was clearly demonstrated in the consideration of Ethiopia's report as well. The UNCRC's Concluding Observations<sup>78</sup> to Ethiopia shows that while they thought some progress had been made since their last review (in 2001) a great deal still needed to be done. For example, Ethiopia has some of the world's highest rates of infant mortality. Malaria and malnutrition are rife. Ethiopia is home to more than 4.5 million orphans (many of them caused by war or HIV/AIDS) and to other vulnerable children including refugees.<sup>79</sup> The main request put to Ethiopia by the CRC was *to submit more complete information on its progress in promoting children's' welfare* (own emphasis). This is both in terms of statistical reporting and in terms of programmes in priority areas such as education, health, justice, assistance for children involved in warfare, demobilized, street/refugee children, sexual abuse of children, orphans etc.<sup>80</sup> The Committee welcomed Ethiopia's State party report and its written replies to the - List of Issues - statistics on education and child promotion activities. It appreciated the constructive dialogue with a high level, cross-sectional delegation and welcomed a number of positive developments in the reporting period.<sup>81</sup>

While the Committee welcomed the increased budget allocation to education and health, it was concerned that resources are insufficient for improving the protection of children's' rights. In particular, it noted the considerable military expenditure in contrast to the allocations to

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<sup>77</sup> *Ibid*, para 42.

<sup>78</sup> Concluding Observations of the Committee on the Rights of the Child, Ethiopia, UN Doc CRC/C/ETH/CO/3. 1<sup>st</sup> November 2006. The Committee considered the third periodic report of Ethiopia (CRC/C/129/Add.8) at its 1162<sup>nd</sup> and 1164<sup>th</sup> meetings (see CRC/C/SR.1162 and 1164), held on September 12, 2006 and adopted the Concluding Observations at its 1199<sup>th</sup> meeting (CRC/C/SR.1195), held on September 29, 2006.

<sup>79</sup> Ethiopian report (note 36 above) para 8-15, at page 9.

<sup>80</sup> This is illustrated by remarks made by CRC expert members as recorded in the Summary Records (CRC/C/SR.1162). Ms Aluoch (Country Rapporteur) regretted that Ethiopia's State Party Report gave no indication of how the national budget was allocated to children's' needs. "*Given the absence of a birth registration system, how could the Ethiopian Government know how many children there are in Ethiopia? What proportion of social spending is used to implement the CRC, in priority area such as health, education and special protection measures?*"

<sup>81</sup> The Committee welcomes a number of positive developments in the reporting period, inter alia: the free anti-retroviral programme that started in 2005; the provisions in the New Criminal Code of 2005 which criminalizes harmful traditional practices and most forms of human trafficking; the provision in the Revised Family Code setting 18 years of age for marriage for both girls and boys; the adoption of a National Plan of Action for Children (2003-2010) etc. See also para 4-14, at page 2 of the Concluding Observations.

education and health. The Committee urged the Ethiopian government to prioritize and increase budgetary allocations for children at both national and local levels in order to improve the implementation of the rights of the child throughout the country. In particular, attention must be paid to the protection of the rights of children belonging to vulnerable groups, including children belonging to ethnic minorities, children with disabilities, children affected by and/or infected with HIV/AIDS and children living in poverty and in remote areas.<sup>82</sup>

The Committee was concerned at the lack of data on children in a number of areas, eg on children involved in armed conflicts children without parental care, children involved in the justice system, and sexually abused and trafficked children. It encouraged Ethiopia to significantly improve birth registration, to strengthen its system of collecting disaggregated data, (especially in relation to the areas indicated in the preceding lines), as a basis for assessing progress achieved in the realization of children's rights and to help design policies to implement the Convention.<sup>83</sup> It recommended that the government should make combating discrimination against vulnerable girls a national priority. The government is to ensure that children's views are given due consideration, explicitly prohibit corporal punishment within the home and enforce the prohibition in all settings. Effective measures are to be taken to protect all children from torture, cruel and degrading treatment.<sup>84</sup>

The Committee recommended that necessary measures should be taken to protect the rights of children without parental care and address their needs, provide more information on domestic adoptions and take necessary measures to prevent child abuse and neglect.<sup>85</sup> In addition, the Committee drew the country's attention to the report of the independent expert for the United Nations study on violence against children<sup>86</sup> and encouraged the taking of all appropriate measures to implement overarching recommendations as well as setting-specific recommendations contained in the report.<sup>87</sup> The Committee further recommends that the

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<sup>82</sup> *Ibid*, para 16, 17 and 28 at page 4 and 6.

<sup>83</sup> *Ibid*, para 18 and 19, at page 4.

<sup>84</sup> *Ibid*, para 25, 30, 34 and 36, at page 6, 7 and 8.

<sup>85</sup> *Ibid*, para 38, 40, 42 and 46, at page 8 and 9.

<sup>86</sup> United Nations Secretary General's Report on Violence (2006) *World Report on Violence against Children*. The study is printed in Geneva, Switzerland by ATAR Roto Presse SA and can be viewed from the following websites, accessed at: <http://www.violencestudy.org>, [www.ohchr.org](http://www.ohchr.org), <http://www.unicef.org>; and <http://www.who.int>, on 18<sup>th</sup> June 2011.

<sup>87</sup> See (note 78) above para 48, at page 10.

Ethiopian government take all necessary measures to strengthen its programmes for improving health care.

Government is to adopt a comprehensive strategy to prevent and combat harmful traditional practices and ensure resources for its implementation.<sup>88</sup> On development rights, it was recommended that there should be increase in public expenditure on education. Additional efforts must be undertaken to ensure access to informal education to vulnerable groups, including street children, orphans, children with disabilities, child domestic workers and children in conflict areas and camps.<sup>89</sup> The Committee was concerned at the lack of physical and psychological assistance for children affected by armed conflict as well as the increasing number of street children. These are also victims of drug abuse, sexual exploitation, harassment and victimization by members of the police force. It noted the lack of measures for street children, children abducted and sold (for \$2 each) for “unknown purposes”.

The Ethiopian government was encouraged by the Committee to eliminate child labor from as early as 5 years old and note that comprehensive measures are not being taken to prevent and combat this large-scale economic exploitation of children.<sup>90</sup> Given these scenarios, it recommended that the government of Ethiopia should develop and implement, with the support of the ILO, UNICEF, and NGOs, a comprehensive plan of action to prevent and combat child labor. That awareness-raising educational measure should be undertaken to prevent and eliminate sexual exploitation including support to physical and psychological recovery for all children and victims of sale or trafficking.<sup>91</sup> Ethiopia is to submit a consolidated 4th and 5th report, by December 12, 2011.

Finally the Committee recommended that the minimum age for criminal responsibility should be raised to an internationally acceptable level, there should be respect for the life of the members of minorities groups and in particular that of children.<sup>92</sup> The Committee urged the Ethiopian government to take all appropriate measures to ensure that the present recommendations are fully implemented. The question is – what happens where the recommendations are not

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<sup>88</sup> *Ibid*, para 54- 59 and 60-62, at page 11-13.

<sup>89</sup> *Ibid*, para 64 (a) and (d) at page 14.

<sup>90</sup> *Ibid*, para 67, 69 and 71 at page 16.

<sup>91</sup> *Ibid*, par 72 and 74 at page 16.

<sup>92</sup> *Ibid*, paras 78 and 80, at page 18.

implemented?. Absolutely NOTHING happened. All the Committee did concerning the failure of the Ethiopian government to ensure realization of rights for children on specific issues referred to in the Concluding Observations is to state as follows:

“The Committee notes with satisfaction that some concerns and recommendations made upon the consideration of the State party’s second report in 2001 have been addressed through legislative measures. However, recommendations regarding, inter alia, resources allocation, harmful traditional practices, birth registration, child labor, refugee children and juvenile justice have not been given sufficient follow-up. The Committee notes that those concerns and recommendations are reiterated in the present document.”<sup>93</sup>

The implication is that, when a country submits the initial report, certain recommendations are made in the Concluding Observations to specific countries. Each country is expected to comply with the recommendations and report such measures taken in compliance with those recommendations. Where the country fails to comply, all the Committee does is to reiterate consistently in subsequent Concluding Observations. For example, where specific recommendations made to the first report are not adhered to or complied with, this will be reiterated in the second Concluding Observations. Where the country fails to report on the actions taken in its second report, the Committee reiterates it again in the Concluding Observations – to the third report. Like a vicious circle, all the Committee does is to reiterate and reiterate and keep on reiterating such recommendations in each Concluding Observations, without taking any proactive action to enforce compliance with such recommendations.

It is interesting to note that this pattern of just reiterating issues was reported in the Committee’s Concluding Observations to both the Ethiopian government and that of Nigerian government’s 1<sup>st</sup> and 2<sup>nd</sup> <sup>94</sup> periodic report, as well as to the 3<sup>rd</sup> and 4<sup>th</sup> periodic reports.<sup>95</sup>

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<sup>93</sup> *Ibid*, para 6, at page 2.

<sup>94</sup> The Committee considered the second periodic report of Nigeria (CRC/C/70/Add.24) at its 1023<sup>rd</sup> and 1024<sup>th</sup> meetings (see CRC/C/SR.1023 and 1024), held on 26<sup>th</sup> January 2005, and adopted the Concluding Observations at the 1025<sup>th</sup> meeting, held on 28 January 2005. The committee in considering this second report also made reference to the Country’s initial reports and stated thus: “The Committee regrets that many of the concerns and recommendations (CRC/C/15/Add.61) it made upon consideration of the State party’s initial report (CRC/C/8/Add.26) have been insufficiently addressed..... the Committee urges the State party to make every effort to address those recommendations contained in its Concluding

The Committee usually appreciates the high level delegation of each country as an opening statement of the Concluding Observations and this was also mentioned to the Nigerian delegates. The positive development related to the implementation of the provisions of the CRC and accessions to series of other international instruments was acknowledged.<sup>96</sup> The Committee then expressed concerns that certain recommendations referred to in the 2<sup>nd</sup> report were not given sufficient follow up in the 3<sup>rd</sup> and 4<sup>th</sup> report and urged the Nigerian government to:

“take all measures to address those recommendations contained in the second periodic report that have not yet been implemented and to provide adequate follow-up to the recommendations regarding, inter alia, data collection systems, the harmonization of minimum ages and definitions, the death penalty, juvenile justice, corporal punishment, and children with disabilities, contained in the present on its combined third and fourth periodic report”.<sup>97</sup>

It was after this reiteration that the Committee then commenced with a series of recommendations, which if Nigerian government refused to address in its 5<sup>th</sup> report, the Committee would need to reiterate again. This is a manifest indication of the ineffectiveness of the UNCRC calling to question the extent to which the Committee’s action are promoting the rights of children. The Committee needs to take tougher measures and actions against countries that have failed and refused to take specific actions on the recommendation. Actions required should go beyond rhetoric and reiteration. The Committee’s Concluding Observations and recommendations to Nigeria, was a 29 paged document containing 96 paragraphs. Recommendations made include undertaking a budget analysis of resources allocated to children and that data collection system is strengthened. She is to put in place data collection

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Observation on the initial report that have not yet been implemented and to address the list of concerns contained in the present report - the second periodic report”. See CRC/C/15/Add.257, para.2, 9 and 10 of the Concluding Observations to Nigeria’s second periodic report of 28<sup>th</sup> January 2005.

<sup>95</sup>See Concluding Observations of the Committee on the Rights of the Child, Nigeria, U.N. Doc. CRC/C/NGA/CO/3-4.11<sup>th</sup> June 2010. The Committee considered the third and fourth reports of Nigeria (CRC/C/NGA/C/3-4) at its 1505<sup>th</sup> and 1507<sup>th</sup> meetings (CRC/C/SR.11505-1507) held on 26<sup>th</sup> May, 2010 and adopted the Concluding Observations, at its 1541 meeting held on 11 June 2010.

<sup>96</sup>*Ibid*, para 2, 3 and 4, at page 1-2.

<sup>97</sup>*Ibid*, para 6 at page 2.

and monitoring cases of violence, abuse and neglect of children. The country is to strengthen its cooperation with the civil society and give practical effect to the principle of non-discrimination.<sup>98</sup> In addition, strengthening of the country's efforts to ensure free and compulsory birth registration for all children was recommended.<sup>99</sup>

The Committee expressed concerns that little or no action has been taken, to follow-up on its earlier recommendations concerning the outlawing of corporal punishment and further recommends prohibition of corporal punishment in all settings. The Committee took cognizance of the level of violence against children across countries and repeated to the Nigerian delegates the same recommendation made to Ethiopian government - on follow up to the UN Study on Violence Against Children.<sup>100</sup> The Nigerian government was encouraged to take all necessary measures to implement the recommendations of the United Nations Study on violence against children. She was to ensure that all children are protected from all forms of physical, sexual and psychological violence and to gain momentum for concrete and time-bound actions to prevent and respond to such violence and abuse.<sup>101</sup> The country was encouraged to harmonize national laws on domestic adoption with the Child Rights Act and ensure their compliance with the Convention.<sup>102</sup> The Committee welcomes the Nigerian government's frank acknowledgment to the significant challenges facing the country in protecting and ensuring the rights of children with disabilities and appreciated the significant efforts in the field of health and implementation of survival rights for children. It encouraged a continuation of efforts to ensure access to education and health services for all children with disabilities.<sup>103</sup>

On education and development rights, the Committee remained seriously concerned about the high percentage of the primary school age population that is not enrolled in schools.<sup>104</sup> It recommended that primary education become effectively free and compulsory for all children without discrimination, including by abolishing school fees.<sup>105</sup> The Committee in responding to the special protection measures recommended that the Nigerian government take all measures

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<sup>98</sup> *Ibid*, para 17, 19, 23, 29, 39(c) and 55(a).

<sup>99</sup> *Ibid*, para 37.

<sup>100</sup> See (note 86) above.

<sup>101</sup> See (note 95) above at para 43(a) and (b).

<sup>102</sup> *Ibid*, para 53 at page 14.

<sup>103</sup> *Ibid*, para 56-60 at page 15-17.

<sup>104</sup> Nigerian report (note 42) above para 7.1.9(a), at page 14.

<sup>105</sup> See (note 95) above at para 71 and 72.

to guarantee the rights and well-being of internally displaced children and children of minority groups should be given equal access to education and any violation of the right to life, survival and development of children affected by violent conflict and unrest be prevented.<sup>106</sup>

Like the recommendation to Ethiopia on child labor, Nigeria was encouraged to take all appropriate steps to eliminate exploitative child labor, including development of a national strategy to support children in street situations. The country was requested to continue its efforts to protect children from trafficking, with effective measures taken to prevent and combat sexual exploitation of children.<sup>107</sup> Specifically, the Committee also reiterated its previous recommendation that the Nigerian government bring the system of juvenile justice fully in line with the Convention. The country must ensure that neither the death penalty nor life sentence are imposed for offenses committed by persons under 18 years of age and that children are held in detention only as a measure of last resort and for the shortest period possible.<sup>108</sup> Nigeria is to submit her next report by November 18, 2016.

To round up this segment, it is important to recap that, the Committee does not raise, nor propose any prescriptive sanctions against South Africa's apathy to her reporting obligation or rights violation of her children as expressed in the only report submitted to the Committee. Specifically, the South African report submitted that - there remains widespread discrimination against children, that the children in institutions are exposed to serious violations of their privacy and human dignity, while homeless children remain vulnerable to abuse by law enforcement officials. There is lack of health care facilities, no accurate data reflecting the number of children with disabilities, while 57,000 babies are infected with HIV/AIDs.<sup>109</sup> In addition, the UNCRC did not take any action to ensure or prevail on Nigeria and Ethiopia to fulfill their international obligations when they both failed to submit their Initial Country Periodic Reports as at when due. It also did not make Nigerian or Ethiopian government liable for their failure to implement the laudable recommendations made to improve the lives of children in the former Concluding Observations articulated in response to the submitted periodic reports. Rights violation of children persists in spite of the report writing status and issuance of Concluding Observations, where all the focus countries are concerned.

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<sup>106</sup> *Ibid*, para 80.

<sup>107</sup> *Ibid*, para 83, 85 (b), 87 and 89.

<sup>108</sup> *Ibid*, para 91(a) and (f).

<sup>109</sup> South African Report (note 25) above at para 95, 147, 184, 185, 186, 225, 238, 255(c) and (d).

### 3.5 Ineffectiveness of the UNCRC and shortcomings of the reporting process

From the recommendations made in the different country's Concluding Observations, it is important to say that issuing Concluding Observations alone or reiterating recommendations will not improve implementation or promote realization of rights for children. Situation of children will remain disheartening, except the Committee has a more result oriented and pragmatic mechanism for enforcement. Commitment of countries to ensure implementation may have to be provoked through naming and shaming countries who has failed to implement UNCRC recommendations, especially during the UN General Assembly meetings. In the alternative, the Committee may need to influence AID and development organizations to withdraw, limit or drastically reduce aid and assistance to such countries.

There is a serious need for the Committee to channel considerable efforts in ensuring each country's accountability and fulfillment of their international obligations. Specific action needs to be taken beyond requesting countries to simply submit budgetary allocations in their Country periodic report, irrespective of the inaccuracy or erroneous nature of the figure reported. The country reports indicated flamboyant and huge resources - budgetary allocations - supposedly invested by governments on child developmental issues. The UNCRC has no mechanisms to verify the authenticity of these allocations or whether these huge sums were actually expended. In the Nigerian report,<sup>110</sup> it was shown that a total of *N15.58 billion* was committed by the Federal Government to the Universal Basic Education programme through the National and State Offices' between 2004 and 2007. Ethiopian report<sup>111</sup> stated that 'the total budget for the education sector increased *from Birr 1.12 billion in 1990 E.C (1997/98) to Birr 2.17 billion in 1993 E.C (2000/01)*. In a similar way the share of the health-care services rose from *Birr 390 million to well over half a billion* (all emphasis mine) in the same period.' The South African report<sup>112</sup> also showed that, 'about 37 per cent (some *R325.1 million*) of the welfare services component of the budget was spent on child and family services'. If it is correct that these huge sums were spent or invested, one can quickly ask why dismal situation and serious deprivations of such developmental rights were reported by focus countries. While realization of development

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<sup>110</sup>Nigerian report (note 42 above) clause 1.2.7 at page 29; and clause 7.1.1(b) at page 111.

<sup>111</sup>Ethiopian report (note 36 above) clause 46 at page 14.

<sup>112</sup>South African Report (note 25 above) clause 376 at page 68.

and educational rights remained far-fetched, universal access to basic education remains an unfulfilled pledge for children in all the focus countries.

The Committee needs to move beyond just providing Concluding Observations, into playing a more concrete role in enforcing the provisions of the Convention and the actual implementation of children's rights. High level ineffectiveness of the UNCRC is demonstrated by its inability to propose prescriptive actions against countries. In addition, Countries' non-compliance with the UNCRC /recommendations and its inability to call such countries to order demonstrates the extent of the Committee's ineffectiveness. The ineptitude instituted at the international scene by the UNCRC is also replicated at the regional orb or sphere.

### **3.6 Role of African Committee of Experts**

The initiative by the African Union to adopt a Charter to promote and safeguard the rights and welfare of the child in Africa is a unique regional development.<sup>113</sup> Not only does this treaty enshrine rights that children can assert and lay legal claim to, it also establishes a monitoring and enforcement mechanism - the African Committee of Experts on the Rights and Welfare of the Child.<sup>114</sup> The ACRWC has established an African Committee of Experts on the Rights and Welfare of the Child. Article 42 of the ACRWC states the African Committee has a 'promote and protect' function.<sup>115</sup> The African Committee is mandated to collect and document information

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<sup>113</sup>Lloyd A, 'How to guarantee credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child' (2004) Volume 12, *The International Journal of Children's Rights*, 21–40.

<sup>114</sup>The African Committee of Experts (hereinafter referred to as the "African Committee") was established on July 10, 2001 at the 37th assembly of Heads of State and Government in Lusaka, Zambia. This is a body of 11 independent members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child, serving in their personal capacity to promote and protect the rights contained in the ACRWC. The African Committee members are given privileges and immunities, which further strengthens the requirement of impartiality and the need to serve in their personal capacity. The African Committee of Experts is mandated to promote and protect the rights and welfare of children by virtue of article 32 and 33 of the ACRWC. The Committee submits reports of each of its Sessions and activities undertaken in the implementation of the ACRWC to the assembly of Heads of State and Government/Assembly of the Union through the Council of Ministers/Executive Council.

<sup>115</sup>Article 42 states as follows: The functions of the Committee shall be:(a) To promote and protect the rights enshrined in this Charter and in particular to: (i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in

and to commission interdisciplinary assessments of situations on African problems. It seems the ACRWC has provided a progressive and action-orientated enforcement mechanism. The African Committee has authority to formulate and lay down principles aimed at protecting children's rights in Africa and can interpret the ACRWC's provisions. The UNCRC was not given this task, but can express its views as regards the interpretation of the CRC.

Under Article 43 of the ACRWC,<sup>116</sup> each State Party that has ratified the regional treaty<sup>117</sup> is also under an obligation to submit, its initial and periodic reports on the legislative or other measures as may be necessary to give effect to the provisions of the ACRWC. This is within two years of ratification and thereafter every three years. Nigeria ratified in 2001, was to submit the initial report in 2003, the first periodic report in 2006 and the 2<sup>nd</sup> in 2009. South Africa's initial report was due in 2002, the 1<sup>st</sup> report in 2005 and 2<sup>nd</sup> Report in 2008. Ethiopia having ratified in 2002 was to submit her initial report in 2004, the 1<sup>st</sup> by 2007 and the 2<sup>nd</sup> by 2010. Till date, only Nigeria has submitted her country report amongst the focus countries.

Nigeria submitted its Initial and 1<sup>st</sup> Country Report in May 2006 and the 2<sup>nd</sup> Report in 2009. South Africa and Ethiopia has not submitted any report till date. The apathy demonstrated in submission of country periodic reports to the UNCRC, the indifference and non-chalance to fulfillment of international obligations is replicated in the government's attitude to the African Committee of Experts. The African countries including two out of the three selected countries have fallen short of their regional reporting obligation. This may not be unconnected with the situation of member States having been particularly concerned with this dual reporting obligation, (both on the CRC and on the ACRWC) and the extra burden to the governments to do so. The timely submission of reports is even less likely with this dual reporting obligation. In

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Africa; (iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.(d) Perform such other task as may be entrusted to it by the Assembly of Heads.

<sup>116</sup>Article 43 (1) states that: Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:(a) within two years of the entry into force of the Charter for the State Party concerned: and (b) and thereafter, every three years.

<sup>117</sup>Nigeria ratified on June 23, 2001; Ethiopia on October 2, 2002; and South Africa on January 7, 2000.

addition, the UNCRC and the African Committee have had severe and continuous problems in receiving State reports<sup>118</sup> till date.

The African Committee, in collaboration with the Legal Counsel of the African Union, agreed that the reports submitted to the UN committee could also be submitted to the African committee, with supplements to take account of the different provisions and higher standards contained in the ACRWC. There are inherent problems with this.<sup>119</sup> Despite member States being issued with guidelines and advice on the supplementary material required, of concern is the necessity and rationale of the African Committee evaluating the same report as the UN Committee. Admittedly, there are to be some additions, but the preponderance of the report will be identical. There seems little justification in the two committees deliberating the same material. It must also be borne in mind that the timeframe for submitting reports is different under both treaties.<sup>120</sup> For the ACRWC, the States parties must submit their initial report within two years of ratification and thereafter every three years.<sup>121</sup> The UNCRC obligation is two years and then every five years respectively.<sup>122</sup> This will result in out of date material being submitted to one of the Committees.<sup>123</sup>

Given this scenario, one can ask- what benefits will the African committee bring to the protection, promotion and monitoring of children's rights?<sup>124</sup> The African Committee can be perceived as weak and not adding anything significant to the monitoring and enforcement of children's rights in Africa and the development of international child's rights law in general. With regard to the experiences of the African Commission and the continuous reminders from the African Union to State parties to submit their reports in a timely fashion, reports from so many African Countries are still overdue. It remains to be seen how willing the State parties will be to submit their supplemented reports to the African committee on children's rights and welfare issues.<sup>125</sup> The African committee has already established effective links with the UN Committee. The Chairperson has become a member of the UN Committee. Thus a co-operative relationship

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<sup>118</sup>Lloyd (note 113) above at page 32.

<sup>119</sup>*Ibid.*

<sup>120</sup>*Ibid.*

<sup>121</sup>See article 43 of ACRWC.

<sup>122</sup>See article 44 of the CRC.

<sup>123</sup>See (note 113 above) at page 33.

<sup>124</sup>*Ibid.*

<sup>125</sup>*Ibid.*

has been established. The UN Committee will be able to provide technical assistance to the African Committee and member States for the preparation and timely submission of initial and periodic reports.<sup>126</sup> Even though this is yet to be operationalized or become a reality but this decision is a paradigm shift and really necessary given the current apathy displayed by many countries in Africa, particularly the difficulty in obtaining the 15 State ratifications required before the treaty came into force.<sup>127</sup> The apathy remained apparent and seemingly incurable till date.

In addition, State parties in Africa have continuously failed and refused to submit their country report and have persistently refused to fulfill their regional obligations. State reporting mechanism has demonstrated that, as a general proposition, the quality of reports varies in detail and content and States do not always provide sufficient information on the implementation of the treaty.<sup>128</sup> For example reports from Mauritius and Egypt were received in 2005 and Nigeria and Rwanda submitted the initial and first report in December 2006.<sup>129</sup> Amongst the selected countries, only Nigeria has been forthcoming with additional submission of her second periodic report in 2009. South Africa and particularly Ethiopia which is the headquarters of the African Union have not submitted to the African Committee, any report from the date of ratification till date. This is an illustration of the indifference of governments to fulfill their obligations and the ineffectiveness of the African Committee to hold governments responsible and accountable to their obligations to their children.

The ACRWC has provided a progressive and action-orientated enforcement mechanism, by prescribing to the African Committee the authority to formulate and lay down principles aimed at protecting children's rights in Africa. However, like the UNCRC, the African Committee also lacks adequate or effective enforcement mechanisms to ensure member States present their reports as at when due. When reports are not submitted or presented by member States, the African Committee *does nothing* (own emphasis) like its UNCRC counter-part.

Furthermore, on request (only on request) from State parties and AU institutions, the African Committee can interpret the ACRWC's provisions. The African Committee can also receive and

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<sup>126</sup> *Ibid.*

<sup>127</sup> Ngokwey N, 'Children's Rights in the Central Africa Sub-Region: Poverty, Conflicts and HIV/AIDS as Context' (2004) Volume 12, *The International Journal of Children's Rights*, 183–216 at 183.

<sup>128</sup> Sloth-Nielsen J, *Children's Rights in Africa: A Legal Perspective* (2008) Ashgate Publishers at 47.

<sup>129</sup> *Ibid.*

decide on individual communications, a task not prescribed to the UN Committee,<sup>130</sup> but this has not added value to, or affected positively the enforcement mechanisms. In addition, a significant concern however, about the effectiveness and credibility of the African Committee arises from the content of their composition and activity.<sup>131</sup> There seems to be a perceived lack of independence and impartiality of some of the members. For example, the activities were stated as being undertaken in their employed capacity, on behalf of their State or government and the members only reported on activities within their own countries. These issues threaten the reputation of the Committee. The members are appointed to sit as volunteers in their personal capacity, be impartial and competent in matters on the rights and welfare of the child. The ACRWC is silent as to the geographical and gender balance of committee members. This consideration has implications for the independence of a body from a continent of different traditions, cultures and legal systems.<sup>132</sup> The principal threat to the effectiveness, efficiency and credibility of the African Committee is the apathy and inaction of the African Union and the lack of resources being allocated.<sup>133</sup>

The African Committee is yet to develop into a strong human rights organ, complementing the work of the global institutions, like the UNCRC and above all strengthening the work of the African Commission. Further, there are three weaknesses regarding the enforcement of the ACRWC. Article 44 (2) of the ACRWC states that every communication 'shall be treated in confidence'. Confidentiality has been used by African States under the guise of facilitating an amicable solution to control human rights monitoring mechanisms.<sup>134</sup> This principle has been cited as one of the factors that accounted for the inefficiency of the African Committee. Publicity

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<sup>130</sup> Article 44 on Communications states as follows: (1) The Committee may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter. (2) Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

<sup>131</sup> Article 42 of the ACRWC.

<sup>132</sup> Lloyd (note 113) above at page 34.

<sup>133</sup> *Ibid*, at page 36.

<sup>134</sup> Article 45 on - Investigations by the Committee states as follows :(1). The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter. (2). The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article [44] of this Charter. (3).The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government. (4). States Parties shall make the Committee's reports widely available to the public in their own countries.

and its resultant shame have a considerable deterrent effect in preventing future human rights violations. The transparency of the African Committee would also not be monitored if the confidentiality principle were strictly adhered to. Secondly, the Charter does not mention anything (e.g., exhaustion of local remedies) regarding the admissibility of communications. Lastly, the wisdom of having a separate body to monitor children's rights is troublesome.<sup>135</sup>

The African Committee has suffered from persistent financial difficulties<sup>136</sup> and has consistently remained ineffective to perform its mandate or monitor or impact violation of rights for the African child.

### **3.7 Role of the National Human Right Institutions**

Sufficient reference have been made to the specific human rights treaties (CRC and ACRWC) being legal instruments which has set international and regional standards for promoting and protecting the rights of children. However, enforcement and implementation requires effective national-level implementation in order to ensure that treaty/human rights are enforced and enjoyed by all children in each country. It has been shown that by ratifying the treaties, States subscribe to these standards and commit themselves to implementing the rights at the national level. The treaty bodies mentioned above (UNCRC and African Committee) encourage and support States in this effort. Even though the treaties were prescribed by international and regional communities, it is clearly set that it is at the national level that the promotion and protection of human rights matters most. The elaborate process of reporting to the UNCRC and African Committee itself radically involves the National Human Rights protection system.

Many countries have created National Human Rights Institutions<sup>137</sup> to promote and protect human rights according to the Paris Principles. The principles also specify the responsibilities of

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<sup>135</sup>Chirwa DM, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) Volume 10, *The International Journal of Children's Rights*, 157–177, at 169-170.

<sup>136</sup>Viljoen F, 'The African Charter on the Rights and Welfare of the Child', in C.J. Davel (ed.), *Introduction to Child Law in South Africa (2000)* Juta Law, 214.

<sup>137</sup>Hereinafter referred to as the "NHRIs". In 1990, the Commission on Human Rights resident in Geneva called for a workshop to be convened with the participation of national and regional institutions involved in the protection and promotion of human rights. The workshop was to review patterns of cooperation of national institutions with international institutions, such as the United Nations and its agencies, and to explore ways of increasing their effectiveness. The conclusions of this important workshop, held in Paris in October 1991, became the Paris Principles representing the status and functioning of national

NHRIs to submit recommendations, proposals and reports to the Government, parliament and any other competent body. They promote conformity of national laws and practices with international human rights instruments, as well as encourage ratification of international human rights instruments and ensure their implementation. An NHRI also contribute to the reporting process under international human rights instruments. It's an organization, with a constitutional or legal basis, and with authority to promote and protect human rights at the national level, as an independent agency. It is one mechanism through which a state responds to its international responsibility 'to take all appropriate action' to ensure that international human rights are implemented at the national level. NHRIs are to be vested with the competence to promote and protect human rights through as broad a mandate as possible, clearly articulated in a constitutional or legislative text.

It was with this background that the Ethiopian Human Rights Commission<sup>138</sup> was established. The core objectives of the EHRC include educating the public to be aware of human rights. It ensures that human rights are protected, respected and fully enforced as well as taking necessary measures where they are found to have been violated. More specifically, the EHRC aspires to develop its institutional capacity to fully promote and protect human rights throughout the country in full compliance with the Federal Constitution.<sup>139</sup> The National Human Rights Commission of Nigeria was also established by the National Human Rights Act, 1995 and in line with the resolution of the General Assembly of the United Nations drawn from the Paris Principles.

The Commission serves as a mechanism for the enhancement of the enjoyment of human rights. Its establishment is aimed at creating an enabling environment for extra-judicial recognition, promotion and protection and enforcement of human rights and treaty obligations. It provides a forum for public enlightenment and dialogue on human rights issues thereby limiting controversy and confrontation.

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institutions for protection and promotion of human rights. In addition to exchanging views on existing arrangements, the workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights instruments. These recommendations were endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of December 20, 1993.

<sup>138</sup> Hereinafter referred to as "EHRC".

<sup>139</sup> Article 55 (1) and (2) of the FDRE stipulates that: (1) The House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal Jurisdiction; (2) It shall establish a Human Rights Commission and determine by law its powers and functions.

The South African Human Rights Commission on the other hand is the national institution established to entrench constitutional democracy. It is committed to promote respect for, observance of and the protection of human rights for everyone without fear or favor. In accordance with the South African Constitution<sup>140</sup> the tasks of the Human Rights Commission are to - develop an awareness of human rights among the people of South Africa. The South African Human Rights Commission works with government, civil society and individuals, both in South Africa and internationally. It acts as both a watchdog and a visible route through which people can access their rights. South African Human Rights Commission however, has not been able to influence the South African government to fulfill her reporting obligation and has no sufficient record of providing any relief to investigative complaints of violation of children rights.

In spite of the prescribed roles stipulated for the human right institutions, their effectiveness or ineffectiveness is measured, based on the UNCRC recommendation in the Concluding Observations to the three countries. An insufficient or inadequate human and financial resource is the common and cross cutting challenge limiting the effectiveness of Human Right Commissions in each focus country. However, starting with South African report, the Committee did acknowledge the establishment of the South African Human Rights Commission and its role of promoting the observance of fundamental human rights at all levels of society. The Committee however was concerned that insufficient resources have been allocated to allow the Commission to carry out its mandate effectively.

Additionally, the Committee noted with concern how the work of the Commission continues to be hampered by, inter alia, red tape, the need for additional legislative reform and the absence of a clear procedure to register and address complaints from children concerning violations of

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<sup>140</sup>The South African Constitution in chapter 9, section 181 (1)(c ), (2) and (3) prescribes the state institutions supporting constitutional democracy to include National Human Right Commissions and further states as follows: (1). The following state institutions strengthen constitutional democracy in the Republic: (a).The Public Protector; (b).The Human Rights Commission. [*Para. (b) amended by s. 4 of Act 65 of 1998.*]; (c).The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d).The Commission for Gender Equality; (e). The Auditor-General; (f).The Electoral Commission; (2). These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice; and (3). Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

their rights under the Convention. The Committee then recommended to the South African government to take effective measures to ensure that adequate resources (both human and financial) are allocated to ensure the effective functioning of the South African Human Rights Commission. The Committee further recommended that the country establish clear child-friendly procedures to register and address complaints from children regarding violations of their rights and to guarantee adequate remedies for such violations. The Committee further suggests that the State party introduce an awareness-raising campaign to facilitate the effective use by children of such a procedure.<sup>141</sup>

To the Ethiopian government, the Committee recommended that the State party ensure as a matter of priority the efficient operation of both the Human Rights Commission and the Ombudsman. This is in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights. It further recommended that both institutions (the Human Rights Commission and office of the Ombudsman) should be provided with the necessary human and financial resources to receive, monitor and investigate complaints from or on behalf of children on violations of their rights.<sup>142</sup> Same recommendation was reiterated to the Nigerian government by the Committee. The appointment of a Special Rapporteur on Child Rights within the Nigerian Human Rights Commission with the mandate to monitor and collect data on violations of children's rights was appreciated. Concerns were expressed on the inadequacy of the human and financial resources available to the Special Rapporteur and on the lack of information on the independence of and activities undertaken by the Special Rapporteur. The Committee further urged the Nigerian government to ensure that the National Human Rights Commission complies with the Paris Principles and is provided with adequate financial and human resources.<sup>143</sup>

The UNCRC, since its inception and through monitoring State reports has worked closely with Human Rights Institutions to influence legislation, public institutions, policies and practice. But a fundamental flaw persists, demonstrating another level of their ineffectiveness. Children and young people that should be protected from harm and violation through the machinery of these Human Right Institutions cannot complain directly to their expert committee about violations of

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<sup>141</sup>See (note 66) above at para 5 and 13.

<sup>142</sup>See (note 78) above at para 15, page 4.

<sup>143</sup>See (note 95) above at para 14 and 15.

their rights by their governments. The Human Rights Institutions have never being their voice to reach out to either the UNCRC or the African Committee. Besides, the UNCRC in particular – does not have a mandate to consider and decide on individual or collective complaints or to undertake enquiries into violations. The African Committee that had the mandate was not and mostly has not been approached by the Human Right Institutions on behalf of children and particularly in the selected countries - children continue to suffer widespread and often severe breaches of their basic rights. In addition, poverty and/or discrimination prevent certain groups of children from accessing those legal systems that do exist.

In conclusion, it can be argued that while the UNCRC - are not taken seriously and the recommendations are still not fully incorporated into national law and programmes, violation of children rights have not been effectively challenged through the national courts, or through the Human Right Institutions. Hence violation of children's rights to participation, protection, survival and development persists, while the National Human Right Institutions remain disturbingly ineffective and incapable of fulfilling the mandate to promote the human rights of the people including children.

### **3.8 Summary**

The outputs of the UNCRC and their roles to provide States with useful guidance towards fulfillment of international obligation have been considered. This is shown alongside their level of ineffectiveness. The commitments of the three countries to international and regional obligations have been scrutinized in the context of specific country periodic reports submitted to the UNCRC. Child rights violation as shown in the different components of the country reports are rarely legally enforceable in national courts, which means that the vast majority of violations of child rights go unchallenged and unpunished by the main international monitoring body- the UNCRC – who could *only* (own emphasis) issue recommendations/Concluding Observations without any enforcement mechanism. Regional enforcement mechanisms on the other hand are also manifestly weak or non-existent. The African Committee of Experts, for example, could be a powerful tool in addressing child rights violations, but it is underfunded and lacks specialist

knowledge and capacity to promote realization of rights for children. As a result, it has yet to complete a single investigation in a region blighted by grave violations.<sup>144</sup>

Efforts at enforcement of the various legislation seems to have been hampered by factors such as poverty, cultural resistance, low-level infrastructure and most importantly the passive efforts of monitoring bodies both nationally by the Human Rights Institution, regionally by the African Committee and internationally by the UNCRC. What constitutes the passive efforts, the effectiveness or ineffectiveness of these monitoring bodies has been considered. Governments of the selected countries have made concerted efforts to prescribe wide but inadequate measures to implement the provisions of the CRC. Attempts have been made to put in place administrative and institutional measures to accelerate progress for implementation of international treaties and Conventions. Nevertheless, as these country profiles attest, far more urgent work must be done to protect children from such heinous violations, as these are still perpetrated with impunity in these countries.

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<sup>144</sup>Save the Children *Improving Accountability for Child Rights; The need for a New International Mechanism*. Policy Brief accessed at <http://resource centre.savethechildren.se>, on 9<sup>th</sup> February, 2011

## CHAPTER FOUR

### Judicial developments and the advancement of children's rights

#### 4.1 Introduction

The ratification of international and regional instruments promoting the rights of children<sup>1</sup> by the selected countries has certainly had positive effects on their legal systems. Based on the ratified international and regional instruments, specific provisions protecting the rights of children are articulated in the different Constitutions<sup>2</sup> and domestic legislation. Despite the provisions articulated in these Constitutions and legal frameworks, gross violation of children's rights persists. The unbearable situation of children and violation of their rights are reported in all the three Countries' periodic reports submitted to the UNCRC, with no sanctions meted to the government and the perpetrators.<sup>3</sup>

This chapter explores the substantive translation of protecting the rights of children into reality, focusing on judicial developments including emerging judgments that have advanced or limited the realization of rights for children in specific country contexts. The application of ratified

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<sup>1</sup>Importantly the CRC, ACRWC and ILO Convention.

<sup>2</sup>Such as: Article 36 of the Constitution of FDRE; section 28 (1)(a-f) of the Constitution of South Africa; and section 42(1) of the 1999 Constitution. See also chapter 1, section 1.1 and chapter 2, section 2.7.

<sup>3</sup>The South African country report (para 552 at page 92) indicated that "The migrant labor system drew prostitutes to the hostels and towns, where the hostels are frequently "serviced" by school girls. That the large commuter population around taxi ranks has led to organized child prostitution, and it seems that employees of the taxi industry are the organizers and procurers. Due to its size, South Africa has a large trucking business which has created a demand for child prostitution. The extensive and highly exploitative system of domestic workers provides hidden opportunities for sex services, either forced or paid". In the case of Nigeria, the country report (para 5.6.4 at page 74) related that "the nature of family-related violence and the economic dependency of the victims on the perpetrators (usually parents, guardians, other adult relatives, or employers) discourage victims from complaining or taking up legal action. Such violent acts are perpetrated within the confines of the home and are hidden from public view". The Ethiopian report amongst other gruesome details (para 118, 120, 129 and 130 at page 28-30) also reiterated cases of inhuman exploitation and brutal treatment that had come to light; the murder, insanity and inflicted disability that were some of the outcomes of external trafficking of Ethiopian children. The country reports did indicate some palliative measures but none of the reports disclosed specific instances where perpetrators of these heinous crimes were brought to justice, or when any child's right violation case was referred to a court of justice to seek redress on behalf of these children that have been abused, trafficked or otherwise exploited. The monitoring bodies also did not take any specific sanction against the government of each of the selected country. See also chapter 3, section 3.3 and 3.5.

international and regional treaties in the context of customary law and common law is noted as an emerging jurisprudence from the African courts to promote the rights of children. The chapter further explores how different domestic courts and jurisdictions have applied the international and regional instruments in their decisions, pronouncements and engagements to advance or limit realization of rights for children. The chapter considers three different components in Ethiopia's judicial systems noting the failure of her courts and judicial officers to apply protective provisions of the international treaties ratified and contextualized into her domestic Laws. The first is that decisions by the courts to apply human rights treaties in Ethiopia are limited as a result of several unfavorable factors. The second is the manifest weakness of the juvenile justice administration and the third, being administering corporal punishment on defenseless children, in spite of prohibitive provisions of her domestic legislation.

Similarly, few but important court's proceedings have been evaluated to track development of justiciability of human rights, entrenched in the Nigerian Constitution and domestic legislation as it affects children's rights. South Africa's judicial systems, on the other hand was extensively explored, to indicate how the country has put in place the best and most advanced judicial systems that have advanced realization of rights for her children.

#### **4. 2 Application of international treaties in domestic legal systems**

Ethiopia legal systems are reported to be the least evolved or developed in promoting, protecting or fulfilling the rights of children. Three main components are discussed to indicate the bane of Ethiopia's government inability, to promote and advance realization of rights for her children through the courts and her judicial systems. The first point to be discussed is that - decisions by the courts to apply human rights treaties in Ethiopia is limited as a result of several unfavorable factors. For example, the courts are required to take as law only those letters that appear in the official law gazettes.<sup>4</sup> Therefore, even if courts wish to apply international human rights treaties including the CRC and ACRWC, the lack of implementing legislation, or some means of making official versions of treaties available, continues to pose a serious problem. Hence, enforcing the rights stipulated in the domestic legislation prescribed by the ratified international treaties is fraught with some difficulties and enforceability by the Ethiopian courts

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<sup>4</sup>1995 Proclamation No.3/Article 2(3).

remains a challenge. The most difficult hurdle to overcome is the fact that international agreements are incorporated into Ethiopian law by a single act of ratification without reproducing the text of the treaty.

Statement of ratification is the only information that is published as a Proclamation<sup>5</sup> after the legislative body decides to ratify a treaty. Arguably, this in effect means that a treaty in the original version automatically becomes the law of the land and binding, as soon its ratification is published. When a treaty is ratified this way, the courts are left without a clue as to its contents. Obtaining the text of the treaty is difficult as the treaties are not available in the Amharic language which is the language of the courts and important cases are usually compiled by the Federal Supreme Court with most of these compilations being Amharic - the national working language.<sup>6</sup> Judicial decisions promoting children's rights in Ethiopian courts that have been translated into English are thus *limited* (own emphasis). To this extent, there is a dearth of decided or adjudicated cases where the courts have made specific reference to and applied ratified international treaties to promote realization of protection rights for children or to protect children from gross abuses and violations. This is notwithstanding the relevant domestic provisions that are in line with international treaties protecting children, especially from violence and exploitation. Some of such provisions are articulated especially in the Criminal Code, the Family Code and other domestic legislation,<sup>7</sup> prescribing stiff penalties for child's rights offenders and violators. *Unfortunately*, (own emphasis) successful court decisions where perpetrators and child's rights offenders have been handed stiff penalties as stipulated in the country's domestic legislation were very difficult to come by and one has to resort to some country reports submitted to US Department of State.

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<sup>5</sup>Ethiopia in ratifying the CRC domesticated this through a national legislation tagged Proclamation No 10 of 1992, while other conventions such as the ACRWC and the ILO Convention 182 on the Worst Forms of Child Labour were ratified by the government through the Ratification Proclamation No.283 of 2002.

<sup>6</sup>'Harmonization of laws relating to children in Ethiopia', The African Child Policy Forum, at page 5 accessed at [www.africanchildforum.org](http://www.africanchildforum.org), on 4<sup>th</sup> March, 2009.

<sup>7</sup>The Criminal Code 2005 of the FDRE in its terms and contents criminalizes sexual violence against children especially in article 635(a) and (b) prescribing up to 5 years' rigorous imprisonment and a fine of up to 10,000 Birr (approx. US\$ 1,125) for offenders who procures a minor for prostitution; article 626(1) and 627(1) prescribes 5 to 20 years' rigorous imprisonment for raping a girl between 13 and 18 years of age. Article 597(1) and (2) at the same time makes it illegal to recruit, receive, hide, transport, export or import a child for forced labor using violence, threat, deceit, fraud or kidnapping or by bribing a person who cares for a child also and prescribe 5 to 20 years' rigorous imprisonment and a fine up to 50,000 Birr (approx. US\$ 5,625) for violators. Article 18(2) of the FDRE Constitution also prohibits human trafficking for any purpose.

This difficulty in the nation's judicial system to protect children, especially the girl child from violence, abuse and exploitation was corroborated by and succinctly placed in the Ethiopia's Human Rights report<sup>8</sup> thus:

“Although the civil courts operated with a large degree of independence, the criminal courts remained weak, overburdened, and subject to significant political intervention and influence..... The judicial system severely lacked experienced staff, sometimes making the application of the law unpredictable..... The seventh criminal branch of the federal court of first instance, headed by three judges, handled cases involving juvenile offenses and cases of sexual abuse of women and children. There was a large backlog of juvenile cases, and accused children often remained in detention with adults until officials heard their cases. There were also credible reports that domestic violence and rape cases were often significantly delayed and given low priority”.<sup>9</sup>

The report went further to state as follows:

“Women and girls’ experienced gender-based violence daily, but it was underreported due to cultural acceptance, shame, fear, or a victim's ignorance of legal protections...Sexual harassment was widespread. The Penal Code prescribes 18 to 24 months' imprisonment; however, harassment-related laws were not enforced. Child abuse was widespread. There was no training of police officers on procedures for handling cases of child abuse. ....The commercial sexual exploitation of children continued.....particularly in urban areas. Girls as young as age 11 reportedly were recruited to work in brothels, often sought by customers who believed them to be free of sexually transmitted diseases. Girls were also exploited as prostitutes in hotels, bars, resort towns, and rural truck stops. Within the country children were trafficked from rural

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<sup>8</sup>The Country Reports on Human Rights Practices are submitted annually by the U.S. Department of State to the U.S. Congress in compliance with sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended. The reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the *Universal Declaration of Human Rights* and *in the Convention on the Rights of the Child* (own emphasis).

<sup>9</sup>See 2010 Human Rights Reports: Ethiopia, section 1, paragraph (e) at page 11-12 accessed at [www.state.gov/document/organization/160121.pdf](http://www.state.gov/document/organization/160121.pdf) on 13th January, 2012.

to urban areas for domestic service, commercial sexual exploitation, and forced labor in street vending and other activities”.<sup>10</sup>

Furthermore, in a more recent publication, Ethiopia’s 2011 Trafficking in Person’s report<sup>11</sup> - has this to say:

“The Government of Ethiopia does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. The government made substantial progress over the past year in addressing human trafficking crimes through law enforcement efforts, which included the country’s first convictions for both transnational sex trafficking and internal labor trafficking. In the capital region, Federal Police investigated and the Federal Court prosecuted an increased number of trafficking crimes, though the low number of investigations and prosecutions of internal trafficking remained a concern.”<sup>12</sup>

The report confirmed the country’s inability to comply with international treaties on eliminating trafficking. By proxy one can say – the country is unable to comply with section 34 and 35 of the CRC duly ratified and made as part of the Ethiopian Law prescribing that States should take measures to protect children from sexual exploitation and to prevent the abduction of, the sale of or traffic in children.

It is however cheering to read in Ethiopia’s trafficking in person’s report, efforts to address child trafficking issues and to punish perpetrators based on her domestic legislation and judicial systems. It is encouraging to read how the *Federal Police investigated and the Federal Court prosecuted* (own emphasis) offenders of trafficking in persons. It is also at least good news, to see the country respond to specific domestic legislation set to protect the girl child from sexual exploitation and internal labor trafficking. The report painted a more prolific picture when it states as follows:

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<sup>10</sup> *Ibid*, section 6 at page 41-42.

<sup>11</sup> United States Department of State, 2011 Trafficking in Persons Report - Ethiopia, 27 June 2011, accessed at <http://www.unhcr.org/refworld/docid/4e12ee7e37.html>, on February 9, 2012.

<sup>12</sup> *Ibid*.

“The Ethiopian government increased its efforts to investigate and prosecute internal and sex trafficking cases during the reporting period, while continuing to punish transnational trafficking offenders. Many law enforcement entities continued to exhibit an inability to properly distinguish human trafficking from other types of crimes and lacked capacity to collect and organize relevant data”...”The court successfully concluded the remaining cases, securing 71 convictions primarily under Articles 598 and 571 and ordering punishments ranging from 20 months' to 12 years' imprisonment with no suspended sentences. *One case was specified as involving sex trafficking, constituting Ethiopia's first conviction for this crime* (own emphasis). In August 2010, the Federal High Court's 11th Criminal Bench convicted an Ethiopian man under Articles 597 and 636 of trafficking three Ethiopian women to China where they were forced into prostitution, imposing a sentence of 10 years' imprisonment, a fine of \$2,400, and restitution of \$3,300 to each victim. Under Article 598(1), *the court in August 2010 also convicted a woman of trafficking 13 Tigrayan girls to Addis Ababa for domestic servitude, sentencing her to six years' imprisonment for internal trafficking* (own emphasis). At the local level, police in SNNPR arrested 12 suspected trafficking offenders and local judicial officials prosecuted and convicted all 12 under the criminal law, imposing sentences of one to three years' imprisonment. Other suspected traffickers received penalties at the local level for violating *kebele* (local administration) by-laws”.<sup>13</sup>

This may be encouraging, it does not remove the fact that in a country as old as Ethiopia, it is in year 2011 that the country is recording its first convictions for both transnational sex trafficking and internal labor trafficking. Efforts to obtain texts of actual law report to extract detailed information on the reasoning of the courts all proved abortive; hence one had to abide with the information as shown in the United State Department of State reports. The country needs to maintain the momentum and bring to justice numerous child rights violators. The initiatives taken by the Federal Police and the Federal Courts should be cascaded to the lower level and to the other regions within the country. The ineffectiveness of the judicial system should be reviewed in favor of promoting and protecting the rights of children.

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<sup>13</sup>*ibid.*

Apart from non-adjudication of child's rights cases, as reflected in Ethiopia's human right reports, and the current or *favorable but limited disposition* (own emphasis) of the judicial officers recalled in the country's report on trafficking, the second persisting problem faced by children in Ethiopia is the administration of juvenile justice. Most importantly, the administration of juvenile justice in Ethiopia is also fraught with legal, technical and structural obstacles that expose children to violations of their rights. These violations take place as the children pass through different phases after having committed offenses - from their communities through to the police and the judiciary. The provisions in the international and regional treaties, which are of paramount importance in relation to justice for children, are articles 40 of the CRC and 17 of ACRWC.<sup>14</sup> These provide for protection of a child accused or recognized to have infringed the penal law. Though Ethiopian laws provide for the setting up of a juvenile justice system,<sup>15</sup> which is based on the protection of the interest of the child, the practice is far from the letters of the law. It provides for how arrest should be made, how court proceedings should be conducted and the custody of a young offender during proceedings. But the real situation of children in conflict with the Law in Ethiopia is, tragic, and heart breaking. The picture was dramatically brought out by an article on 'Innocent offenders'.<sup>16</sup> From the opening page of this article we find this statement:

"...Precipitated by such factors as the break-up of family structures, the displacement consequent to armed conflict and natural disasters, the lack of opportunity, the lack of proper counseling and guidance services, the harsh discipline of parents and guardians, and the ever present and pervading face of poverty, many children are each year committing anti-social and criminal deeds. Behind each deed of crime committed by a

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<sup>14</sup>Article 40(1) of the CRC enjoins state parties to 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; while article 17 (1) of the ACRWC states that: Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

<sup>15</sup>The Criminal Procedure Code of Ethiopia of 1959 has devoted 11 articles to the procedure applicable with regard to juvenile criminal justice.

<sup>16</sup>See 'Innocent Offenders' published by Action Professionals' Association for the People, a not-for profit, non-partisan and indigenous non-governmental organization established in 1993 with the main objective of providing legal services to the marginalized or otherwise disadvantaged sections of the Ethiopian society, accessed at [www.apapeth.org/docs/Innocent Offenders.pdf](http://www.apapeth.org/docs/Innocent%20Offenders.pdf) on 13<sup>th</sup> January, 2012.

child, there lies a story of desperation and woe. Each child in conflict with the law is a case of unfulfilled dreams of childhood, unsatisfied craving for love, and unappeased needs for the demands of a full life. Organized society's primary mechanism for dealing with such deeds, the criminal justice system as it is in Ethiopia, has not yet managed to develop the infrastructure facility, and specialized capacity to fully and adequately respond to these children and to their needs. Incapacitated by lack of expertise, and resources, there is much that needs to be done for the criminal justice system to realize its avowed inspiration of<sup>17</sup> "the welfare and, indeed, the rehabilitation of the individual accused of crime".<sup>18</sup>

The article paints a picture of debilitating limitation in terms of values, institutions, resources, and procedures in Ethiopia juvenile justice system and further has this to say:

"The fact that the existing domestic law on the administration of juvenile justice is compatible with the minimum international standard does not, however, mean that it is adequate. Rather it exhibits many lacunae and even those existing provisions are lacking in essential details. In this regard the most conspicuous shortcomings are: existence of disposition measures that are not congruent with the stated objective of juvenile justice administration; absence of early disposition mechanism such as diversion; and inadequacy of the existing procedures for the handling of young offenders.<sup>19</sup> Absence of non-judicial mechanism for diversion is the second area from which the domestic law of Ethiopia on the administration of juvenile justice suffers".<sup>20</sup>

The article further indicated how:

"the Penal Code does not recognize any diversionary role to the police. The court is expected to act as a non-judicial diversionary mechanism. The Code, however, seems to overlook the fact that it is the police who normally have the first encounter with a juvenile offender. Those who accuse young offenders and the police find it less troublesome to handle cases of juveniles without resort to courts. More disturbingly, the diversionary

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<sup>17</sup> *Ibid*, at page 1.

<sup>18</sup> Preface to the Penal Code of Ethiopia No 158 of 1957.

<sup>19</sup> See (note 16) above at page 21.

<sup>20</sup> *Ibid*, at page 22.

role of courts is not at all understood by courts, the police or the community at large. As the Code does not regulate how police should handle young offenders, present police practices come to frustrate the very purpose for which diversion is required”.<sup>21</sup>

It is interesting to note that the failure of the judicial system and judicial officers to apply protective provisions of international treaties is not limited to the weak or non-application of the Penal Code provisions. The same gap was reflected in the operationalization of the country’s Criminal Procedure Code. Article 172 of the Criminal Procedure Code stipulates that the police, the public prosecutor, his parents, guardians or the complainant could bring a young offender immediately to the nearest court. The Criminal Procedure Code also follows a procedural approach, which is meant to protect the interest of the young offender according to the relevant provisions of the CRC. Its provisions *briefly* (emphasis mine) provided the special procedures,<sup>22</sup> which should apply to young persons. As pointed out by Fisher, “inevitably, such brief coverage (shown in articles 171-180) has kept many matters unsettled and it is often problematic whether and how much of the rest of the code [applicable to adults] should be used to fill the gap”.<sup>23</sup> Hence, the lack of practical guidelines and detailed rules in handling young offenders in the process of administration of criminal justice has meant uncertainty and confusion creating gaps and resulting in children being treated no differently than adults by the police and even at times by the judiciary.

The most fundamental of these gaps appears to be lack of an effective juvenile justice system in the country. As a result, in many regions juvenile offenders are tried and convicted in adult courts. Likewise, several bottlenecks are slowing down the initiative to strengthen the juvenile justice system including such constraints and challenges enumerated in the Ethiopian country report including:

“absence of mechanisms to record and report the cases of sexual abuse, abduction, rape; there is only one Juvenile Delinquents Rehabilitation Institute, the facilities of which are inadequate; lack of a specialized juvenile court system with specialized judges; lack of organizational capacity to reach the grass-roots level to combat harmful traditional

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<sup>21</sup> *Ibid*, at page 23.

<sup>22</sup> See articles 171-180.

<sup>23</sup> Fisher S, ‘Criminal Procedure of Juvenile Offenders’ (1973) Volume VII, *Journal of Ethiopian Law*, 127.

practices; the alarming rise in number of HIV/AIDS orphan children; low participation of the community in the process of solving the problems of street children; attitudinal problems of the community towards Children in Especially Difficult Circumstances in general; lack of coordination/networking/collaboration among organizations supporting orphan and vulnerable children; lack of financial and human power resources to minimize effectively the problems of vulnerable children; inadequate coordinated and target-oriented advocacy work on various child-focused issues; and *low enforcement of legislation to protect the rights and well-being of children*<sup>24</sup> (emphasis mine).

The third point is on corporal punishment. In compliance with article 19 of the CRC,<sup>25</sup> the FDRE Constitution in its article 39(5)<sup>26</sup> prohibits corporal punishment but only ‘in schools and other institutions responsible for the care of children’. This does not seem to include the home of the child. The Criminal Code upon its lofty and positive provisions does legitimize the use of violence by parents or legal guardians against their children. It entitles - “the right to administer lawful and *reasonable chastisement*”.<sup>27</sup> Article 258(2) of the Revised Family Code too, seems to imply the same thing. It states that “the guardian may take the *necessary disciplinary measures* for the purpose of ensuring the child’s upbringing”. Thus, the authorization of ‘*reasonable chastisement*’, or ‘*necessary disciplinary measures*’ (all emphasis mine) in the Criminal Code

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<sup>24</sup>See Ethiopian report, para 225 at page 62-63. The Ethiopian Country Report gave a detailed account of the situation of children in the country, indicating the extent of violation of their rights and the low level of implementation of the broad and protective provisions of the CRC including in the child justice system. Already discussed in chapter 3, sections 3.3 and 3.4.

<sup>25</sup>Article 19 of the CRC enjoins state parties 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; Article 16 of the ACRWC ensures protecting the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.

<sup>26</sup>Article 36 of the Constitution of FDRE states that : Every child has the right:(1) To life; (2) To a name and nationality; (3) To know and be cared for by his or her parents or legal guardians; (4) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being; (5) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children; (6) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child; (7) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults; (8) Children born out of wedlock shall have the same rights as children born of wedlock; and (9)The State shall accord special protection to orphans and shall encourage the establishment of institutions that ensure and promote their adoption and advance their welfare, and education.

<sup>27</sup>Article 576(3) of the Criminal Code of Ethiopia.

and the Revised Family Code respectively, is in direct conflict with the article 19 of the CRC. In the same vein, the Penal Code specifically contains such negative disposition measures of allowing corporal punishment<sup>28</sup> of children which at a glance also negates article 19 of the CRC. The language used by the legislation can be seen as being geared towards satisfying the vengeance needs of society than towards either reforming the behavior of the child or promoting his/her best interest and well-being.<sup>29</sup> Hence prohibition of corporal punishment is still to be achieved in the home and alternative care settings in Ethiopia. It can then be concluded that, while the country's judicial systems is weak, her judicial officers have also woefully failed to apply protective provisions of international treaties to protect the rights of her children.

Similarly, in Nigeria, child's rights violation is rarely legally enforceable in national courts, which means that the vast majority of violations of child rights go unchallenged and unpunished. Consequently, relevant provisions of both the Nigerian constitutions and domestic legislation that are in compliance with ratified instruments are either non-justiciable,<sup>30</sup> or rendered inapplicable by the courts. Few but important cases will be evaluated to track development of justiciability of human rights, entrenched in the Nigerian constitution as it affects children's rights.

The Constitution of the Federal Republic of Nigeria, 1999 in its preamble<sup>31</sup> guarantees certain fundamental rights to every citizen including children. Chapter II of the Nigerian Constitution incorporates the 'Fundamental Objectives and Directive Principles of State Policy'. These provisions are declarations of objectives to be pursued by the government and policies that should help in the realization of those objectives. The chapter constitutes a guide to

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<sup>28</sup>Article 172(1) and (2) of the Penal Code specifically state as follows: (1). Where a young offender is contumacious the Court may, if it considers corporal punishment is likely to secure his reform, order corporal punishment. Corporal punishment shall be inflicted only with a cane and the number of strokes shall not exceed twelve to be administered on the buttocks. Only young offenders in good health shall be subjected to corporal punishment; and (2). The Court shall determine the degree of punishment taking into account the age, development, physical resistance and the good or bad nature of the young offender, as well as the gravity of the offence committed.

<sup>29</sup>See (note 16) above at page 22.

<sup>30</sup>From the legal dictionary, the simple meaning of justiciable is 'a matter capable of being decided according to legal principles by a court'; and that of non-justiciable is 'not appropriate or proper for judicial consideration or resolution', accessed at [www.duhaime.org/Legal Dictionary](http://www.duhaime.org/LegalDictionary), on 10th February, 2011.

<sup>31</sup>The people resolved: '.....To provide for a Constitution for the purpose of promoting the good government and welfare of all persons\_ in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the Unity of our people.....'

governmental actions and includes provisions similar to development rights as articulated in the CRC and ACRWC.<sup>32</sup> Chapter II, sections 16(2) (d) and 18(1) and (3) particularly enjoins government to ensure adequate shelter, provide for the wellbeing of citizens with disabilities, provide educational opportunities and eradicate illiteracy.<sup>33</sup> The essence of relief that these provisions are thought to have provided is obliterated by the same Constitution in section 6(6)(c)<sup>34</sup> which unequivocally rendered the provisions non-justiciable. This section can be interpreted as meaning that the provisions of chapter II are non-justiciable as they constitute mere ideals towards which the states are expected to aim. Thus without any ambiguity, it can be stated that these development rights enumerated in the chapter II of the Nigerian constitution are incomplete and inadequate, to secure the fundamental liberties of Nigerians and her children. However, several fundamental rights also in line with specific provisions and principles of the CRC and ACRWC are further articulated in chapter IV, and in sections 33 to 46 of the Nigerian Constitution.<sup>35</sup> Section 42<sup>36</sup> especially, encapsulates the right to freedom from discrimination and provided for non-discrimination on the basis of gender, religion, ethnicity, age

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<sup>32</sup>Article 27 of the CRC and Article 14 of the ACRWC prescribes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; and Article 28 of the CRC and Article 11 of the ACRWC provides for the child's right to education.

<sup>33</sup>Section 16(2)(d) of the 1999 Constitution states as follows: The state shall direct its policy towards ensuring 'that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare are provided for all citizens; section 18(1) states: Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels; and section 18(3) states: Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide: free compulsory and universal primary education; free secondary education; free university education; and free adult literacy programme.

<sup>34</sup>Section 6(6) (c) of the 1999 Constitution states that: the judicial powers vested in the courts- shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the 'Fundamental Objectives and Directive Principles of State Policy' set as out in chapter II of this constitution.

<sup>35</sup>The rights as provided in the Constitution are as follows: section 33 - right to life; section 34 - right to dignity of human person; section 35 - right to personal liberty; section 36 - right to fair hearing; section 37 - right to private and family life; section 38 - right to freedom of thought, conscience and religion; section 39 - right to freedom of expression and the press; section 40 - right to peaceful assembly and association; section 41 - right to freedom of movement; section 42 - right to freedom from discrimination; section 43 - right to acquire and own immovable property anywhere in Nigeria; section 44; compulsory acquisition of property; section 45 - restrictions on and derogation from fundamental rights; and section 46 - special jurisdiction of High Court and legal aid.

<sup>36</sup>Section 42(1) of the 1999 Constitution states that: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, circumstances of birth, sex, religion or political opinion shall not by reason only that he is such a person.....be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, circumstances of birth, sex, religious or political opinions are not made subject to....'

or circumstances of birth against any citizens including children in line with article 3 of the CRC and article 4 of the ACRWC.

The question to be asked is – how has the Nigerian courts fared in the application of these international treaties in promoting children’s rights in her domestic legal and judicial systems? The case of *Uzoukwu v Ezeonu*<sup>37</sup> is most instructive. In *Uzoukwu’s* case, the appellants and respondents were natives of Atani Community in Anambra state of Nigeria. The appellants brought an application before the High Court of Anambra state sitting at Onitsha, pursuant to section 42 of the then 1979 Constitution to enforce their fundamental rights. They claimed at the High Court that being citizens of Nigeria with fundamental human rights according to sections 31 and 39 of the then 1979 constitution,<sup>38</sup> that they have fundamental rights as guaranteed by the Constitution.<sup>39</sup> The trial judge dismissed the appellant’s action in its entirety averring that they had not provided sufficient evidence to establish discrimination and that the history of the community could not be obliterated by law, not even by the Constitution. The appellants appealed to the court of appeal. The Federal Court of Appeal also dismissed the appellants appeal, unanimously canvassing as follows:

“Not all fundamental rights are available to all persons in a country. Some of the provisions are limited to the citizens while other provisions are applicable to all persons, citizens and aliens alike. It is common ground that citizens and aliens alike enjoy legal

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<sup>37</sup>(1996) 6 NWLR (Part 200) 708.

<sup>38</sup>Section 31(1) of the 1979 Constitution states that- ‘Every individual is entitled to respect for the dignity of his person, and accordingly – (a) no person shall be subjected to torture or to inhuman or degrading treatment; (b) no person shall be held in slavery or servitude; and no person shall be required to perform forced or compulsory labor’; and section 39 (1) states that –‘A citizen of Nigeria of a particular community, ethnic group, place of origin, by religion or political opinion shall not by reason only that he is such a person- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action in the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject.

<sup>39</sup>The appellants alleged that they cannot be discriminated against on the basis of whatever circumstances attended their birth, or be subjected to any human indignity or be called ‘slaves’, ‘second class citizens’ or strangers in the Atani community. Appellants in the case argued that the respondent referred to, treated, and regarded them as slaves, descendants of slaves, or persons of inferior stock, and for that reason prevented them from enjoying certain rights, such as owning property, taking titles, or taking part in developmental activities of the town. The respondents, it was alleged, required the appellants to observe a practice of "redemption", in order to be recognized as persons of equal status. Under redemption, the appellants would, among other things, slaughter a cow or goat, or make other offerings or sacrifices to the respondents.

rights, popularly called civil rights which are ordinarily enforceable and justiciable in our courts. Out of the civil rights, some have been chosen and related to the level of Fundamental rights and are protected and enforced under the Constitution. Other legal rights are themselves protected by law and many of them are justiciable. Such rights as the rights to own property, the right to form clubs, the right to build houses etc, are legal rights which are justiciable and enforceable in the courts. There are other rights which may pertain to a person which are neither fundamental nor justiciable in the courts. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution".<sup>40</sup>

The Nigerian Court of Appeal in this case emphatically prohibited bringing an action – including any enforcement of children’s rights - to enforce the development rights encapsulated in the chapter II of her Constitution. However, there is an isolated case where the court with a similar jurisdiction has not only condemned discrimination according to chapter IV of the Constitution, but has also allowed justiciability of chapter II of the same Constitution in favor of children and their rights to education. This is in the case of *Adamu v Attorney General of Borno State*<sup>41</sup> adjudicated upon, also at the nation’s Federal Court of Appeal.<sup>42</sup>

At the Borno State High Court, the appellants as plaintiffs under chapter II section 18(1)<sup>43</sup> of the Nigerian Constitution claimed against the respondents as defendants some reliefs in respect of equal treatment to their children in the field of education.<sup>44</sup> The defendants counsel argued that

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<sup>40</sup>Per Mamman Nasir JCA at 761 A-D.

<sup>41</sup>(1996) 8 NWLR (Part 465) 203.

<sup>42</sup>Chapter VII of the Nigerian Constitution stipulates the hierarchy of courts in Nigeria. The Supreme Court is the apex court with the highest jurisdiction in Nigeria, and the decisions of the Supreme Court of Nigeria are binding on all other courts to which the common law doctrine of binding precedent applies. The Federal Court of Appeal is next in the hierarchy and it is bound by the decisions of the Supreme Court, while all the State High Courts including the Federal High Courts are bound by the decision of the Federal Court of Appeal and the Supreme Court. The Magistrate courts, Area Courts and the Sharia courts are at the lowest levels and these are bound by the decisions of the State High courts.

<sup>43</sup>See (note 33) above.

<sup>44</sup>The appellants claim against the respondents some reliefs including: "... a declaration that by the law of this country, both Christians and Muslim pupils in primary schools in the Gwoza Local Government Area of Borno State are entitled to equal treatment in all educational and religious fields; a declaration that the practice whereby the plaintiffs pay from their pockets for their children to be taught the Christian religion when the Gwoza Local Government Council pays Islamic teachers is unlawful and above all unconstitutional as such a practice is discriminatory against all plaintiffs; and a declaration that the defendants have no right to introduce discriminatory practices between the Christians and the Muslims on any ground whatsoever, as such is unconstitutional..."

the appellant's cause of action is based on their desire to impart a particular type of education on their children. He referred to section 18(3) chapter II, of the Nigerian Constitution. He submitted that free primary education is merely 'Fundamental Objective and Directive Principles of State Policy' which is not justiciable by virtue of section 6(6) (c) of the Constitution. He further argued that - they are declaratory statements of national policy that establish broad economic, social and cultural guideline and are not justiciable under the Nigerian Constitution. In a considered ruling, the learned judge upheld the respondent counsel's contention that the cause of action was not justiciable and dismissed the plaintiff's suit. Dissatisfied with the ruling, the appellants appealed to the Court of Appeal. Unanimously allowing the appeal, Justice Oguntade delivering the lead judgment averred brilliantly as follows:

"Religion as a subject falls within the objective policy and directive principles of state policy not justiciable per se under chapter II of the Constitution. However, the teaching of religious knowledge which carries with its practice and worship can give rise to certain fundamental rights enforceable by virtue of section 42 of chapter IV of the Constitution".<sup>45</sup>

He further averred that:

"Although by virtue of section 6(6)(c) of the Nigerian Constitution<sup>46</sup> chapter II of the constitution is not justiciable, where the provisions of the constitution defines a certain cause of action or enshrines certain rights, those provisions must be applied without any inhibition emanating from chapter II. In other words, where any legislation for implementing the 'Fundamental Objectives or the Directive Principles' is in issue, the courts shall not declare such legislation void unless the fundamental rights of any citizen is infringed or any other express provision is clearly infringed. Therefore, where a local authority as in the instant case, in the implementation of the fundamental objectives of state policy adopts a system which infringes on citizens fundamental right of freedom to religion and freedom from discrimination on ground of religion, that breach of the citizens' right is justiciable".<sup>47</sup>

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<sup>45</sup>Per Justice Oguntade at 225 F.

<sup>46</sup>See (note 34) above.

<sup>47</sup>Per Justice Oguntade at 226 B-E.

The above precedent of the Federal Court of Appeal was however short-lived and complicated by decisions of the highest court of the land in the case of *Attorney General of Ondo State vs Attorney General of the Federation & 35 Ors.*<sup>48</sup> Justice Uwaifo JSC opined four years later that:

“.....courts cannot enforce any of the provisions of chapter II of the Constitution until the national assembly has made specific laws for their enforcement”.<sup>49</sup> As for the non-justiciability of the ‘Fundamental Objectives and Directive Principles of State Policy,’ in chapter II of our Constitution, section (6)(c) of our Constitution says so. While they remain mere declarations they cannot be enforced by legal process.....but the ‘Directive Principles’ (or some of them) can be made justiciable by legislation.”<sup>50</sup>

The learned justice continued and stated that:

“...the national assembly can well legislate if in its wisdom it considers it necessary to do so ,..... and that ‘national integration shall be actively encouraged while discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited’.<sup>51</sup> A similar enactment can possibly be made to ensure ‘that suitable and adequate shelter, food, reasonable national minimum living wage, old age care pensions and unemployment, sick and unemployment benefits and welfare of the disabled are provided for all citizens .....as was done in the Constitutional Court of South Africa in the case of *Grootboom v President of the Republic of South Africa*”.<sup>52</sup>

While appreciating the positive reference of the learned Supreme Court justice to the *Grootboom*’s case, the reference was *only made in this one sentence* ‘as was done in the Constitutional Court of South Africa in the case of *Grootboom v President of the Republic of South Africa*’<sup>53</sup> (own emphasis). The learned justice did not in any detailed manner refer to the facts, intellectual and prolific thoughts expressed by the erudite judges of the South African

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<sup>48</sup>(2002) 9 NWLR (Part 772) 222.

<sup>49</sup>Per Uwaifo JSC at 343 D-F.

<sup>50</sup>At 382 A-C.

<sup>51</sup>At 410 D-E.

<sup>52</sup>At 410 F-G.

<sup>53</sup>2000 (11) BCLR 1169 (CC). Hereinafter referred to as *Grootboom*’s case.

Constitutional Court. The learned Supreme Court justice did not in any other term or context build on the well thought judgments, neither did he apply the principles or give vent to the weighty and critical constitutional issues that was determined. In essence, where incidents of violations are perpetrated against children and redress is sought under this Constitutional provision, on 'Fundamental Objectives', the contending party may object using the precedent as stated by the learned justice.

The apex court from the averments was more interested in shifting the responsibility to the country's parliamentarians and the executives, to give expression to any one of the 'Fundamental Objectives' through appropriate enactment as occasion may demand. Meaning, until such legislation or enactment is done by the legislative arm of government, the provisions remain non-justiciable and the judiciary cannot venture into creating the necessary and needed change.

Unlike what operates in the South African Courts, where all rights under the Constitution are made justiciable to ensure the government fulfills her international obligations under ratified human right treaties, especially the Convention on the Rights of the Child, the position is not the same with the Nigerian courts. The Nigerian apex court woefully failed to appreciate the judicial intricacies surrounding promotion of development rights for her citizens and especially the children. The South African Constitutional Court courageously held in *Grootboom's* case that the government had failed to meet the obligation placed on it by section 26 of the South African constitution<sup>54</sup> to provide emergency housing relief for those in desperate need. The learned justices in Nigeria failed to apply the same principles to confront the government on the Constitutional obligations imposed by the provisions of the Convention on the Rights of the Child. They refused to hold as a precedent that the government is to provide such amenities like suitable and adequate shelter, food, reasonable national minimum living wage, old age care pensions, for its citizens, including children. The implication here is that realization of fundamental rights remains perpetually denied for Nigerians and most importantly her children. The Nigerian courts lack the courage and pragmatism of the South African law courts and jurisprudence to promote realization of rights for her children.

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<sup>54</sup>Section 26(1) of the South African Constitution states that 'everyone has the right to have access to adequate housing, whilst section 26(2) provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right'.

Following the apex court's tapered decision in AG's case, the ECOWAS Community Court of Justice sitting in Abuja - Nigeria's Federal Capital Territory - in a dramatic and ground-breaking decision, declared divergently that all Nigerians are entitled to education as a legal and human right.<sup>55</sup> The Federal Government had alleged, through the Universal Basic Education Commission, that:

"the Court lacks jurisdiction to entertain the action filed by SERAP on the grounds that the Compulsory and Basic Education Act 2004 and the Child's Rights Act 2004 are Municipal Laws of Nigeria and not subject to the jurisdiction of the Court because it is not a treaty of ECOWAS; that the educational objective of Nigeria under the 1999 Constitution is non-justiciable or enforceable; and that SERAP has no *locus standi* to institute or maintain the action".<sup>56</sup>

The Court held that the right to education is enforceable and justiciable and dismissed the Federal Government of Nigeria's objections that education is "a mere directive policy of the government and not a legal entitlement of the citizens." The Honorable Justice Hansine N. Donli while presiding, dismissed all the other objections by the Nigerian government, and ruled that:

"It is important to assess the basis of SERAP's claims in determining the justiciability or otherwise of its claims with respect to the right to education and whether it can be litigated before this Court. Though SERAP factually based its claim on the Compulsory and Basic Education Act and the Child's Right Act of Nigeria, it alleged a breach of the right to education contrary to article 17 of the African Charter on Human and Peoples' Rights and not a breach of the right to education contained under chapter II of the 1999

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<sup>55</sup>The ECOWAS Court's decision, made public on 27<sup>th</sup> October, 2009 followed a suit (ECW/CCJ/APP/08/08) instituted by the *Registered Trustees of the Socio-Economic Rights and Accountability Project* (hereinafter referred to as "SERAP") against the *Federal Republic of Nigeria and Universal Basic Education Commission* (hereinafter referred to as "UBEC") - being the first and second defendants. SERAP as plaintiffs, alleged the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and to economic and social development, based on the Compulsory and Basic Education Act and the Child's Right Act of Nigeria. It alleged a breach of the right to education contrary to article 17 of the African Charter on Human and Peoples' Rights. The case came up in the Community Court of Justice of the Economic Community of West African States (ECOWAS) Abuja, before Hon Justice Hansine N. Donli, as the presiding judge, Hon Justice Anthony Benin and Hon Justice Soumana D. Sidibe.

<sup>56</sup>Per Justice Hansine N. Donli at 6-7.

Federal Constitution of Nigeria. It is trite law that this Court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and article 17 thereof guarantees the right to education".<sup>57</sup>

He further ruled that:

"It is well established that the rights guaranteed by the African Charter are justiciable before this Court. Therefore, since SERAP's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of the government that the right to education is not justiciable as it falls within the 'Directive Principles Of State Policy' cannot hold".<sup>58</sup>

In spite of this landmark judgment, 4.7million Nigerian children aged 6 to 11 still do not have access to primary education.<sup>59</sup> Realization of this development right does not only remain a mirage, but also demonstrates the limitations and ineffectiveness of the judicial system to promote and fulfill rights for the Nigerian child. The government of Nigeria has not been able to put in place effective measures to make free primary education available to all children and the fruit of the judgment was never realized. The Nigerian courts have been very slow and 'stingy' in pronouncing judgments in favor of children based on international and regional Conventions.

However, there was another trail blazing decision of the Court of Appeal where references were made to the provisions of the Convention on Elimination of All forms of Discrimination Against Women<sup>60</sup> affirming the principle of non-discrimination in line with article 2 of the CRC and Article 3<sup>61</sup> of the ACRWC.

In the case of *Muojekwu v Ejikeme*<sup>62</sup> the Nnewi customary law of 'Oli-ekpe' was struck down under the repugnancy principle by the unanimous judgment of the Enugu Division of the Court of Appeal. The basis of the decision was that the customary law in question which "permits the

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<sup>57</sup>At page 9.

<sup>58</sup>At page 10.

<sup>59</sup>Convention on the Rights of the Child, CRC/C/NGA/3-4. 5<sup>th</sup> Jan 2009, at para 7.1.9, page 114.

<sup>60</sup>Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on September 3, 1981; ratified by Nigeria since June 13, 1985.

<sup>61</sup>The principle of non-discrimination is articulated in: article 2 of the CRC and article 3 of the ACRWC.

<sup>62</sup>(2000) 5 NWLR (Part 657) 402.

son of the brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female child" was a clear case of discrimination and hence inapplicable. The appellants in the case claimed that as heirs and successors in title to Reuben Muojekwu who died intestate, they are by virtue of the Nnewi Custom entitled exclusively to the estate of the deceased. The respondents on their part claimed that they are related to the late Reuben Muojekwu, they being sons of Benneth Ejikeme a distant cousin to the Reuben Muojekwu. They maintained that Reuben's lineage became extinct due to the fact that he had no male child surviving him by virtue of the Nnewi Custom and as distant cousins, they must inherit the estate of Reuben to the exclusion of Reuben's "daughters". The deceased daughter of Reuben Muojekwu was Virginia; she was the mother of the 3<sup>rd</sup> Appellant and the grandmother of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. At the conclusion in the high court, the trial court found that Reuben's lineage became extinct on the death of his daughter and that the appellants are therefore not heirs to Reuben Muojekwu and is not entitled to succeed him or his estate. The court therefore dismissed the suit. The appellants were aggrieved and therefore appealed to the Court of Appeal.

In determining the appeal, the Court of Appeal considered the provision of section 42(1) of the Nigerian Constitution and vehemently condemned the Nnewi Custom relied upon by the respondents. The court held as being repugnant to natural justice, equity and good conscience the custom that permitted them to inherit the estate of the deceased merely because he had no male child. Such a custom clearly discriminated against Virginia, the daughter of the deceased and is therefore unconstitutional in the light of section 42 of the Nigerian constitution.<sup>63</sup>

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<sup>63</sup>The court per Tobi JCA at 425-426 C-F and 435-436 H-C held that: "By section 42(1) of the constitution of the Federal Republic of Nigeria, 1999, a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person, be subjected either expressly by, or in the practical application of, any law in force in Nigeria; or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject. In the instant case, the fact that the appellants were born out of wedlock was immaterial. That cannot be used against them in inheriting the estate of the deceased. As blood relations, the property of the deceased should devolve on the appellants. Also, the Nnewi custom relied upon by the respondents, which permitted them to inherit the estate of the deceased merely because he had no male child surviving him, is repugnant to natural justice, equity and good conscience. Such a custom clearly discriminated against Virginia, the daughter of the deceased and is therefore unconstitutional in the light of the provisions of section 42 of the constitution of the Federal Republic of Nigeria, 1999".

Justice Niki Tobi stated that:

“Virginia, the mother of the 3<sup>rd</sup> appellant and the grandmother of the 1<sup>st</sup> and 2<sup>nd</sup> appellants, a victim of the Nnewi Custom ‘*nrachi*’ custom ceremony, cannot be discriminated against on grounds of her female sex. By the application of the custom, Virginia was subjected to the liabilities or restrictions which the provision of Section 42(1) of the Constitution forbids. The above apart, Virginia has protection under Article 2 of the Convention on the Elimination of All forms of Discrimination Against Women. By the Article, state parties condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women. By Article 5, state parties are called upon to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either sexes. In view of the fact that Nigeria is a party to the Convention, courts of law should give or provide teeth to its provisions”.<sup>64</sup>

Justice Olagunju concurring with Justice Niki Tobi, also opined as follows:

“What is intriguing is the wholesale disqualification of the direct progeny of the founder of an estate from the right of inheritance which is passed over to the distant relations of the founder by sheer accident of the founder being survived by a female child.<sup>65</sup> ...I agree that the circumstances of the appellant’s birth should not be a bar to their legal rights guided by the mandates of the Constitution”.<sup>66</sup>

The court, in making reference to articles 2 and 5 of Convention on the Elimination of All Forms of Discrimination Against Women have employed by proxy, similar provision in article 2 of the CRC and article 3 of the ACRWC. Even though gender issues was the pivot of this landmark case in Nigeria, here the courts have bravely upheld the provisions of the Nigerian constitution and thus have employed the international Conventions to promote the rights of the girl child in Nigeria.

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<sup>64</sup>Per Justice Niki Tobi at 436 C-F.

<sup>65</sup>At 438 B-C.

<sup>66</sup>Per Olagunju JCA at 439 B.

The Court of Appeal's pronouncements presents a turning point in Nigerian jurisprudence, as the judiciary scrutinized the customary laws of inheritance through a human rights lens. Notwithstanding the decision, cases promoting children's rights by applying the ratified international and regional treaties remains scarce in Nigeria. It is hoped that other justices would become proponents, to promote and protect the rights of children as articulated in the treaties. The pace remains achingly slow and the momentum sluggish in the Nigerian courts.

#### **4.3 Application of international human rights laws in the context of customary and common law**

However, before drawing the curtain here and moving on to the jurisprudence in South Africa it is important to discuss more on the issue of scrutinizing the customary laws of inheritance through a human rights lens. The application of ratified international and regional treaties in the context of customary law and common law is a common feature that interestingly traversed boundaries, countries and legal systems. In this context we find the precedent set in *Muojekwu's* case from Nigeria being adopted in an interesting case from South Africa. In *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)*,<sup>67</sup> one of the issues that the South African Constitutional Court had to decide was - whether the customary law rules that gave rise to differential entitlements of children born within a marriage and those born extra-maritally constituted unfair discrimination on the grounds of birth. Writing for the majority of the Court, Langa DCJ stated as follows:

“In interpreting both section 28 and the other rights in the constitution, the provisions of international law must be considered. South Africa is a party to a number of international multilateral agreements designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their ‘physical and mental immaturity’ need ‘special safeguards and care’. Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of ‘race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’. Similarly, “article 3 of the African Charter on the Rights and Welfare of the Child provides that children are

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<sup>67</sup>2005 (1) SA 580 (CC), hereinafter referred to as “*Bhe's*” case.

entitled to enjoy the rights and freedoms recognized and guaranteed in the Charter 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, ... birth or other status".<sup>68</sup>

The Court found that unfair discrimination on the ground of 'birth' should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. The differentiation was thus found to be unfair discrimination. The court found that, the law and social practice concerning extra-marital children, without doubt conferred a stigma upon them, which was harmful and degrading.

However, partially dissenting Ngcobo J in *Bhe's* case made copious references to jurisprudential issues from other African states/courts which have considered the position of women and girls in the context of succession and customary laws of inheritance. He explained the nature of indigenous law and the concept of succession in indigenous law. He asserted that:

"Our Constitution recognizes indigenous law as part of our law. Thus s 211(3) enjoins courts to 'apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights. While in the past indigenous law was seen through the common-law lens, it must now be seen as part of our law and must be considered on its own terms and 'not through the prism of the common law'. Like all laws, indigenous law now derives its force from the Constitution. Its validity must now be determined by reference not to common law but to the Constitution".<sup>69</sup>

The learned justice in his extensive written judgment explained the concept of succession in indigenous law, raised issues around the rule of male primogeniture, the challenge to the rule based on age and birth discrimination and the social context in which the law developed. He

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<sup>68</sup>At 609-610 para 52-55.

<sup>69</sup>At 637-638, para 148.

stated that - the rule has lost the vitality to a certain degree.<sup>70</sup> He further stated that jurisprudence from African courts, which have considered the position of women in the context of succession, further demonstrates that the rule in its present form no longer has any place in modern times.<sup>71</sup> To prove this, he purposefully and painstakingly drew precedents from some African countries like Nigeria, Zimbabwe, Tanzania, Ghana and his host country - South Africa. Since it is not practical to make references to all the court decisions and arguments averred by Ngcobo J, a brief overview of some of the learned justice's postulations and decisions from different countries are presented.<sup>72</sup>

Ngcobo J concluded as follows, based on his analysis of the jurisprudence from the African courts:

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<sup>70</sup>At 649, para 156 – 190.

<sup>71</sup>At 650, para 191.

<sup>72</sup>Ngcobo J's written judgment in *Bhe's* case extended from page 635-664. He deliberated on African jurisprudence citing and analyzing numerous cases and decisions from Nigeria, Zimbabwe, Tanzania and Ghana in para 192 - 209 and page 650 – 654. For example he made reference to the Nigerian case of *Mojekwu v Mojekwu* (2000) 5 NWLR (Part 657) 402, where the Igbo succession rule was challenged on the ground that it discriminated against females. The Court of Appeal held that the rule of male primogeniture was unconstitutional and contrary to democratic values. See para 194 page 650. He mentioned *katekwe v Muchabaiwa* 1984 2 ZLR 138 SC, where the Supreme Court of Zimbabwe had to consider the effect of the Legal Majority Act and held that 'parliament's intention was to create equal status between men and women and more importantly, to remove the legal disabilities suffered by African women because of the application of customary law. See para 195 page 651. He further discussed other cases decided from Zimbabwe, especially that of *Jenah v Nyemba* 1986 (1) ZLR 138 (SC) where the court held that protection given by the statute is not restricted to single persons but it extended to married African women aged 18 years or over, who primarily were perpetual minors. See para 195 page 650. He contrasted *Jenah's* case with *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC) where the Supreme Court held that 'The Legislature, by enacting the Legal Age of Majority Act, made women who in African law and custom were perpetual minors majors and therefore equal to men who are majors. By virtue of the provisions of s 3 of the Act, women who attain or attained the age of 18 years before the Act came into effect acquired capacity. That capacity entitles them to be appointed intestate heiresses'. He then referred to *Murisa NO v Murisa* 1992 (1) ZLR 167 (S) where the Supreme Court of Zimbabwe took a different stand from *Chihowa's* case and rather held that 'Customary law does not recognize a widow's right to inherit in a direct fashion from her deceased husband's estate. He mentioned how *Murisa's* case has been criticized for excluding widows from inheriting from their husbands and how it was difficult to reconcile this decision with the *Chihowa* and *Jenah* cases. See para 197-199 page 652.

He did not fail to mention the Ghanaian case of *Akrofi v Akrofi*, 1965 GLR 13, where the younger brother of the deceased was appointed *indlalifa* to succeed. The appointment followed a custom in terms of which women were not allowed to succeed to their deceased fathers' estates. A daughter of the deceased challenged the appointment, claiming that she was entitled to succeed her father. The High Court issued a declarator to the effect that the daughter was 'within the range of persons . . . entitled to succeed to her father's estate'. The court issued the declarator because under the Ghanaian custom in issue- the *indlalifa* was determined at a meeting of family members. The ruling of the Ghanaian court brought the daughter within the range of persons who could be considered for appointment. See para 203-204 page 653.

“Having regard to these developments on the continent, the transformation of African communities from rural communities into urban and industrialized communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discrimination, namely: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African (Banjul) Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights. In particular, CEDAW requires South Africa to ensure, amongst other things, the practical realization of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women”.<sup>73</sup>

Ngcobo J in the above postulation was in tandem with Justice Niki Tobi *in Mojekwu's case*<sup>74</sup> and did agree together on the modification or abolition of social and cultural patterns of conduct of men and women with a view to eliminating prejudices, customary law and practices that constitute discrimination against women and girls.

However, *Magaya's case*<sup>75</sup> and *Mthembu v Letsela*<sup>76</sup> also referred to by the learned justices in *Bhe's case* is worth mentioning. While *Magaya's case* rendered the decisions of the African jurists void, it rendered the reasoning in *Mojekwu's case* a nullity. *Mthembu's case* on the other hand violates the equality rights of women and upheld the customary - law rule of primogeniture with the inequalities and discrimination aligned with the rule.

In *Magaya's case*, the deceased had died intestate leaving two wives, both marriages having been contracted under African marriages as well as under the African customary law. The appellant was the daughter of the deceased by his first marriage. The respondent, the deceased's son by his second marriage, claimed heir-ship after the deceased's eldest son had declined to do so. Heir-ship had initially been awarded to the appellant by a community court, but the respondent applied to a magistrate for a re-hearing of the matter on the ground that

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<sup>73</sup>Per Ngcobo J at para 209 page 654.

<sup>74</sup>See (note 64) above.

<sup>75</sup>1999 (1) ZLR 100 (S).

<sup>76</sup>1998 (2) SA 675 (T); and 2000 (3) SA 867 (SCA).

persons interested in the deceased's estate had not been summoned to attend the original hearing. The magistrate appointed the respondent as the heir, holding that under customary law the appellant being female could not be appointed as heir of her father's estate where there was a man of the family who was entitled to claim heir-ship. The appellant appealed to the Supreme Court. The appellant argued that to deny her heir-ship was contrary to the principle of gender equality enshrined in various human rights instruments to which Zimbabwe was a party. The appellant also submitted that the discrimination against women which existed at customary law was based on their perpetual minority status which, it was argued, had been abolished by the Legal Age of Majority Act (the Act). It was further submitted that, in any event, the court should exercise its discretionary law-making role to ensure that women were not excluded from being appointed heiresses at customary law and that recent authorities supported this conclusion. The appellant claimed that this was a peculiar case where special circumstances existed, in that the respondent, as the child of the deceased's second wife, was unlikely to look after the deceased's first wife and her child.

In the leading judgment by Mucshete JA, the Supreme Court of Zimbabwe dismissing the appellant's case *sadly* pronounced as follows:

“The application of customary law generally was sanctioned by s 89 of the Constitution of Zimbabwe. Under s 68(1) of the Administration of Estates Act, the estate of the deceased, who had died intestate having been married in accordance with customary law, was to be administered in accordance with Shona customary law, which preferred males to females as heirs. Upon the death of a family head his eldest son (where the deceased had more than one wife, usually the eldest son of his first wife) normally succeeded to the status of the deceased. That implied that an heir inherited not only the deceased's property but also his responsibilities, in particular the duty to support surviving family dependants. Section 2 of the Constitution, prohibiting discriminatory laws or treatment, did not forbid discrimination based on sex. However, even if the section was to be interpreted as incorporating the principle of gender equality enshrined in international human rights instruments to which Zimbabwe was a party, Section 23(3) of the Constitution expressly exempted matters involving the devolution of property on death and customary law involving Africans from the discrimination provisions. That matter concerned succession and the deceased had contracted two marriages

according to African law and custom: on both those grounds, therefore, the discriminatory aspects of the applicable law were saved by the Constitution exemptions".<sup>77</sup>

It was *disparagingly* (own emphasis) held that:

"at the head of the family there was a patriarch, or a senior man, who exercised control over the property and lives of women and juniors. It is from this that the status of women is derived, 'the woman's status is therefore basically the same as that of any junior male in the family'.<sup>78</sup>

He further stated as follows:

"While women were given certain rights at common law under the Act which they previously lacked, it was never in the contemplation of the legislature that the courts would interpret the Act so widely as to interfere with or distort customary law. That was apparent given the consideration that matters including succession and customary law were exempted from the constitutional prohibition of discrimination. Moreover the concepts of 'minority' and 'majority' status were common law concepts which were not known to African customary law and therefore the provisions of the Act could not be viewed as having removed the barriers which existed at customary law in respect of women being appointed to heir-ship, as such would be tantamount to bestowing upon women rights which they had never possessed under customary law. Hence, in the instant case, there being a suitable male heir (the respondent), the appellant could not be appointed as heir. Furthermore there was no reason to appoint the appellant as heir on the ground that she feared that the respondent would fail to properly maintain herself and her mother, because it was open to the appellant to apply to the court should it transpire that the respondent was not fulfilling the obligations of heir-ship which required that he support the family of the deceased".<sup>79</sup>

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<sup>77</sup>Per Mucchechetera JA at 41-42.

<sup>78</sup>At page 45.

<sup>79</sup>At page 44-48.

From the foregoing precedent and statements, the learned justice has clearly expressed the view that all the problematic features of substantive customary law which negatively affect women have not been removed by the Constitution of Zimbabwe. The Supreme Court justice thus *dangerously* (own emphasis) approved the constitutional provisions that support discrimination based on sex in the area of customary law. This has posed a serious threat to the girl child and women's rights, first and foremost in Zimbabwe, then in Africa - because women can no longer use the Constitution to challenge discriminatory customary laws. The Supreme Court in Zimbabwe has indicated, by its decision and views that it will not be sympathetic to such challenges. This is a very sad precedent for Zimbabwe and the rest of women in Africa.

The implication in *Magaya's* case has further shown that for the specific issue of inheritance, the girl child in Africa cannot inherit from her father. Then in cases where the estate is governed by customary law, the issue of the majority status of women and the application of this explicit customary law, will continue to affect girls and women in other areas of law.

It is however comforting to note that the presiding judge in *Bhe's* case while referring to this negative precedent averred that customary law and rules of succession set in *Magaya's* case violates the equality rights of women and is an affront to their dignity. Langa DCJ puts it implicitly as follows:

“The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary-law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom...In conclusion, the official system of customary law of succession is

incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny".<sup>80</sup>

With this pronouncement, the learned justice also made a reference to *Mthembu's* case,<sup>81</sup> which central aim is on the customary - law rule of primogeniture.<sup>82</sup> In *Mthembu's* case, Tebalo Wilson Letsela (hereinafter 'the deceased') died on 13 August 1993. At the time of his death he was the holder of a 99 year leasehold title in respect of a fixed property situated in Vosloorus. He lived on the property with the appellant (Mildred Hleziphi Mthembu) and her two minor daughters. One of these children, Thembi, was born on 7 April 1988 of an intimate relationship between the appellant and the deceased. The deceased was also survived by his father (the first respondent), his mother and his three sisters. The deceased's father and mother, along with one of his sisters and her children lived with the deceased, the appellant and her daughters on the property. The appellant alleged that she and the deceased entered into a customary marriage on 14 June 1992 (less than 14 months before his death). She supported this allegation with the receipt for the first installment of R900.00, towards her *lobolo* of R2000.00. The balance was to be paid soon thereafter. The deceased, however, died before it was paid. The appellant claimed that she is the widow of the deceased, on the grounds that a valid customary marriage was entered into by herself and the deceased, and that her child was therefore legitimized by their subsequent nuptials.<sup>83</sup>

The matter first came before Le Roux J (the first *Mthembu*-case), who was unable to resolve the factual dispute relating to the existence or otherwise of a customary marriage between the

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<sup>80</sup>Per Langa DCJ at page 622-623.

<sup>81</sup>See (note 76) above.

<sup>82</sup>In *Mthembu's* case, central to the indigenous law of succession, is the rule of male primogeniture. It was described as follows by Mpati AJA of the SCA at para 8: "The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds.....Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources and not to expel them from his home".

<sup>83</sup>This portion was extracted from the Supreme Court of Appeal of South Africa case File No: 71/98, in the matter between *Mildred Hleziphi Mthembu v Henry K Letsela and Another*, accessed at [www.justice.gov.za/sca/judgements](http://www.justice.gov.za/sca/judgements) on 24th July 2011.

appellant and the deceased. The court referred the issue for oral evidence. The issue was accordingly postponed *sine die*. In the second *Mthembu*-case it was accepted that because no evidence was tendered from either side, that the matter was to be decided on the assumption that there was indeed *no such marriage* between the parties. Langa DCJ in his lead judgment in *Bhe's* case explained the decision in *Mthebu's* case thus:

“The relationship between customary law and the Constitution was considered in the two *Mthembu* decisions, firstly in the Pretoria High Court and lastly in the appeal heard by the Supreme Court of Appeal. The appellants brought an application in the High Court for an order, declaring the customary-law rule of primogeniture and reg 2(e) to be invalid on the grounds that they gratuitously discriminate against women, children who are not the eldest and extra-marital children in a manner that offends the equality guarantee under s 8 of the interim Constitution. The High Court dismissed the application, holding that neither the rule nor the regulation was inconsistent with the equality protection under the interim Constitution. On appeal, the Supreme Court of Appeal was invited to set aside the order of the High Court and to develop, as required by s 35(3) of the interim Constitution, the rule of primogeniture in order to allow all descendants to participate in intestacy. The Court rejected this contention and dismissed the appeal and held that s 23 is inconsistent with the Constitution and invalid. As a result, reg 2(e) falls away. I have also found that the customary – law rule of primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution. It follows therefore that any finding in *Mthembu* which is at odds with this judgment cannot stand”.<sup>84</sup>

In bringing this segment into culmination, it can be concluded that the primogeniture rule as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality prescribed in the focus international and regional instruments. It is therefore submitted that, the favorable precedents from Nigeria, Zimbabwe, Ghana and South Africa, that has promoted gender equality and freedom for categories of the African woman and the girl child who are presently subject to customary law of succession be widely publicized to create a *social change* (own emphasis) within the Committee of African nations.

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<sup>84</sup>Per Langa DCJ in *Bhe's* case at page 623 – 624.

This is in agreement with Ntlama's<sup>85</sup> argument, where she opined that "the successful enforcement of the right to equality in South Africa depends on the effectiveness of law in bringing about social change". She was however critical of the Constitutional Court's decision in *Masiya's* case in so far as the majority decision refused to expand the common law definition of rape to include anal penetration of a man. She opined that the narrow interpretation of the equality clause adopted by the majority in this instance has cast doubt on the extent to which the courts can be used to *promote equality and foster social change in general* (own emphasis). However, in the next segment other decisions promoting realization of rights and gender equality for boys and girls under a distinctive child's law jurisprudence in the South Africa's legal systems are extensively discussed. Copious references are made to the development of jurisprudence at domestic level on the application of international human rights laws in the promotion of children's rights.

#### **4.4 Distinctive child's law jurisprudence in the South Africa's judicial systems**

In South Africa, the judicial systems and decided cases on child's rights issues have been drastically and dramatically influenced by the ratified international and regional instruments. South Africa seems to be the most advanced country with diverse cases decided to promote and protect the rights of children especially where the established international, regional and national monitoring bodies have failed.

Furthermore, to draw a distinction or comparison between what is operating in the Nigerian and Ethiopian legal systems, South Africa stood out with a clear, unambiguous and distinctive jurisprudence in her legal systems to promote and protect the rights of children. Constitutional and domestic legal instruments have been used to develop jurisprudence on the rights of children. This means that these instruments have been instrumental in the development of positive jurisprudence that seeks to protect the broad rights of children as entrenched in various international, regional and domestic legislation/instruments. Plethora of cases from the South

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<sup>85</sup>See Ntlama N, 'Equality: A tool for Social Change in Promoting Gender Equality'. A presentation at the Law Society of the Northern Province titled: "The improvement of the Quality of Life, Status, Justice and Constitutional Development of Women" 01-10 August 2006, South African Reserve Bank Conference Centre, Pretoria. She assessed the Equality Act as a particular example of the use of Law as a vehicle for social change. It was from this perspective she readily criticized the court's decision in *Masiya's* case. See also Ntlama N, 'Masiya: Gender Equality and the Role of the Common Law' (2009) Volume 3, No 1 *MLJ* at 117-132.

African experience abounds<sup>86</sup> to indicate the courts readiness to promote the rights of children. Specific provisions of International Conventions have been enforced, while the government has been compelled to fulfill her international obligations. Parents, care givers and entire civil society have been encouraged to respect, protect, and promote those rights. Some outstanding precedents recounted here, include such decisions protecting children from unlawful removal from one country to another,<sup>87</sup> from exposure to a grave risk of physical or psychological harm or intolerable situation<sup>88</sup> and from child pornographic materials.<sup>89</sup>

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<sup>86</sup>It is practically impossible to examine all the judicial decisions rolled out in sundry courts. These ranged from cases on upholding the best interest of the child, to non –discrimination, abduction of minors, child justice, parental care, maintenance suits, registration of children born by artificial insemination, rights of children born out of wedlock, etc. The issues are endless. Some of such cases have been referred to by scholars and child’s rights advocates like Skelton A, (Advocate of the High Court of South Africa; Director of the Centre for Child Law, University of Pretoria, South Africa ) and by Sloth-Nielsen J, to mention just a few. The perspectives of the courts and cases referred to by these two scholars are relied upon in conceptualizing and analyzing the child’s law jurisprudence referred to in this section. Some other cases found relevant are also mentioned. See Sloth-Nielsen J, ‘Children’s rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child’ (2002) Volume 10, *The International Journal of Children’s Rights*, 137-156; and Skelton A, ‘The development of a fledging child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2009) Volume 9, *African Human Rights Law Journal*, 482-500.

<sup>87</sup>*Jackson v Jackson* 2002 (2) SA 303 (SCA) - in a custody case, application by custodian parent for leave to remove minor children from South Africa to Australia was denied. Best interests of children were given first and paramount consideration. Section 28 of the South African Constitutions refers. It states that “A child’s best interests are of paramount importance in every matter concerning the child”.

<sup>88</sup>In *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) – An application was made by the father of the child requesting that the mother having taken the child back to South Africa must return her to Canada, that the mother acted in violation of the Hague Convention on Civil aspects of International Abduction (1980) as incorporated into South African law. The mother contended that there should be no order for the return of her child because she (the child) would, on the basis of series of allegations about violent and threatening behavior by the father and the special needs of the child, be at grave risk of psychological harm and placed in an intolerable situation, should she be returned. The father’s application was not granted. The court found that it was in the best interest of the child that she should remain in the sole custody of her mother. Section 28 of the South African Constitution on the application and paramountcy of the best interest principle refers. Also in *Chief Family Advocate and Another v G* 2003 (2) SA 599 (W), where the same Hague Convention was applied, the court ordered the return of child to England. Here the father had not tried to obtain the mother’s consent when he removed the child out of Britain and took him to South Africa. The court held that the child was wrongfully abducted from England since there was no consent of the mother and ordered that the child be returned to England. In both cases, the courts were more concerned with the well-being of the child and consistently considered the best interest of the child. Further, in *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA), where an international abduction of a minor occurred, the right of the child to be protected from exposure to a grave risk of physical or psychological harm or intolerable situation was also affirmed. Hague Convention on Civil aspects of International Abduction (1980) as incorporated into South African law was also applied.

<sup>89</sup>In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC), the appellant had unsuccessfully challenged the constitutionality of certain provisions of the Films and Publications Act 65 of 1996. On appeal to the Constitutional Court against the decision of the high court, the appellant contended that the provisions of section 27 (1) of the Act which prohibited the

Moreover, the rights of an extra-marital child to parental care and support, irrespective of the circumstances of his birth were affirmed.<sup>90</sup> The South African Courts also ensured non-biological father provides support and maintenance for children from his wife's previous marriage.<sup>91</sup> Children born by artificial insemination and to same – sex parents had their births registered. This is to protect and affirm their rights to a name and nationality according to Section 28(a) of the South African Constitution, article 7 of CRC and Article 5 of ACRWC.<sup>92</sup> Remarkably, in another dimension to uphold the child's best interests' principle, the courts allowed the applicants – partners in a long-standing lesbian relationship to become joint - adoptive parents of two children.<sup>93</sup> The Constitutional court in *Masiya v DPP*<sup>94</sup> drew a distinction between the girl child and the boy child in the extension of the common law definition of rape to include anal penetration.

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creation, importation or possession of child pornography read with the definition of child pornography in section 1 of the same Act limited the right to privacy, freedom of expression and equality. The court dismissed the appeal and decided on what was covered by the definition of child pornography and the need to protect children from consumption of pornographic materials. Per Langa DCJ in para 89, 90 and 91.

<sup>90</sup>In *Peterson v Maintenance Officer, Simon's Town Maintenance Court and others* 2004 (2) SA 56 (C), it was held that parental grandparents of an extra-marital child owe the child a duty to parental care and support. Duty of courts to develop common law 'in accordance with spirit, purport and objects of the Bill of Rights' as intended in section 39 (2) of the South Africa Constitution refers. The child's right to human dignity irrespective of the circumstances of his birth was upheld.

<sup>91</sup>In *Heystek v Heystek* 2002 (2) SA 754 (T), it is interesting to note that the court ordered the husband to maintain the children of the wife's previous marriage even though he was not the biological father. Husband was ordered to provide maintenance for wife, even if portion thereof was used for wife's children from another marriage. Court's decision was based on Section 8 of the South African Constitution averring the husband as upper guardian to the children. The court was also mindful of the child's rights in terms of section 28(1)(b)(c), (2), and section 29 (1)(a) of the South African Constitution as well as Section 50(2) of Child Care Act 74 of 1983.

<sup>92</sup>*J and another v Director General, Department of Home affairs, and others* 2003 (5) SA 621 (CC).

<sup>93</sup>*In Du Toit and Another v Minister of Welfare and Population Development and others* (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC), Skweyiya J in the lead judgment spoke about the paramountcy of the child's best interest and referred to *Fitzpatrick's* case (discussed below). The court allowed the lesbian couple to become adoptive parents who will provide a loving and stable family life for the children compared with the social reality of the vast number of parentless children in the country. See para 20, 21 and 22.

<sup>94</sup>*Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC). Mr. Masiya was charged with the rape of a nine-year-old girl; at the trial, evidence came out that he had penetrated the girl anally which required a conviction for indecent assault rather than rape. The High Court, however, amended the common law definition of rape to include anal penetration as well and made the definition gender-neutral. Mr. Masiya appealed. The Constitutional Court affirmed the High Court's decision and held that the definition of rape must be extended to include non-consensual anal penetration of females. See note 82 above.

The courts decisions have also included ensuring that the parents with the custody of children in a divorced marriage as well as the non-custodian parents have a duty to provide parental care to the children and the children have a right to receive such care.<sup>95</sup> The court further opined that the parent of minor children to whom custody has been awarded is entitled and required to direct the daily lives of the children. Education, religious and secular, fell within that duty.<sup>96</sup> In addition, the court in awarding custody of children in another divorce case was flexible enough and allowed amendment to a custody settlement agreement to favor the children of the marriage. Best interest of the children of the marriage was considered paramount.<sup>97</sup> The court upheld school children's constitutional right when it held that the duty to provide care and social services to children removed from the family environment rested upon the state.<sup>98</sup>

Then, in deciding the case of a young child in conflict with the law, the court was humane, practical and reasonable. Relevant international legislation protecting the rights of children in conflict with the law indicating that the child must not to be detained except as a matter of last

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<sup>95</sup>In *Alsop v McCann* 2001 (2) SA 706 (C), the applicant being the custodian parent, sought an interdict to prevent the children of a divorced marriage from attending the Roman Catholic Church while they spent weekends with the respondent (the non-custodian parent); and to prevent their receiving any education in the Roman Catholic religion. Foxcroft J in holding the applicant's prayer unreasonable held as follows:

"In terms of Section 28 (1)(b) of the Constitution of the Republic of South Africa, the non-custodian parent has a duty to provide care to the children and the children have a right to receive such care. Neither parent may dictate what religion, if any, their children eventually adopt, but each parent is entitled to provide religious instruction, at 713 F/G-H/I. To restrict the rights and duties of the non-custodian parent in the field of education to the secular would significantly erode that parent's rights of access, at 713 A/B-B".

<sup>96</sup>At 713 C-D.

<sup>97</sup>In *Lubbe v Du Plessis* 2001 (4) SA 57 (C), custody of the three children was awarded to the mother/wife respondent, with settlement agreement incorporated into the divorce order awarding custody to her. But even though the capacity and competency of the respondent as a parent was not doubted, the court allowed an amendment to the settlement agreement on the father/applicant's request. The court granted the father custody of the minor children who was found to be more capable to provide the necessary care and support to the children. It was found that it will be in the best interest of the children to be placed with the applicant and father of the children. Per Van Heerden J at 66 B-C and E-F.

In addition the South African High Court further made a similar decision in the case of *Hlope v Mahlalela* 1998 (1) 449 (T) SA, where it was decided that the best interests of the child was the main criterion to be utilized in disputes relating to the custody of children, and that this would override any rule of customary law. The Court referred to the best interest's principle in the South African Constitution, but did not make direct reference to international law.

<sup>98</sup>*Centre for Child Law and other v MEC For Education, Gauteng and Others* 2008 (1) SA 223 (T). Here the first applicant was concerned that the conditions at a certain school of industry infringed the children's constitutional rights. It sought orders directing the respondents to put in place proper access and control and psychological support structures and to make immediate arrangement for the school to be subject to a developmental quality-assurance process. It was held amongst other that the schools of industry should provide a higher standard of care than that which the child's parents were able to provide. See Murphy J's decision in para B-C at page 226 and para G at page 228.

resort - was affirmed.<sup>99</sup> Further, the South African courts are pragmatic in their consideration of the provision of the ACRWC on imprisoned mothers which is not in the CRC. The court took note of article 30 of the ACRWC, especially as there is no similar article in CRC. It was emphatically pronounced that the sentencing court must give specific attention to the impact the sentence of mothers will have on the child or children of a primary care giver. The Constitutional Court on appeal humanely considered the best interests of children of the mother to be imprisoned. Her sentence was set aside and replaced with one that would require her to serve a lesser term- all in the interest of her children.<sup>100</sup>

The substratum, foundation and bedrock of the cases discussed above<sup>101</sup> have its roots in the specific provisions of the South African Constitution which requires the courts to consider international law in their deliberations. This is prescribed in section 39(1) and (2)<sup>102</sup> captioned 'Interpreting the Bill of Rights.' Since the Bill of Rights was inspired by international human rights conventions, this clause allows the values and norms related to human dignity, equality and freedom to be brought into the reckoning. In addition, section 233<sup>103</sup> instructs the courts to afford preference to an interpretation of statutory law that is 'consistent with international law' whenever such an interpretation would be reasonable.

By virtue of these Constitutional provisions, the CRC, ACWRC, ILO Conventions and other ratified Conventions enjoy a heightened status in the South African legal frameworks. In the words of Julia Sloth-Nielsen,<sup>104</sup> 'the Convention on the Rights of the Child has acquired legal significance *via* the Constitution since specific children's rights which have been so

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<sup>99</sup>*Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (3) SA 515 (SCA).

<sup>100</sup>See *S v M's (Centre for Child law as Amicus Curiae)* 2008 (3) SA 232 (CC).

<sup>101</sup>See (note 87-100) above.

<sup>102</sup>Section 39(1) and (2) of the South African Constitution specifically stipulated that: (1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

<sup>103</sup>Section 233 states that: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

<sup>104</sup>Sloth-Nielsen (note 86 above) at page 139.

encapsulated in the Constitution are justiciable in the courts'.<sup>105</sup> The South African Constitution in section 28 affirms the provisions of the CRC, the ACRWC and the ILO Convention. Specifically, child's right to nationality, family care and basic health are enshrined. Children are to be protected from exploitative labor including that the best interest of the child should be of paramount importance in adjudicating child's rights cases. This is evidenced by the numerous cases where the paramountcy of the child's best interest was upheld as shown in this write up.

In support of Sloth-Nielsen's assertion, the Constitutional Court in South Africa has made many social welfare decisions by direct enforcement of the substantive protection of rights as entrenched in this portion of the South African Constitution. A confirmation can be seen in the milestone case of *Grootboom*.<sup>106</sup> The case presided over by Yacoob J, concerned a brutal eviction of a group of families, including young children, from land which they had unlawfully occupied. In the process, their shacks were bull-dozed and their belongings destroyed. Denied access to state land, they were literally without shelter during a period of severe rains. They had been placed on a waiting list for low cost housing, for as long as seven years. Section 26(1) of the South African Constitution states that 'everyone has the right to have access to adequate housing, whilst section 26(2) stipulates that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right'. An action was launched in the Cape High Court to compel the local municipality to provide them with a minimum of shelter, and with access to water and basic sanitation.

The Constitutional Court's decision has been widely acclaimed in so far as the Court was prepared, to uphold the general claim that the state had failed to meet the obligation placed on it

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<sup>105</sup>Section 28(1) of the Constitution of South Africa states that: 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 health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labor practices; (f) not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, 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 sections 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 not to be used directly in armed conflict, and to be protected in times of armed conflict.

<sup>106</sup>See (note 53) above.

by section 26(2) and 27 of the Constitution. This is to provide emergency housing relief for those in desperate need. A part of the judgment turned more specifically on the children's rights clause, and the meaning of the right of every child to shelter. Thus, the rights to 'basic nutrition, shelter, basic health care services and social services' was read with the right of the child to 'family care or parental care, or to appropriate alternative care when removed from the family environment'.<sup>107</sup>

Elaborating further upon the nature of the state obligation in relation to the socio-economic rights provided for in section 28, Yacoob J stated that "where children *are* in parental or familial care, the state's obligation would normally entail passing laws and creating enforcement mechanisms for the maintenance of children and for their protection from abuse, neglect or degradation". However, as regards the provision of 'deliverables', such as land, housing, food, and social assistance, the judgment implies that the state need only provide these on a 'programmatically and co-ordinated basis, subject to available resources'. The learned Justice made it clear that the first responsibility to advance the protection of the rights of the child lie with the parents. It is only when there are no alternatives that the government has to come into play. The court here reasoned that the parents bore the primary obligation to provide shelter for their children, but that Section 28 (1) (c) of the Constitution imposed an obligation on the State to provide that shelter, if the parents could not.

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<sup>107</sup>The judge apparently read the provisions of section 26 and 27 of the South African Constitution to be in line with articles 5,9,10 and 27 of the CRC which stipulates in general terms, children's rights to a standard of living adequate for their growth and development and which can be achieved in a family setting and comfortable home environment provided by the parents. Particularly, article 5 of the CRC is on respect for the responsibilities, rights and duties of parents; article 9 states that a child shall not be separated from his or her parents against their will; article 10 indicates how for the purpose of family reunification, states shall deal with the issues in a positive, humane and expeditious manner; and article 27 specifically obliges states to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. To complement these provisions, sections 26 and 27 of the South African Constitution then states as follows: 26 (1). Everyone has the right to have access to adequate housing; (2). The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right; and (3). No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions; and 27 (1) states: Everyone has the right to have access to- (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2)The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

The court concluded that *an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parents* (own emphasis). The inference drawn here is that the South African Constitution obliges the state to act positively to provide access to housing, health care, food, water and social security to those in need who are unable to support themselves and their dependents. *Grootboom's* case does refer to the Convention on the Rights of the Child, stating that the constitutional rights in section 28 are a 'mechanism to meet the obligations' imposed under the Convention in respect of the protection of children's rights.<sup>108</sup>

With the bold precedent set in *Grootboom's* case, the Constitutional courts opened the way in protecting and promoting the rights of children through reliance on provisions of International Convention and calling on governments to fulfill their international obligations. Two years after *Grootboom's* case, in the *Minister of Health v. Treatment Action Campaign*,<sup>109</sup> the Constitutional Court was again required to consider how best to interpret and enforce the positive dimension to the socio-economic rights guarantees contained in sections 26(2) and 27(2) of the Constitution. This time, in the context of a claim that the failure to provide access, outside of certain designated "test sites," to an anti-retroviral - nevirapine - shown substantially to decrease the risk of mother-to-child-transmission of HIV, was in breach of the "*right to access health care services*" protected by section 27(1) of the Constitution.

In the High Court, Botha J approached the question in terms of the framework set out in the *Grootboom's* case, by asking whether the refusal to provide access outside the pilot sites could be considered reasonable in the circumstances, and found that:

"the State's failure to provide such access could not in fact be considered reasonable on the facts before the Court. He said that given in particular, that there was clear "residual capacity" in many public hospitals around the country in relation to the provision of nevirapine, that the government had not advanced any compelling reason for denying

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<sup>108</sup>Per Yacoob J, in *Grootboom's* case at para 15, 75, 76 and 78.

<sup>109</sup>2002 (10) BCLR 1033 (CC), hereinafter referred to as "*TAC's*" case.

hospitals with the capacity to provide the drug the *flexibility* to do so, in appropriate cases”.<sup>110</sup>

Botha J went ahead to make orders requiring the National Minister of Health and provincial members of the Executive Council for Health to “make nevirapine available to pregnant women with HIV who give birth in the public health sector and to their babies in public health facilities and where in the judgment of the attending medical officer nevirapine was medically indicated, appropriate testing and counseling could be provided”.

He further ordered that, respondents:

“forthwith, plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counseling and testing, and where appropriate, nevirapine or other appropriate medicine, and formula milk for feeding”.<sup>111</sup>

On appeal, the Constitutional Court endorsed the reasonableness-based approach taken by Botha J to defining the scope of Section 27(2), on the basis that sections 26 and 27 were “*related and must be read together*” and that the South African Constitution contemplates a “*restrained and focused role for courts*” in the area of socio-economic rights enforcement.<sup>112</sup> Like Botha J, the Constitutional Court held, however, that none of the reasons advanced by the government were sufficient to support a finding that non-provision was in fact reasonable in the circumstances,<sup>113</sup> given the inflexibility in the government’s policy,<sup>114</sup> its effect on particularly

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<sup>110</sup>See Justice Botha’s decision at the high court level in *Treatment Action Campaign v. Minister of Health & Ors*, 2002 (4) BCLR 356 (T), at para 75-76.

<sup>111</sup>*Ibid* at para 85-87.

<sup>112</sup>TAC’s case at para 38.

<sup>113</sup>The government advanced four distinct rationales for its decision not to provide nevirapine outside of the designated sites, namely: (i) that the drug was not effective if the mother continued to breast-feed, and that there were substantial cultural and practical barriers to ensuring bottle-feeding in conjunction with access to nevirapine; (ii) that access to the drug could lead to the development of resistant strains of HIV; (iii) that there were doubts as to safety of the drug; and (iv) that providing the testing and counseling associated with provision of the drug would impose an undue strain on the public health system as a whole. The cost of the drug itself was not advanced as a rationale for non-provision, as the manufacturer had undertaken to provide it to South Africa at no cost, for a period of five years.

<sup>114</sup>TAC’s case at para 80 and 95.

vulnerable members of the population<sup>115</sup> and on other constitutionally protected rights such as rights of the child,<sup>116</sup> and that HIV/AIDS was the single greatest threat to public health in South Africa.<sup>117</sup> To this extent, the Court thus largely followed the approach it had taken in *Grootboom's case*.

The substratum of TAC's case was to provide pregnant HIV positive women with drugs that could prevent the transmission of the virus to their child during labor as preventing mother-to-child transmission of HIV can be seen as protecting children's rights to life and survival but in a broad sense the right to enjoy good health. The case can further be said to have contributed immensely to advancing realization of not only child's rights to health, but the precedent set can be applied to other child centered constitutional rights including access to education, food, clean water, and housing, thus recognizing these baskets of rights as measurable and justiciable.

When the case of *Khosa v Minister of Social Development*<sup>118</sup> came up two years after TAC's case and four years after *Grootboom's case*, the Court elected to take the same approach and further consider the challenge primarily in terms of section 9<sup>119</sup> of the Constitution, rather than sections 26(2) and 27(2).<sup>120</sup> The Constitutional Court following the precedent in *Grootboom's* and TAC's cases<sup>121</sup> found that a number of rights were at stake.<sup>122</sup> The applicants, who were indigent Mozambican citizens with permanent resident status in South Africa, challenged certain provisions of the Social Assistance Act 59 of 1992 that reserved the old age pension and child support grants to South African citizens only, thereby excluding permanent residents. The

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<sup>115</sup>At para 70 (namely on poor, rural women outside the catchment-area of testing sites and with no ability to pay for private health-care).

<sup>116</sup> At para 77.

<sup>117</sup> At para 93.

<sup>118</sup>2004 (6) SA (CC) 505.

<sup>119</sup>Section 9(1)(2) and (3) states that: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms, the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>120</sup>See (note 107) above.

<sup>121</sup>Hereinafter referred to as the 'twin cases'.

<sup>122</sup>The applicants alleged that exclusion of non-citizens from social grant entitlements was unconstitutional on the basis of the South African Constitution in section 9 - right to equality, section 10 - right to human dignity, section 27 - right to health care, food, water and social security; and section 28 - indicating broad rights of children.

applicants brought their application in their own names and on behalf of their minor children. The applicants argued in the High Court that the citizenship requirement infringed their Constitutional rights to equality, social security, and the rights of their children. The High Court found for the applicants. In addition, the Director-General of Social Development and the MEC for Health and Welfare in the Northern Province were ordered to pay to the applicants the relevant grants, including certain arrears. They were ordered to receive and process applications for grants from the named persons on whose behalf the applicants acted.

On appeal, the Constitutional Court following the precedent in *Grootboom's* and *TAC's* cases - the 'twin cases' - found that apart from the right to social security, the case also affected the right to life, dignity, and equality. This prompted the Court to build on the reasonableness test, which was applied in the previous twin cases. The Court identified additional factors that should be taken into account in determining if the State's action was reasonable, namely: the purpose served by social security; the impact of the exclusion on permanent residents; the relevance of the citizenship requirement to that purpose; and the impact that this has on other intersecting rights.<sup>123</sup> The Court noted that social grants are targeted at vulnerable people in order to realize Constitutional objectives in line with international obligations.<sup>124</sup> It emphasized that the purpose of social security rights was to ensure that basic needs are met, thereby valuing the fundamental dignity of people - especially because the strictly means-tested grant is aimed at people in poverty.<sup>125</sup> The Court found that the discrimination on the grounds of residential status was unfair and offended a person's dignity.

It was pointed out that the Constitution mandates special protection for children and that the denial of support infringes on their rights.<sup>126</sup> The Court therefore held that the applicants were a vulnerable group in need of constitutional protection. The effect on the dignity of the exclusion of this group of vulnerable people - namely poor permanent residents caring for elderly people and children - was not outweighed by the comparably small cost to the state to affect their inclusion. The exclusion was therefore unreasonable and the State had not proved that this was a justifiable limitation. The Court therefore ordered that the old age pension and the child support grant should be available to permanent residents in the same way as it was available to citizens.

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<sup>123</sup> *Khosa's* case at para, 46-47 and 49.

<sup>124</sup> At para 51.

<sup>125</sup> At para 52.

<sup>126</sup> At para 86.

There were two dissenting judgments.<sup>127</sup> It was interesting to note that the judges writing the dissenting judgment made ample references to children and confirmed that the exclusion of children from access to these grants amounted to unfair discrimination. The dissenting judgment affirmed that "the denial of support to children in need, trenches upon their rights under section 28(1)(c) and that denying the children their right to education is unconstitutional". The opinions expressed by the dissenting judges indicate that all the judges *agreed in principle that in the field of education, non-citizens and children should not be discriminated against* (own emphasis). The remarkable point is that all the judges irrespective of their leanings while pronouncing the judgment appreciated the importance of realization of rights - to education for children as provided by article 28 of the CRC.<sup>128</sup> The case indicates that not allowing permanent residents who are not national citizen's access to education would be discriminatory. In closing this segment, it is trite to say that, with the famous sequence of these human rights cases,<sup>129</sup> the South African Constitutional Courts relentlessly continued to apply the domestic legislation, constitutional provisions and other international and regional instruments to promote and advance the rights of her children.

To further demonstrate South Africa's advancement in child's law jurisprudence in comparison with the Nigerian and Ethiopian legal systems, some court's decisions were made by combining salient provisions of not only international and regional instrument, but other human right standards protecting children. Building on this premise, the case of *S v Kwalase*<sup>130</sup> is worth mentioning. In a review of a sentence of imprisonment imposed upon a juvenile for an offence committed when he was 15 years of age, extensive reference was made to the necessity of

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<sup>127</sup>Dissenting judgments simply means the judgment of a judge, showing that he or she disagrees with other judges in a case which has been heard by several judges.

<sup>128</sup>The two dissenting judges in this case found that section 3 (c) of the 1992 Act [must be referring only to South African citizens] and was a reasonable limitation of the right of access to social security. They stated that the state has insufficient resources to provide for everyone within its borders and is entitled to prioritize its citizens and as such, the Act has the legitimate purpose of encouraging self-sufficiency in immigrants. Furthermore, it is important that the provision of these benefits does not create an incentive to immigrants to South Africa. The minority held further that the limitation is merely temporary since it is possible for permanent residents to naturalize after five years.

<sup>129</sup>Protecting and promoting the rights of children dealing on housing (*Grootboms* case), provision of medicine to children with HIV/AIDs (*TAC's* case) and the rights of permanent resident's/non-citizens of South Africa to child support grants (*Khosa's* case).

<sup>130</sup>2000 (2) SACR 135 (CPD), hereinafter referred to as "*Kwalase's*" case.

bearing in mind the 'post 1994 constitutional and international legal dispensation in South Africa' in the determination of appropriate sentences for youthful offenders.

The court referred to article 37(b) of the CRC and section 28(1)(g) of the South African Constitution.<sup>131</sup> The presiding judge also referred to South Africa's ratification of the Convention on the Rights of the Child, stating that this meant that there was 'international legal obligation to put into effect in its domestic law, the provisions of this Convention'.<sup>132</sup> He also made references to other international instruments.<sup>133</sup> The judge was of the opinion that the provisions contained in section 28 of the South African Constitution should be read together with relevant international instruments relating to juvenile justice. This is in reference to section 39(1) of the Constitution, where the courts are enjoined to consider international law when interpreting the Bill of Rights. The Judge further stated that custodial sentences should only be used as a last resort. He mentioned the fact that pre-sentence reports should be mandatory before the imposition of such sentences. The sentence was replaced with a shorter term, one which could be converted into a correctional supervision, and a community-based sentence, by the prison authorities.

In appreciating South Africa's model and advanced legal system, the case of *S v M*,<sup>134</sup> is noted. The court ensured protection for the minor children of a convicted mother and certain aspects of substantive differences between CRC and the ACRWC were highlighted therein. Specific provisions of the ACRWC were cited which are different from the CRC. The case indicates the possible emergence of a jurisprudence of children's rights linked specifically to the ACRWC. These are described as '*fledging African child law jurisprudence*'.<sup>135</sup> The court rightfully applied the provisions of the CRC alongside the ACRWC appreciating the rights of the children for parental care, above the circumstances of their mother's situation.

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<sup>131</sup>See note 105 above, while article 37(b) of the CRC states: 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.

<sup>132</sup>*Kwalase's case* at 139 A-E.

<sup>133</sup>Such as article 37(b) and 40(1) of the CRC emphasizing the aims of juvenile justice policy, the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (1990).

<sup>134</sup>See (note 100) above.

<sup>135</sup>Skelton (note 86) above at page 483.

One of the major issues before the court in *S v M's* case was to decide on: What are the duties of a sentencing court in the light of section 28(2) of the Constitution and any relevant provisions, when the person being sentenced is the primary caregiver of minor children, keeping in mind the constitutional protection of the best interests of the child? The appellant in the case was M, the mother of three minor children. She was the sole caregiver of the children, and was also the main provider of financial support for their care. She had raised a bond on a modest home in which the family lived on the income she derived from two small businesses. She was convicted on various counts of fraud and theft and was sentenced initially by the Regional Court to four years' imprisonment.

On appeal, her sentence was set aside. It was replaced with a sentence that would require her to serve approximately six months in prison before the Commissioner of Correctional Services could consider releasing her on correctional supervision. The *amicus curiae* submitted that the sentencing court should take cognizance of the rights of the children, when sentencing a primary care giver, and provided support from international and regional instruments in this regard.<sup>136</sup> Evidence before the lower court was that the children's father was an alcoholic and that at times whilst the children were in his care he had been so drunk that arrangements had to be made for the children to spend the night elsewhere. At the time of judgment, he was in military detention facing charges relating to his drinking problems. No other family members were available to take over the day to day care of the children whilst their mother was serving a sentence of imprisonment. Further submissions pointed out that one of the features of the ACRWC that distinguishes it from CRC is the fact that it contains a separate and distinct article on 'children of imprisoned mothers', namely article 30,<sup>137</sup> which has no counterpart in the CRC. The judgment makes reference to international and regional treaties and in particular, to article 30 of the ACRWC. In the final analysis, the Court raising the issues on situation of imprisoned mothers and the best interest of their children pronounced as follows:

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<sup>136</sup> *S v M's* case at para 31 and 32.

<sup>137</sup> Article 30 reads thus: State parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular: (a) ensure that a non-custodial sentence will always be the first consideration when sentencing such mothers; (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers; (c) establish special alternative institutions for the holding of such mothers; (d) ensure that a mother shall not be imprisoned with her child; (e) ensure that a death sentence shall not be imposed on such mothers; (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

“Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts”.<sup>138</sup>

Sachs J in the lead judgment continued as follows:

“.....the ambit of Section 28 of the Constitution was undoubtedly wide. The comprehensive and emphatic language used in the section indicated that, just as law enforcement must always be gender-sensitive, so it must always be child-sensitive; statutes must be interpreted and the common law developed in a manner that favored protecting and advancing the interests of children; and courts must function in a way that showed due respect for children’s rights. Section 28 was also to be seen as an expansive response to South Africa’s international obligations as a State party to the UN Convention on the Rights of the Child. The four great principles of this Convention which, as international currency, guided all policy in South Africa in relation to children were survival, development protection and participation. What united these principles and lay at the heart of section 28 was the right of a child to be a child and to enjoy special care. Every child had his or her own dignity; each child was to be constitutionally imagined as an individual with a distinctive personality and not treated as a mere extension of his or her parents. The unusually comprehensive and emancipatory character of section 28 pre-supposed that the sins and traumas of fathers and mothers should not be visited on their children.”<sup>139</sup>

Further, the Court referred specifically to the Convention on the Rights of the Child and to article 3(1) which obliges (amongst other bodies) courts to have regard to the best interest of children in all actions. Conceding that the impact of this provision upon the principles of sentencing had not been fully grappled with by the lower courts, the Constitutional Court judge placed her under correctional supervision instead of sending her back to the prison stating that:

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<sup>138</sup> *S v M’s case* at para 33.

<sup>139</sup> At 244 para 15 and 16.

“...despite the bad example she has set, she is in a better position to see to it that her children continue with their schooling and resist the pressures and temptations that would be intensified by the deprivation of her care in a socially fragile environment. It is to the benefit of the community, as well as of her children and herself, that their links with her not be severe”.<sup>140</sup>

The result of the judgment in the *S v M's case*, is that in each case, the sentencing court must give specific attention to the impact the sentence will have on the child or children of a primary care giver. This does not mean that a primary care giver will never, henceforth, be given a custodial sentence. The judgment explains quite clearly that the choice of the sentencing option least damaging to the interests of the children is made ‘within the legitimate range of choices in the circumstances available to the court’. It is significant, in jurisprudential terms, that the Court took note of article 30 of the African ACRWC, especially as there is no similar article in CRC. It is thus interesting to see that jurisprudence has already developed relating to this article of the ACRWC, giving further weight to the idea of an ‘African child rights jurisprudence’.<sup>141</sup>

Unlike Justice Sachs strong pronouncements made in favor of protecting the rights of children in *S v M's case*, there are also instances where learned Judges have failed to advance children’s rights and have rather taken a narrow interpretation of the same section 28. The classical example is the case of *Jooste v Botha*.<sup>142</sup> The case, covered the same aspect of the Constitution on the child’s right to parental care as provided for in section 28(1)(b)), but from rather a novel and strange angle which is, the Justice made references to the international treaties and instruments but failed to enforce its salient provisions. The plaintiff in this case was in fact supposedly the child, who brought the action assisted by his mother who was also his legal guardian. The defendant was his biological father. His mother and father were never married, and had also never cohabited.

However, the defendant paid maintenance for the boy and there was no claim that he was in any way failing in respect of the duty to provide materially for the support of his child. Since the

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<sup>140</sup>At 267 para 70.

<sup>141</sup>Skelton (note 86) above at page 491.

<sup>142</sup>2000 (2) SA 199 (T).

birth of the child (at the time of the action he was 11 years old), the defendant had refused to admit that he was the father of the plaintiff, to communicate with the boy, to show any interest in him or to take any steps which would naturally be expected of a father with respect to his son. The child was cold-shouldered by his father, who in any event had long since married and had children born of another marriage. The action was based on the child alleging that as the result of the neglect by his father, he has suffered damage in the form of an '*iniuria*', emotional distress and loss of amenities of life. At the core, therefore, was the argument that the defendant, as a father, was under a legal duty to render the plaintiff love and attention.

The case was based squarely on the constitutional right to parental care, since no authority in common law for this action was adduced or could be found by the presiding judge, who said that it followed that the plaintiff's claim 'must find its legal foundation in the constitution, or fail'. In the judgment, Van Dijkhorst J stated that:

"The provisions in the interim Constitution and those in the 1996 Constitution dealing with the child should be evaluated in the light of pre-existing international law. These are: International Covenant on Civil and Political Rights; the European Social Charter; the International Covenant on Social, Economic and Cultural Rights; the African Charter on Human and People's Rights; and the American Convention on Human Rights. The most important because it is binding, is the United Nations Convention on the Rights of the Child, which was ratified by the Republic of South Africa".<sup>143</sup>

The judge appreciated the international and regional instrument but made some disturbing statements when he said:

"It is clear that children have a legitimate interest in general, physical, intellectual and emotional care within the confines of the capabilities of their care givers. Yet it is significant that the Constitution does not state that parents are obliged to love and cherish their children or give them their attention and interest. The Constitution is silent on the most important aspect of the alleged legal right".<sup>144</sup>

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<sup>143</sup>Per Van Dijkhorst J at 201-203.

<sup>144</sup>At 207 H.

He then went further to state that:

“.....the state must not interfere with the integrity of the family....and that section 28(1) and (2) of the Constitution find its antecedents in article 7(1) of the UNCRC in terms of which the child shall have ‘....as far as possible, the right to know and be cared for by his or her parents’. In terms of article 7(2), State parties are obliged to ensure that implementation of these rights is in accordance with their national Law”.<sup>145</sup>

The learned Justice made reference to and acknowledged the relevant and significant provisions of section 28(1)(b) of the Constitution and article 7 of the Convention on the Rights of the Child and still went ahead to dismiss the claim of the plaintiff. The Judge made negative statements like:

“Despite recent statutory developments which have materially improved rights of a natural father in respect of his illegitimate child, neither our common law nor our statutes recognize the right of a child to be loved, cherished comforted or attended to by a non-custodian parent as creating a legal obligation. A bond of love is not a legal bond. Insofar as the plaintiff’s claim is based on the common law it must fail. While children are residing with their parents, the law imposes no duty on the latter to see to their developmental interests, except in the limited field of education”.<sup>146</sup>

The learned judge was quite insensitive, vicious and cold hearted in his pronouncements. He openly referred to the aggrieved child as ‘illegitimate’, took a very narrow and cruel view and went on to pronounce as follows:

“the law will not enforce the impossible. It cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers”.<sup>147</sup>

He finally held as follows:

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<sup>145</sup>At 208 F/G.

<sup>146</sup>At 207 B/C.

<sup>147</sup>At 209 H.

“.....there rests no legal duty on the defendant to afford the plaintiff his love, attention and affection. The claim is bad in law. It will serve no purpose to grant leave to amend it”.<sup>148</sup>

With these statements, the judge here stood negatively different and the decision did not advance the rights of children. He was unmindful of the ‘equality’ clause in section 9 (3) and (4) of the South African Constitution where unfair discrimination on the ground of ‘birth’ especially is prohibited. He failed to follow the precedents in the sequential human rights cases,<sup>149</sup> where it was broadly pointed out that the South African Constitution mandates special protection for *ALL children whether born legitimately or illegitimately, to indigents or non-indigents* (own emphasis) and that the denial of support by the government or individuals or civil society, infringes on their rights.

In the same spirit, the learned justice ought to have compelled the boy’s father to go beyond common duties of ‘merely’ and be compelled to render the boy attention, love, cherishment and interest as claimed. The court ought to have ensured the father performs his duties to his son as envisaged to be performed by parents to their children in the numerous international instruments he copiously relied upon. These include especially section 27 of the CRC where the right of the child to ‘a standard of living adequate for the child's physical, mental, spiritual, moral and social development’ was specifically mentioned. It also includes providing an environment of love, affection and consideration. Acknowledging or making references to these instruments are not sufficient. The learned justice is expected to make such pronouncement in the best interest of the child, which would be binding on the father, to ensure realization of these rights, as stipulated in the standards and instruments irrespective of the circumstances of the child’s birth.

It is however cheering to note that the precedent laid in *Jooste’s* case, was not deeply entrenched in South Africa’s legal systems. This is profoundly shown in the numerous decisions where the courts have made laudable and commendable pronouncements strictly based on the

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<sup>148</sup>At 210 H.

<sup>149</sup>See (note 129) above.

'best interest' of the child.<sup>150</sup> These are enshrined in article 3 of the CRC and article 4 of the ACRWC. A foremost decision worth adding to the numerous cases already cited is *The Christian Schools Case*.<sup>151</sup> The case concerned a constitutional challenge to section 10 of the Schools Act 84 of 1996 outlawing corporal punishment. The action was brought by a consortium of independent schools, on the basis that the blanket prohibition of corporal correction in schools invaded their 'individual, parental and community rights to freely practice their religion'.<sup>152</sup> The applicants quoted verses from the Bible in support of their claim. They contended that the offending section interfered with the constitutional rights to freedom of religion and to cultural life and that the imposition of corporal punishment (with the consent of parents) was a 'vital aspect of Christian religion'.<sup>153</sup>

The Minister of Education, opposing the application, relied on the equality clause, the right to human dignity, the right to freedom and security of the person, and the rights of children to be protected from maltreatment, neglect, abuse or degradation.<sup>154</sup> It was contended that state policy and public practice had formerly permitted corporal punishment to be administered to children in schools, to juvenile and other offenders in prisons and other correctional institutions. That state policy was, in the light of the new constitutional order, now different.<sup>155</sup> The Minister, in his opposing affidavit, referred explicitly to South Africa's international obligations under the Convention on the Rights of the Child, stating that articles 37, 19, and 28(2) of the Convention required the abolition of corporal punishment in schools.<sup>156</sup>

The court presided over again by Sachs J expressed the view that, the Schools Act did not deprive parents of their general right to bring up their children according to Christian beliefs. It merely limited their capacity to empower or authorize teachers to administer corporal punishment in their name.<sup>157</sup> What was in issue, the Judge said, was not so much whether a general prohibition on corporal punishment was justifiable, but whether the impact of such a

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<sup>150</sup>See (note 86-100) above. All the courts decisions referred to were made and upheld in consideration of the 'best interest' of the child.

<sup>151</sup>2000 (10) BCLR 1051 (CC), hereinafter referred to as "*The Christian Schools*" case.

<sup>152</sup>At para 2.

<sup>153</sup>At para 4.

<sup>154</sup>See sections 9, 10, 12 and 28(1)(c) of the South African Constitution.

<sup>155</sup>*The Christian Schools* at para 11.

<sup>156</sup>At para 13.

<sup>157</sup>At para 22–26 and para 34–36.

prohibition upon the religious beliefs and practices of the appellant's members can be justified under the limitations test in Section 36 of the Constitution. Was the failure to provide for an exemption to accommodate the appellant's beliefs reasonable and justifiable? The answer given was that the blanket prohibition on schools imposing corporal punishment was reasonable and justifiable.

The reasons for this are set out fully in the judgment. It include: "...*the need for uniform norms and standards in schools; the international law recognition of the protection of children from potentially injurious consequences of their parents' religious practices; the constitutional duty upon the state to help diminish the amount of public and private violence in society; and the duty incurred upon ratification of the Convention on the Rights of the Child to - take all appropriate measures to protect the child from violence, injury or abuse*".<sup>158</sup> Allusions were also made to the symbolic and principled function of introducing such a prohibition, given the authoritarian past which had prevailed in South Africa.<sup>159</sup> The State thus has a duty to protect children from degradation and indignity. Dignity being a core value in the South African Constitution. Judge Sachs made references to some other judgments<sup>160</sup> in which judicial corporal punishment was declared unconstitutional and found wide support for the stance that corporal punishment in schools was in itself a violation of the dignity of a child.<sup>161</sup>

The South African court's decision is the best practice that other countries like Ethiopia and Nigeria would need to emulate in protecting children from degradation and indignity of corporal punishment. For example, in Ethiopia's domestic legislation,<sup>162</sup> corporal punishment is lawful in the home. The relevant legislation recognizes that "the guardian may take the necessary disciplinary measures for the purpose of ensuring the upbringing of the minor" and that "reasonable chastisement" of children is allowed. This however is in contradiction of article 16 and 18 of the Constitution of FDRE which states that "everyone has the right to protection from "bodily harm," and from "cruel, inhuman or degrading treatment or punishment".

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<sup>158</sup> At para 32, 38 and 40. The court also made reference to articles 4, 19 and 34 of the CRC.

<sup>159</sup> At para 50.

<sup>160</sup> *S v Williams* 1995 (3) SA 632 (CC) and case Law from Zimbabwe and Namibia.

<sup>161</sup> *The Christian Schools* at para 52.

<sup>162</sup> Article 579 of the Criminal Code of 2005; and Article 258 of the Revised Family Code of 2000.

Corporal punishment can also be seen as being explicitly prohibited in Ethiopian schools by article 36(5) of the Constitution of the FDRE, which states that every child has the right “to be free of corporal punishment or cruel and inhuman treatment in schools and other institutions responsible for the care of children. But the reality of the situation of Ethiopian children is reflected in a study<sup>163</sup> in which 1,223 children from five regions were interviewed and only 17 children (1.4%) stated that they had never experienced corporal punishment in the home. In another research,<sup>164</sup> it was reported that 21% of urban schoolchildren and 64% of rural school children had bruises or swellings on their bodies resulting from parental punishment. For the thousands of child victims of violence inflicted by corporal punishment, the courts in Ethiopia have not risen up to adjudicate against such injustice and impunity.

In Nigeria, corporal punishments have been prohibited by certain provisions of the Child’s Rights Act 2003,<sup>165</sup> but it is a known fact that corporal punishment is thriving in the Nigerian schools, homes and communities which most of the time goes unreported. There has been no reported or decided case to halt the degrading treatment of corporal punishment of children in Nigeria. There is the need to emulate South African courts in developing a more child friendly jurisprudence to protect the rights to dignity of African children.

Beyond upholding the dignity of the child by applying the provisions of the CRC and ACRWC, the South African court’s bold, pragmatic and practical judgments ensuring fulfillment of children’s rights to parental care and protection is also commendable. The Constitutional Court’s decision in the case of *Minister for Welfare and Population Development v Fitzpatrick and Others*<sup>166</sup> also stood out uniquely as the ‘best interest’ principle was applied. The decision was also based on the central premise of the best interests of the child. Adoption provisions preventing non-nationals from applying to adopt South African children was the focus of the challenge. At that time, South Africa had not yet ratified the Hague Convention on Inter-Country Adoptions. Prior to this case, inter-country adoption was not possible due to a clause in Section

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<sup>163</sup> *Violence Against Children in Ethiopia In Their Words* (2006) The African Child Policy Forum and Save the Children Sweden. See also chapter 1, section 1.4.3.

<sup>164</sup> Ketsela T, & Kedebe D, ‘Physical punishment of elementary school children in urban and rural communities in Ethiopia’ (1997) Volume 35, *Ethiopian Medical Journal* pp.23-33, cited in Krug, EG et al (eds) (2002), *World report on violence and health*, Geneva: World Health Organization.

<sup>165</sup> Sections 11(a) (b) and 221(i)(b) of the *Child’s Rights Act of 2003*.

<sup>166</sup> 2000 (3) SA 422 (CC), hereinafter referred to as “*Fitzpatrick’s*” case.

18(4)(f)<sup>167</sup> in the Child's Care Act 74 of 1983, that prohibited foreign persons from adopting South African children. The impugned section was struck down with immediate effect. The Court determined that the children's courts' powers to hear domestic adoption matters were wide enough to allow them to deal with inter-country adoptions and that the CRC provided sufficient guidance in this respect. In the *Fitzpatrick's case*, the good Samaritans (Mr and Mrs Fitzpatrick, are British citizens wishing to adopt a minor child- Kaydon Salters) involved in this application had taken in many foster children during their stay in South Africa, after having produced four children of their own. Now liable to transfer back to their country of origin, they wished to adopt a child whom they had fostered for two years and accordingly applied to the court for an order declaring Section 18(4)(f) of the Child Care Act invalid as it is inconsistent with the South African Constitution.

The issue for which an appropriate remedy is sought came from the Minister and the *amicus curiae* who were concerned that an immediate order of invalidity regarding the offending section would open the door to trafficking in children across borders. By contrast, Mr and Mrs Fitzpatrick being the prospective adoptive parents wanted the order of invalidity to take immediate effect, so as to enable them to secure finality with regard to the adoption process. It was in this respect that the court courageously adduced that - article 21(b)<sup>168</sup> of the Convention on the Rights of the Child is and will be made applicable since South Africa had not yet ratified the Hague Convention on Inter-Country Adoptions.

The Constitutional Court approached the matter from the vantage point of the 'best interests' standard in section 28 of the Constitution. The principle was considered at some length, and its application in a broad variety of situations was referred to choice of forum in respect of custody orders and access by natural fathers to their illegitimate offspring. Given the paramountcy of the 'best interests' principle, the Court held that the provision of the Child Care Act preventing non-

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<sup>167</sup>Section 18(4)(f) of the Child Care Act 74 of 1983 absolutely proscribed the possibility of foreign citizens and persons who do not qualify to become naturalized adopting a South African child. The section requires that an applicant for the adoption of a child born of a person who is a South African citizen must also be a South African citizen resident in the Republic, or must be a person with the necessary residential qualifications for the grant of South African Citizenship, who has made application for a certificate of naturalization.

<sup>168</sup>Article 21(b) of the CRC provides that 'States Parties which recognize and/or permit the system of adoption . . . shall . . . recognize that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.

citizens from adopting South Africans altogether, whatever the circumstances, was 'too blunt and all-embracing an instrument, as the facts of this case so clearly illustrated'. It was obviously in the best interests of this child to remain with this caring family.<sup>169</sup>

The court referred to the principle articulated in the article 21(b) of the CRC, as the principle of subsidiary, which entails that inter-country adoption may be considered as an alternative means of providing for the care of children, where a child cannot be placed with foster parents or an adoptive family in the country of origin. Goldstone J presiding, mentioned specifically that, courts would be obliged to take this principle into account, even in the absence of express provision for it in domestic law, as it is enshrined in international law. The Court's reasoning is appreciated when it held that the obligation to consider the principle of *subsidiarity* flowed from the imperative in section 39(1)(b) of the South African Constitution - that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law, especially the best interest principle as articulated in the Convention on the Rights of the Child. Goldstone J stated that:

".....one of the concerns 'that underlie the principle of subsidiarity are met by the requirement in section 40 of the Child Care Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other'.....In terms of Section 39(1)(b) a court is obliged, when interpreting the Bill of Rights, to consider international law".<sup>170</sup>

By this reasoning Inter-country adoptions became lawful in South Africa when the Constitutional Court struck down the said Section 18(4)(f) of the Child Care Act 74 of 1983 which prevented foreigners from adopting South African children. The Court from the pronouncements found that this law was too restrictive to allow for children's best interests to be realized, and the impugned section was declared invalid with immediate effect. The Court indicated at that time that the Children's court would deal with such adoptions when Goldstone J declared as follows:

"In terms of the Child Care Act, the Children's courts are charged with overseeing the wellbeing of children, examining the qualifications of applicants for adoption and granting

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<sup>169</sup> *Fitzpatrick's* at para 20.

<sup>170</sup> At para 32.

orders. The provisions of the Act creating Children's court and establishing over all guidelines advancing the welfare of the child offer a coherent policy of child and family welfare".<sup>171</sup>

Consequent upon the precedent set by the learned Justice in the *Fitzpatrick's* case, the children's court dealt with adoption matters until about eight years after the case when a similar case came up. Here, the High Court, the Supreme Court of Appeal and eventually the Constitutional Court were all tasked to decide a similar case concerning inter-country adoption. This was in the case of *De Gree and Another v Webb and others (Centre For Child Law as Amicus Curiae)*.<sup>172</sup>

Unlike the precedent set by the court in *Fitzpatrick's* case, as it concerns hearing adoption cases in the children's courts, Mr and Mrs De Gree as appellants instituted proceedings in the Johannesburg High Court. They applied for an order that the sole custody and guardianship of the minor child, Ruth Joy Webb (Ruth) be awarded to them. The appellants also sought ancillary relief to the effect that Ruth be declared to have been abandoned and that the order by the children's court placing her in the foster care of Mr and Mrs Webb (the first and second respondents) be discharged. That the appellants be authorized to leave South Africa with Ruth with a view to adopting her in the United States of America. This was an unusual route for inter-country adoption in South Africa, where there is a children's court at magistrate's court level which hears all domestic adoption matters and has been dealing with inter-country adoptions since the year 2000 when the *Fitzpatrick's* case was decided.

The High Court judge - Goldblatt J dismissed the application being concerned about the unusual order sought by the *De Grees* and found that it was not for the High Court to decide what is Ruth's best interest but that, it should be done by the children's court in accordance with the decisions in *Fitzpatrick's* case and the provisions of the Child's Care Act 74 of 1983. On appeal to the Supreme Court of Appeal, the Court was divided three to two, with four written judgments.<sup>173</sup> Heher JA in her minority judgment while allowing the appeal and departing from

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<sup>171</sup> At para 31.

<sup>172</sup> 2007 (5) SA 184 (SCA), hereinafter referred to as "*Baby Ruth's*" case.

<sup>173</sup> *Baby Ruth's* case was decided by Heher JA, Ponnann JA, Hancke AJA, Synders AJA and Theron AJA. In four written judgments, Justice Theron in para 27 expressed that it may be in the best interest of Baby Ruth to be adopted by the appellants, but this should be effected by the children's court and further

Goldstone J's assertions and reasoning in - *Fitzpatrick's* case - in her concluding remarks opined as follows:

"Having attempted to identify the argument for and against the granting of the order, it becomes necessary to decide whether the benefits and advantages to the child in this case outweigh those on the opposite side of the scale to the extent that the level of the child's best interest is reached in the overall evaluation. I have no doubt that the level is comfortably exceeded. The substantial value to Ruth of a stable, happy and potentially prosperous future with the applicants in the United States and the enormity of the deprivation and prejudice which she will suffer if no adoptive parent should come forward far outweighs the sum of formal compliance with the Child Care Act, the speculative possibility of remotely comparable parents coming to her rescue in South Africa, the preservation of her cultural and religious identity, the maintenance of a rigid and unyielding policy on inter-country adoptions and the avoidance of the possibility of an undesirable precedent. At the same time I remain wholly un-persuaded that an inflexible insistence on strict compliance with every procedural aspect laid down for a formal adoption according to the supervision of a children's court would have strengthened or weakened the applicant's case in any material aspect".<sup>174</sup>

Following the divided opinions in Supreme Court of Appeal the case proceeded to the Constitutional Court as the *AD's* case.<sup>175</sup> The Constitutional Court, hearing the appeal from the Supreme Court of Appeal had to decide whether the process of applying for a sole custody and guardianship order in the High Court was an acceptable approach, or whether the children's

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opined that the court should not sanction an adoption procedure which is in conflict with international treaties....., *Synders AJA* (gave no written judgment) and *Ponnan JA* both concurred with the *Theron AJA's* judgment. *Ponnan JA* took a very narrow approach and opined in para 83 that "South African nationals seeking an adoption order are obliged to approach the children's court which has the sole authority and power to grant orders of adoption. But *Hancke AJA* and *Heher JA* dissented.

*Heher JA* disagreed with *Theron AJA's* opinion in para 54 when she wrote that "the grant of the application would sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified. *Heher JA* further stated in para 39 that "the best interest of a minor child are dynamic and not static" and concluded in para 77 that "the benefits and advantages to Baby Ruth outweighs all the other issues as canvassed by the opposite side and allowed the appeal". *Hancke AJA* agreed with *Heher JA* and stated in para 105 - that "the best interest of the child are served by relying on the case presented by the appellants and not by deferring a decision on the merits".

<sup>174</sup>Baby Ruths case, per Heher JA in para 77.

<sup>175</sup>2008 3 SA 183 (CC).

court was the correct forum, where an adoption could be concluded. The majority in the Supreme Court of Appeal had upheld the order of the High Court, in which the couple had been advised that the correct forum to conclude the inter-country adoption was the children's court.

Whilst recognizing the importance of the international law principles relating to inter-country adoption, the Constitutional Court decided in the end (upholding the minority judgments of Heher JA and Hancke AJA) that the best interests of the child's principle was paramount. The Court found that it was in the child's best interests to be adopted by the appellants, the court made an order that the adoption be heard in the children's court within one month, and Baby Ruth was duly adopted. The 'best interests of the child principle' carried the day.

The South African Courts continued relentlessly to apply the 'best interest' principle as it concerns children and not the circumstances of their births or that of the parents or to *the existing rigid and unyielding policy* (own emphasis). This is specifically highlighted in the case of *P and Another v P and Another*.<sup>176</sup> The matter concerned the custody and guardianship of and access to the minor child, G, who had been living with her uncle and aunt, the plaintiffs, for a continuous period of four years. The second plaintiff faced possible relocation to the United States for employment reasons for a period of four years and the issue of whether the plaintiffs should be allowed to take G to the United States with them arose. G's biological mother, the second defendant, and her husband, the first defendant, opposed G's move to the United States. These were on various grounds, fuelled by a concern that they would not be able to maintain the parent/child relationship with G, if she were so far removed from them. The plaintiffs had in the past made a concerted effort to ensure that G regularly visited the defendants. Hurt J in awarding custody of G to the plaintiffs stated as follows:

".....the first aspect which emerged from section 28 of the South African Constitution in relation to the issues under consideration was that it was the child's rights which were defined and not those of the parents. In law, the existence of a right was tantamount to the creation of a duty on the part of another to fulfill that right. Guardianship and custody were not to be viewed as rights vesting in the parents but as duties imposed upon the parent. The Constitution required those duties to be exercised in the interests of the

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<sup>176</sup>2002 (6) SA 105 (N).

child. In considering what was in the best interest of the child, the courts had always regarded the biological bond between the child and its parents as almost sacrosanct and only to be disrupted or affected by the intervention of the courts in its capacity as upper guardian where the interests of the child, and not those of the parents, so dictated".<sup>177</sup>

It was further held that:

"Had the defendants sought an order for custody of G to be restored to them in the present circumstances, the Court would not have been persuaded to grant it. The evidence showed that the defendants were clearly not in the position to give G the type of stable background and room for improvement which she needed to develop and become a useful member of the society. It would not benefit G in any way to be returned to the defendant's home as it was at present, with cramped accommodation and serious personality conflicts being only two of the many problems which she would encounter. To remove G from the environment in which she had been nurtured for the past four years would clearly do her substantial damage and it would accordingly not be in the child's interest to restore custody to the defendants at this time".<sup>178</sup>

The court was courageous and chose to disrupt the biological bond between the child and her parent, found undesirable restoration of effective custody to the biological parents and enforced the child's rights as opposed to the parents' rights. The best interest of G was duly considered, hence the court allowed G to travel with the plaintiffs to the United States.

Lastly, the *best interest principle* was also applied in the case of *V v V*.<sup>179</sup> The case concerns the custody of children upon divorce of their parents. The application of the mother of the children for joint custody was opposed by the father, in part based on the fact that she was involved in a lesbian relationship, and he did not want her to exercise access when her partner was sleeping over, lest the children themselves grow up with a gay or lesbian orientation.<sup>180</sup>

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<sup>177</sup>Per Hurt J at 107 I-J and 108, B-C.

<sup>178</sup>At 109, H-J and 110 E-G.

<sup>179</sup>1998 (4) SA 169 (C).

<sup>180</sup>One of the cases referred to by the court was the case of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), on page 189 A-B per the same Foxcroft J, which also concerned a lesbian mother and a dispute about access. In that case it was held that the children's best interests would not be served by allowing

Foxcroft J underlined the importance of constitutional children's rights and the Convention on the Rights of the Child. He cited the latter and linked it to the constitutional provision in section 28(1)(b), which provides for the right of the child to parental care, or to alternative care when removed from the family environment. Foxcroft J further held that:

"The child's right were paramount and needed to be protected and situations might well arise where the best interest of the child required that action be taken for the benefit of the child which effectively cuts across the parent's rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents rights. The right which a child has to have access to its parents is complemented by the right of parents to have access to the child".<sup>181</sup>

The learned Justice reasoned that joint custody will be in the best interest of the children and consequently awarded a joint custody stating that:

"I cannot allow the plaintiff's anger against the defendant be visited upon his children. They broke no agreement and should not be deprived of real mothering".<sup>182</sup>

The case was further decided in the spirit of article 9 of the CRC, which states that children have a right to maintain contact with both of their parents on a regular basis where it is not contrary to their best interests. The Court here also described and emphasized the right to parent-child contact as an important right of the child and not just the parent. Even though article 9 is not cited directly in the decision, but the Court does appear to uphold the provision nonetheless.

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them to be exposed to the sexual relationship of their mother with another woman, and access was only granted under extremely strict conditions. J Heaton and DP Cronje (*Case Book on South African Family Law* [Durban: Butterworths, 1999], at 358–359) are amongst the many commentators who have expressed the view that were the order to be handed down today, it would probably be declared unconstitutional in the light of the inclusion in section 9 of the Constitution of a prohibition against discrimination on the grounds of sexual orientation. According to newspaper reports in late 2000, the order was revisited by a court, and altered. The restrictive conditions were removed, and custody of one of the children awarded the mother, the judge saying that the original order should never have been made in the first place.

<sup>181</sup> *V v V's case*, at 189 B, C and E.

<sup>182</sup> At 192 B.

In closing, it is right to state that most of the decisions are consistent with specific provisions as articulated in both the CRC and the ACRWC. Most importantly the best interests of the child became the guiding principle in which the decisions concerning the children were based.

#### 4.5 Summary

Since ratification of the treaties, the judicial developments have been tracked and different judgments on child's right cases have been analyzed. The impact that the - CRC and ACRWC have had upon the practice in the courts and legal systems particularly in South Africa have been evaluated. Arguably, the Convention has played a bigger part in South Africa's judicial practice than in any other country discussed. It has also been argued that the Nigerian and Ethiopian courts do not place sufficient emphasis on international law when they define the content of the rights found in their Constitutions and domestic legislation. Although the Nigeria's constitution enumerates development, survival, protection and participation rights, the courts have found such rights to be non-justiciable.

The Nigerian courts have been very slow and *stingy* (emphasis mine) in pronouncing judgments in favor of children based on international and regional treaties. Ethiopia is truly in compliance with the treaties as far as it concerns harmonization of the treaties through incorporating them into the domestic legal system. It was however noted that, absence of official translations of the conventions is observed to impede their implementation by the courts. Important cases in Ethiopia are compiled by the Federal Supreme Court and most of these compilations are in Amharic (the national working language) thus limiting the number of cases referred to from Ethiopia.

It was also indicated that the South African courts did not only recognize children's vulnerability, but were courageous to assess the - government's, parents and legal guardians actions - through a child rights perspectives and applied international law to protect them from the vulnerabilities. Active consideration of the general principles of the CRC and the ACRWC were considered in every decision which has a direct or indirect effect on children.

The plethora of cases and decisions to fulfill rights for children and the courage, brilliance and practicality of most judges from South Africa has made the South African situation unparalleled in international constitutional child's law jurisprudence.

It can be concluded that amongst the three countries only South Africa has taken great strides to develop her case law sufficiently to promote, protect and fulfill rights for children, calling for emulation by other focus countries.

## CHAPTER FIVE

### General conclusions and recommendations

#### 5.1 General conclusions

The general conclusions and recommendations are presented in this chapter. This thesis in summary, set out to investigate the continuous and pervasive violation of rights of children in specific African countries - South Africa, Ethiopia and Nigeria. This is notwithstanding the international and regional instruments and treaties ratified by these countries. The constitutional and legislative reforms and the extent to which the rights of children are enforced within each country's legal systems were analyzed. Specific roles and actions taken by established monitoring bodies have been examined to indicate their effectiveness and ineffectiveness in ensuring realization of rights for children. The regional/international dimensions of responses to violations of rights of children in spite of protective constitutional provisions have been highlighted. Roles of governments and the judiciary were examined in the context of realization of rights for children amidst the different judicial, political and socio-cultural settings of each country.

The second chapter provides the historical development of international and regional instruments promoting the rights of children.<sup>1</sup> A comprehensive review of the evolving legislative provisions in the Conventions and treaties stipulating children's rights have been discussed. A brief overview of the most important legal instruments in the international, regional and national framework on the development and promotion of children's rights was discussed in the same chapter two. Particular emphasis was placed on the CRC which provides a comprehensive set of standards against which ratifying states may measure the extent to which they fulfill the rights of children.<sup>2</sup> Specific contents of the CRC and other child related international and regional instruments, including their areas of differences, linkages and convergence were examined.<sup>3</sup> The different definitions of children's rights, views and opinions of international non - governmental organizations, including that of protagonists and opponents of children's rights

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<sup>1</sup>Chapter 2, section 2.2.

<sup>2</sup>Chapter 2, section 2.3.

<sup>3</sup>Chapter 2, sections 2.4 and 2.5.

were examined. A consideration of the different views was made to highlight how their respective contributions has limited or promoted realization of rights for children.<sup>4</sup> Considerable efforts by the governments to put in place legislative, institutional and administrative measures, for the implementation of the ratified Conventions have been shown. The extent to which the countries have translated into reality, the standards set by the international and regional treaties at the national or domestic level was scrutinized.<sup>5</sup>

In chapter three, substantive issues relating to children's survival and development rights were analysed. The extent of selected country's violations of these baskets of rights is *juxtaposed* against information reported in each Country's Periodic Reports. The roles of international, regional and national monitoring bodies are examined within this context. Specific roles of the United Nations Committee on the Rights of the Child at the international level and that of the Expert Committee of the African Union Charter on the Rights and Welfare of the Child are examined at the regional level. At the national level, role of National Human Right Commissions and their added value to the work of both Committees in fulfilling their mandates of promoting and protecting the rights of children are considered.

In measuring the extent of realization of survival and development rights for children, evidence - based data was presented with reference to available information, national surveys and Country Periodic Reports. Country reports are to be submitted to treaty monitoring bodies established by the international community. The realization of survival rights for children in the three countries largely remains difficult, with children dying mostly from vaccine preventable diseases. Across the focus countries, where children's rights have been held in such high esteem, given the legislative and institutional frameworks, the statistics suggests a significant regression in combating avoidable child deaths. The information reported on the situation of children is to highlight, emphasize, stress and draw attention to massive deprivation and violation of rights for children. It is to underscore government's failure to provide comprehensive Country Periodic Reports on measures taken to implement the ratified instruments and non-fulfillment of their international obligations. Most of the information from surveys and other reports indicating massive deprivation of rights for children were not mentioned in the Country Periodic Reports, where sometimes glossy and rosy pictures of the implementation measures and situation of

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<sup>4</sup>Chapter 2, section 2.6.

<sup>5</sup>Chapter 2, section 2.7.

children are mixed with some realities. Flamboyant and huge resources – colossal budgetary allocations – were alleged to have been invested by governments especially on child developmental issues. In spite of the supposedly huge budgetary allocations being invested, each country report displayed a generally depressing record. Apathetic stance of the three African countries in relation to enforcing domestic legislation and giving effect to international human rights instruments and treaties was reported within the context of their attitudes to submissions of country reports and implementing recommendations of monitoring bodies. The country reports do not articulate sufficiently, evidence - based data and information on the reality of the situation of children. This is in spite of the international, regional and national monitoring bodies supposedly established to monitor, enforce and ensure the proper implementation of prescribed children's rights.

To this extent, specific roles of the UNCRC at the international level<sup>6</sup> were spelt out, while that of the African Committee of Experts was examined at the regional level.<sup>7</sup> At the national level, role of National Human Right Commissions and their inability to add tangible value to the work of both committees in fulfilling their mandates of promoting and protecting the rights of children was considered.<sup>8</sup> High level ineffectiveness of the UNCRC was demonstrated by its inability to propose prescriptive actions, proffer concrete solutions and deal with challenges that have emerged from the lateness or delays in submission reports. The ineffectiveness instituted at the international scene by the UNCRC is also replicated at the regional sphere. The African Committee has suffered from persistent financial difficulties and has consistently remained ineffective to perform its mandate and to monitor or impact rights violation for the African child.

An insufficient or inadequate human and financial resource was shown as the common and cross cutting challenge limiting the effectiveness of Human Right Commissions in each focus country. With gross violation of children's rights reported in chapter three, the ineffectiveness, inactions, ineptitude and incompetence of the monitoring bodies to prevent such violations were highlighted. With failure of the monitoring bodies and perpetration of violations of children's rights, chapter four therefore investigated the judicial developments and some emerging

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<sup>6</sup>Chapter 3, section 3.4.

<sup>7</sup>Chapter 3, section 3.6.

<sup>8</sup>Chapter 3, section 3.7.

judgments that have advanced or limited the realization of rights for children in the specific country context.

In chapter four, commencing with Ethiopia and Nigeria, the thesis explored how the courts and jurisdictions - including judicial officers - have applied international and regional instruments in their actions and decisions to promote or advance children's rights.<sup>9</sup> The application of ratified international and regional treaties in the context of customary law and common law was shown as an emerging jurisprudence from the African courts to promote the rights of children.<sup>10</sup> It was argued that the Nigerian and Ethiopian courts does not place sufficient emphasis on international law when they define the content of the rights stipulated in their Constitutions and domestic legislation. The chapter considers three different components in Ethiopia's judicial systems, noting the failure of her courts and judicial officers to apply protective provisions of the international treaties ratified and contextualized into her domestic Laws. Similarly, few but important court's proceedings have been evaluated to track development of justiciability of human rights, entrenched in the Nigerian Constitution and domestic legislation as it affects children's rights. The Nigerian courts have been shown to be very slow and 'stingy' in pronouncing judgments in favor of children based on international and regional Conventions.

It was argued that the Convention has played a greater part in South Africa's judicial practice and legal systems in comparison with any other country discussed.<sup>11</sup> South Africa's judicial systems and developments was extensively explored, to indicate how the country has put in place, the best and most advanced judicial systems to advance realization of rights for her children. It was concluded that amongst the three countries, only South Africa has developed her case law sufficiently to promote, protect and fulfill rights for children, calling for emulation by other focus countries.

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<sup>9</sup>Chaper 4, Sections 4.2.

<sup>10</sup>Chaper 4, Section 4.3

<sup>11</sup>Chaper 4, Section 4.4.

## 5.2 Recommendations

### 5.2.1 Challenge discrimination

Analysis of the nature of discrimination and how it impacts on children's lives were discussed in all the chapters of the thesis.<sup>12</sup> The country reports<sup>13</sup> submitted to the UNCRC by all the three countries outlined the legal and constitutional context under the "Principle of non-discrimination". All the three governments were blatant in reporting the pervasive discrimination against their children. There remained both in law and in practice, pervasive discrimination against South African children, especially the girl-child.<sup>14</sup> In Nigeria, children with disability experience continuous discrimination limiting their participation on issues that concerns them, while in Ethiopia, stigmatization and discrimination inflicts a heavy psychological blow on People Living with AIDS or AIDS orphans.<sup>15</sup> Monitoring bodies could not persuade countries to fulfill their international obligation to enforce the principle of non-discrimination. Relevant provisions of both the Constitutions and domestic legislation that are in compliance with non-discrimination provisions are either non justiciable,<sup>16</sup> or rendered inapplicable by the courts. Ethiopia's legal systems are reported to be the least evolved or developed in promoting, protecting or fulfilling the rights of children including non-discrimination rights. The Nigerian courts have been very slow and 'stingy' in pronouncing judgments in favor of children based on international and regional Conventions.<sup>17</sup> Amongst the three countries only South Africa has developed her case law sufficiently to promote, protect and fulfill rights for children, calling for emulation by other focus countries.<sup>18</sup>

With this level of insensitivity from the judiciary and governments, coupled with manifest ineffectiveness of international institutions (to promote and fulfill non-discrimination rights of children) all the relevant actors must be called upon to accept a collective responsibility to

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<sup>12</sup>Considered and discussed in Chapter 1, Section 1.4; Chapter 2, Section 2.2, 2.4, 2.5; Chapter 3, Section 3.4; and Chapter 4, Section 4.3.

<sup>13</sup>Chapter 3, Section 3.4

<sup>14</sup>South African report, para 95, page 25.

<sup>15</sup>Ethiopian report, para 71 pg 19; and Nigerian report, para 3.1.2, page 35.

<sup>16</sup>Chapter 4, Sections 4.2 and 4.3.

<sup>17</sup>Chapter 4, Section 4.5.

<sup>18</sup>*Ibid.* South Africa might have scored a good point on this, but other instances of gross discrimination and abuse of her children are shown in the Country Report referred to in Chapter 3, Section 3.3 and 3.4

enforce non-discrimination provisions of international and regional instruments. All state parties should be challenged to promote positive actions and ensure that all children are afforded equal rights and equal opportunities in life.

Governments must ensure that their own actions do not discriminate against any child and that active measures are taken to prevent discrimination by the entire civil society - parents, guardians, child care givers and educational instructors. Such active measures should include governments monitoring programmes to identify discrimination, scrutinize all policies, programmes, services and plans to ensure that these do not directly or indirectly discriminate against any group of children. Since the commitments to equal rights for all children will often necessitate additional resources, governments are therefore enjoined to scrutinize budgets to ensure that they are devoting the maximum possible resources to protecting the equal rights of all children.

Emerging judgments and favorable precedents that have advanced the realization of rights for children including non-discrimination rights and that has promoted gender equality and freedom for the African woman and girl child must be widely publicized to create a social change within the committee of African nations.

### *5.2.2 End violence against children*

The thesis in strong terms has made several references to the extent of violence experienced by children globally<sup>19</sup> and specifically in the focus countries. Violent acts against children in Ethiopia comes in all shapes and forms, including rape, beatings, bullying, sexual harassment, verbal abuse, abduction, early marriage, female genital mutilation, committing children to abusive and exploitative labor, trafficking, and the use of children as weapons and targets of war. The Nigerian situation indicated existence of violence against children in the sense that the nature of family-related violence and the economic dependency of the victims on the perpetrators (usually parents, guardians, other adult relatives, or employers) discourage victims from complaining or taking up legal action and there is the existence of different types of

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<sup>19</sup>Chapter 3, Section 3.4.

violence in Nigerian schools.<sup>20</sup> Children in South Africa are regularly subjected to corporal punishment, including spanking and slaps, and extending to hidings, whippings and beatings with hands, fists, belts, sticks, hosepipes and even electrical wires.<sup>21</sup>

With these gruesome treatments against children, efforts to prevent and respond to violence against children must be multi-faceted and adjusted according to the form of violence, its setting and the perpetrators. Governments of selected countries must develop a multi-faceted and systematic framework to respond to violence against children, which is integrated into national planning process. A national strategy, policy or plan of action on violence against children with realistic and time-bound targets, coordinated by an agency with the capacity to involve multiple sectors in a broad based implementation strategy should be formulated.

All forms of violence against children in all settings, including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation, sexual violence, torture and other cruel, inhuman or degrading punishment and treatment, already profusely referred to in this thesis must be prohibited. Violence against children must be prevented by governments addressing its underlying causes and adequate resources must *once again (emphasis mine)* be allocated to address risk factors and prevent violence before it occurs. Attention should be focused on economic and social policies that address poverty, gender based violence, inequality, income gaps, unemployment, urban overcrowding and other factors which undermine society.

Governments and civil society should strive to transform attitudes that condone or normalize violence against children, including stereotypical gender roles and discrimination. Public information campaigns should be used to sensitize the public about the harmful effects that violence has on children. The media should be encouraged to promote non-violent values and implement guidelines to ensure full respect for the rights of the child in all media coverage. Capacity of all who work with and for children to contribute to eliminate all violence must be developed. Accessibility, child sensitive, universal health and social services, including pre-hospital and emergency care and legal assistance must be provided for children who have suffered any form of violence.

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<sup>20</sup>Chapter 3, Section 3.3

<sup>21</sup>*Ibid.*

Health, criminal justice and social service systems should be designed to meet the special needs of children. Governments of focus countries should improve data collection and information systems in order to identify vulnerable sub-groups, inform policy and programming at all levels and track progress toward the goal of preventing violence against children. Safe, well-publicized, confidential and accessible mechanisms for children, their representatives and others to report violence against children should be established. All children, including those in care and justice institutions, should be aware of the existence of mechanisms of complaint.

Governments should build community confidence in the justice system, by bringing all perpetrators of violence against children to justice and to ensure that they are held accountable through appropriate criminal, civil, administrative and professional proceedings and sanctions. Persons convicted of violent offences and sexual abuse of children should be prevented from working with children. Governments should actively engage with children and respect their views in all aspects of prevention, response and monitoring of violence against them.

### *5.2.3 Listen to children*

The CRC enshrines participation as a fundamental right to all children and youths.<sup>22</sup> Children therein are affirmed as fully fledged persons, who have the right to express their views in all matters affecting them. It requires that those views be heard and given due weight in accordance with the child's age and maturity.

The thesis brought out as a flaw the ineffectiveness of the NHRIs due to the fact that children and young people - that should be protected from harm and violation through the machinery of the NHRIs - has no voice and cannot complain against the government directly to the expert committee about violations of their rights. It was shown that children continue to suffer widespread and often severe breaches of this basic right to freedom of expression.<sup>23</sup>

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<sup>22</sup>Article 13 (1) of the CRC: 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. Child's participation rights include rights to freedom of expression, to freedom of thought, conscience and religion, to free association and peaceful assembly, to privacy and access.

<sup>23</sup>Chapter 3, Section 3.7.

Redress to these flaws must be provided and the voicelessness and helplessness of children in speaking about violations of their rights must be stopped. There is a need to create independent national monitoring bodies (with a broad mandate to listen and respond to children) consisting of government and non-government representatives, such as Children's Commissions, Children's Ombudspersons or independent Human Rights Commissions.

It is obvious that the current NHRIs by their set up have no form of independence in the least, but are seriously dependent on their governments for sustenance. The NHRIs has failed woefully to ensure realization of participation rights of children or provided the fora for them to speak out and to reduce vulnerabilities, hardships and violations they are subjected to. The failure of NHRIs to fulfill this mandate, fulfill rights for children or to act independently of the government is brought out most specifically in the Concluding observations of each focus country.<sup>24</sup>

Political will of government must be secured and resources must be made available for efficient operation of Human Rights Commissions. They must be capacitated to receive, monitor and investigate complaints from or on behalf of children. Child help lines and clear child-friendly procedures must be in place to monitor, register and address complaints from children regarding violations of their rights.

The suffering of children who experience discrimination, abuse, bullying, humiliation, social isolation and neglect is too often unheard. The silence also contributes to the persistence of discrimination against them as it was discussed earlier. It is only through listening directly to children that adults can work effectively to tackle the roots or the impact of violations of their rights. All professionals working with children need consistent training and building their capacity to begin to listen to children.

Finally, the media has an informative and educational role to play towards the public. Media should bear the task of scrutinizing government measures and giving systematic coverage to the status of children and the fulfillment of their participatory rights. There media must respect

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<sup>24</sup>Chapter 3, Section 3.7.

the rights to freedom of expression and consistently support children to express their views on issues concerning them freely and through the electronic and print media.

#### 5.2.4 *Invest in children*

Ngokwey<sup>25</sup> argues in the general context of Africa that, while ‘some progress’ has been made in addressing problems affecting children, there is ‘stagnation’ or in some cases, ‘a reversal in trends’ in the realization of the rights of children to life, survival, and development. This is characterized by “the litany of shameful indicators [including] very high and/or worsening child mortality rates, worsening nutritional status of children, lagging net primary school enrolments, declining primary school completion rates, high HIV prevalence rates, *low public spending in education and health*,(emphasis mine) increasing numbers of working children and children affected by conflicts.<sup>26</sup> With this plethora of problems, it may be inferred that *poverty alone* (emphasis mine) accounts for many of the problems faced by children in Africa.<sup>27</sup> But when the budgetary allocations in the focus Country periodic reports sent to the UNCRC are scrutinized, the governments are shown to have spent huge and flamboyant resources for child rights issues without corresponding effect on the lives of their children.

The Nigerian report indicated a total sum of *N15.58 billion* was committed by the Federal Government to the UBE programme through the National and State Offices’ between 2004 and 2007. Ethiopian report showed that ‘the total budget for the education sector increased *from Birr 1.12 billion in 1990 E.C (1997/98) to Birr 2.17 billion in 1993 E.C (2000/01)*. In a similar way the share of the health-care services rose from *Birr 390 million to well over half a billion* in the same period. The South African report also showed that, ‘about 37 per cent (some *R325.1 million*) of the welfare services component of the budget was spent on child and family services’.<sup>28</sup> Unfortunately, the monitoring bodies that should ensure that the huge investments allegedly expended on children were actually spent, had no mechanisms to verify the authenticity of these allocations or whether these huge sums were actually expended. .

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<sup>25</sup>Ndolamb Ngokwey, ‘Children’s Rights in the Central Africa Sub-Region: Poverty, Conflicts and HIV/AIDS as Context’ (2004) Volume 12, *The International Journal of Children’s Rights*, 183–216.

<sup>26</sup>*Ibid* at page 211.

<sup>27</sup>Rwezaura B, ‘Competing ‘Images’ of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa’ (1998) Volume 12, *International Journal of Law, Policy and the Family*, 253 at 268.

<sup>28</sup>Chapter 3, Section 3.5.

With this situational report, a more practical approach therefore must be employed by the monitoring bodies, to ensure governments *truly*, (emphasis mine) actively, tangibly, realistically and palpably invest in the lives of children. It is hereby recommended that the UNCRC and African Committee of Experts has a more result oriented and pragmatic mechanism for confirming veracity of budgetary allocations besides the country reports. During the UN General Assembly meetings, commitment of countries to leverage sufficient resources and address the problems of children in Africa *must* be provoked through naming and shaming countries who has failed to invest truly and considerably in their children.

The realization of children's rights as a whole requires government at all levels to leverage sufficient resources and make substantial financial investments into general and basic services - health care, nutrition, free and compulsory basic education and other 'child-developmental' needs.

**Title of thesis:**

**THE ROLE OF INTERNATIONAL, REGIONAL AND DOMESTIC STANDARDS IN  
MONITORING CHILDREN'S RIGHTS**

**Key terms:**

Children's rights; Violation of children's rights; International treaties; Regional and National standards on child's rights; Monitoring bodies; Convention on the Rights of the Child; UN Committee of experts; Country periodic reports; Child's Law jurisprudence; Judicial developments.

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