

# "KENYA'S IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A CRITICAL ANALYSIS"

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# DECLARATION

I hereby affirm that this dissertation is my own original work, and it has not been presented in any University for an award of a degree.

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## DEDICATION

To my family, Dad Philip, Mum Joyce and my Brothers David and Dominic. and  
to all the Children of Kenya.

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"The Rights of Children that are assured by a society indicate the progress that society has made towards becoming civilized".

(Stuart N Hart, 1991 p.53)

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## ACRONYMS

AIDS	Acquired Immune Deficiency Syndrome
ANPPCAN	African Network for the Prevention of Children Against Abuse
BSS	Basic Social Services
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEDC	Children in Especially Difficult Circumstances
CNSP	Children in Need of Special Protection
CRC	Convention on the Rights of the Child
ESAF	Enhanced Structural Adjustment Facilities
FGM	Female Genital Mutilation
GDP	Gross Domestic Product
GOK	Government of Kenya
HIV	Human Immune Virus
ILO	International Labor Organization
IMF	International Monetary Fund
KAARC	Kenya Alliance for the Advancement of Children Rights
KDHS	Kenya Demographic and Health Survey
MOH	Ministry of Health
NGOs	Non-Governmental Organization
NPAC	National Plan of Action for Children
SAPs	Structural Adjustment Programs
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
WHO	World Health Organization
WMS	Welfare Monitoring Survey

## **ABSTRACT**

The International Law on the Rights of the Child is a fairly recent development in the field of international human rights law. This development signifies that the child is today regarded as a bearer of rights and is no longer to be viewed as an object of sympathy and charity. The United Nations Convention on the Rights of the Child (CRC) is an international instrument which protects the rights of the child. However this instrument is of little use if states do not implement it. The CRC becomes meaningful in the protection of children's rights only when it is implemented.

Kenya in its vision to protect and ensure the survival and development of its young citizens ratified the CRC in 1990. Despite having shown a lot of enthusiasm during the ratification, almost a decade after, the Convention has not yet been fully implemented. This study therefore seeks to find out the impediments making the implementation of the CRC difficult.

In its investigations, the study found out the state of implementation of the CRC is wanting. For one, child law in Kenya is scattered in various statutes. Secondly the legal and policy frameworks do not reflect the CRC. The study found out that the slow implementation of the CRC is due to a combination of factors from the present constitution, gaps in legal and policy frameworks, corruption poverty and socio-cultural.

# CHAPTER ONE

## INTRODUCTION

### 1.0 Background of the Study

The notion that a human being has rights by virtue of being human took centuries to be universally accepted and to be made part of international law. The codification of human rights was made first at the national level, and later made part of international law. *The United States Declaration of Independence* and the *French Declaration of the Rights of Man and Citizens* were the first manifestations of this codification at the national level. At the international level, the *Geneva Declaration of 1864 on the Amelioration of the condition of the Wounded in Armies in the Field* was succeeded by the *United Nations Universal Declaration of Human Rights*, its *Optional Protocol of 1948* and the *International Covenant of Economic, Social and Cultural Rights (1966)* and the *International Covenant on Civil and Political Rights (1966)*.

Broadly speaking, the human rights regime has developed in three stages: first generation, second generation and third generation human rights. The first generation human rights consist of civil and political rights as espoused in the western political philosophy notion of liberal individualism. The first generation of

human rights holds that "the human person by virtue of his/her membership in the human race is supposedly endowed with, and entitled to certain natural and inalienable human rights such as life, liberty and property".<sup>1</sup> The first generation of human rights centered on the individual rights of a person. Thus, the child's rights to a name and nationality, freedom of expression, religion and assembly, protection from torture and respect for child's privacy all fall under first generation human rights.

Second generation human rights have to do with economic, social and cultural rights, and emerged in the nineteenth century. The second generation rights are collective rights, that is, the rights of human beings in their various group and social roles. The Convention on the Rights of the Child (CRC) thus presents the rights of children as vulnerable members of the human race. The second generation rights are positive rights, in the sense that their achievement or realization has to be demanded of the state. With regard to children's rights, the state has the obligation to put in place the necessary framework to assure the rights of the child.

Second generation rights are social rights to basic needs rights to food, shelter, education, clothing and health. The CRC makes provisions for the basic needs of children. It lays down the child's right to education, health, family, protection and to food, which cater for the basic needs of the child. The second generation rights are also rights to social equality, which calls for equitable participation.

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<sup>1</sup> Falk R.A et al (1991). *The UN and a Just World Order*. (Boulder, Co.: Westview Press) p.358.

Children have a right to participate in decision making and to have their views given due weight in all matters concerning them. The CRC also sees both the boy and girl child as equals who should both enjoy equal rights.

The third generation human rights consisting of solidarity rights came into being in the 1970s. The third generation rights -also known as "brotherhood rights" - include the rights to peace, development, a healthy and ecologically balanced environment, and the right to share the common heritage of mankind. *The African Charter on Human and People's Rights* (The OAU Human Rights Charter) is the first of the third generation of solidarity rights, at least in treaty form. The OAU Charter was adopted in 1981 and came into force in 1986. It contains a wide range of rights: the traditional civil and political rights, economic, social and cultural rights and various other peoples' group rights. The Charter makes specific mention of the right to self-determination, development and a generally satisfactory environment.

The third generation rights form an important framework for discussing children's rights. The third generation rights are significant in discussing the rights of the child since they embrace the broad aims of the CRC, namely, to protect and ensure the child's survival, provide developmental avenues and encourage the participation of the child. The CRC is out to ensure the protection, survival, development and participation of the child. The CRC ensures that the child is protected from all forms of abuse and neglect. It also guarantees the survival of

the child through the provision of health, nutrition, and education. Children's right to development are provided for in the provision of education while their participation is guaranteed through their right to have their views listened to, and taken into account.

Modern human rights law emerged at the end of World War Two. This was in response to the atrocities and massive violations of basic human rights witnessed during the war. The charter of the United Nations was drafted in 1945, and states laid the conceptual and legal foundations for the future development of international measures to protect human rights. Articles 55 and 56 of the UN Charter pledge member states and the United Nations itself to promote the universal respect for, and observance of, human rights and fundamental freedoms. This internationalization of human rights led to a growth of human rights treaties, the most significant of which are: *The International Covenant on Civil and Political Rights*, *The International Covenant on Economic, Social and Cultural Rights* and *The International Covenant on the Elimination of all Forms of Racial Discrimination*.

The internationalization of human rights did not however guarantee the protection of all groups. A need arose to give specific protection and recognition to certain groups. *The Covenant on the Elimination of all Forms of Discrimination Against Women* (CEDAW 1979) provides a Bill of rights for women. *The United Nations Convention on the Rights of the Child* (CRC 1989), enumerates the rights owed

to the child. In a regional context the *African Charter on the Rights and Welfare of the Child* (1989), addresses specifically the condition of children in Africa and seeks to make the CRC culturally specific to the African situation.

The CEDAW and CRC puts women and children within the domain of fundamental human rights. Fundamental human rights are the civil and political rights human beings are entitled to by virtue of their membership of the human race. These rights are natural and inalienable. Fundamental rights are "inviolable and may not be derogated from persons by States in times of war or national emergency. These include freedom from torture, freedom from slavery and from *ex facto* laws".<sup>2</sup>

Both the CEDAW and the CRC acknowledge that, while the general human rights treaties apply to both women and children, their situation and status entitles them to specific protections. This is especially important for women and children in Africa, where culture and tradition hamper their ability to enjoy fundamental human rights. Women and children rights therefore need to be safeguarded to ensure cohesion from the family level through the national to the international level.<sup>3</sup>

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<sup>2</sup> Van Bueren G. (1998). *The International law on the Rights of the Child*, (Martinus Nijhoff Publishers, The Hague) p.4.

<sup>3</sup> Mwangi and Karuru (1998), *Women's Land and Property Rights in Conflict Situations*, Nairobi. CCR-WLEA. Publishers p.2-3.

The *Convention on the Rights of the Child* (1989) establishes the internationally recognized rights of the child as a human being. The Convention presents the human rights of a special category of the human race. The children of the world are innocent, vulnerable, dependent, and have special needs. The CRC thus specifies the rights of the child as a special person.

As is the case with any other international treaties, the state is obliged to observe and implement the provision of the CRC. Different states have different ways of bringing international treaties into force within their jurisdiction. There are those who follow the transformation approach as the basis for enacting appropriate legislative rules. Others use the incorporation approach, in which case, once the treaty has been ratified, it becomes part of the national law.<sup>4</sup> Kenya follows the transformation approach where parliament has to pass an enabling Act to enable the treaty to be enforced municipally.

The state therefore plays a very pivotal role in the implementation process of the CRC. This does not mean that private bodies and individuals have no role to play in the implementation process: rather that the State is the most important organ in the implementation process. In Part I of the CRC, the state is charged with the responsibility of articulating the specific rights of the child; and in Part II, with the task of establishing a system of accountability and monitoring the implementation.

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<sup>4</sup> Shaw M (1997), *International Law*, 4<sup>th</sup> ed., (U.K Cambridge University Press) UK p.100-101.



## 1.1 The Problem

Kenya was among the first States to ratify the *United Nations Convention on the Rights of the Child*. Indeed Kenya was the 20<sup>th</sup> ratifying State, thus bringing the Convention into force. However despite having shown a lot of early enthusiasm in signing and ratifying the Convention, Kenya is yet to put in place structures to make the Convention directly applicable in Kenya.

According to Kabeberi, the law concerning the child is wanting. This is because, the Child law in Kenya is fragmented and scattered and is contained in diverse Acts whose concern with children is often tangential.<sup>5</sup> This scattered nature of the statutes fails to reflect the current thinking and spirit embodied in the CRC. Kibwana notes Kenya's inconsistency when he adds that "the multiple pieces of legislation in which it is articulated (child law) do not sharply focus on children's rights, especially on the same lines as the emerging international law on the child".<sup>6</sup> From the two scholars it emerges that Kenya's failure to harmonize and review child law impacts negatively on its implementation efforts.

Kenya in ratifying the Convention committed itself to safeguard the rights of all the children under its jurisdiction. Almost 10 years down the line, the rights of the Kenyan child are still grossly wanting. The government has made some minimal efforts, to review the laws relating to the child. In 1991 for example, the

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<sup>5</sup> Kabeberi J. W (1989), 'Child Law in Kenya an analysis', *University of Nairobi Law Journal*, Nairobi, p.21.

<sup>6</sup> Kibwana K. (1996) 'Family Rights in Kenya' in Palriwala and Risseuw eds, *Shifting Circles of Support: Contextualising Gender and Kinship in South Asia and Sub-Saharan Africa*, (New York: Sage Publications) p.263.

government set up a task force to review children law and this led to drafting of a children's Bill. The Constitution, which does not address the child, is yet to be reviewed and the Children's Bill is still in limbo. With this State of affairs, the successful implementation of the CRC becomes grossly undermined if not jeopardized all together. This study therefore seeks to find out the impediments, making the implementation of the CRC difficult.

## **1.2 Objectives**

The main objective of this study is to examine the state of Kenya's implementation of the Convention on the Rights of the Child. More specifically, the study examines:

- i. Kenya's achievements in the implementation of the CRC
- ii. The factors that have impeded the Kenyan Government from fully implementing the Convention.

## **1.3 Justification**

Kenya provides a good illustration and a test case of states and especially African States who shy away from the language of human rights. Most African states shy away from this language of human rights because the language connotes a duty, which they (States) feel they are compelled to observe. This attitude towards human rights and especially the protection of specific groups like women and children can be held accountable for the slow implementation of

treaties that guarantee their rights. It is against this background that this study is justified on both academic and policy grounds.

### **1.3.1 Academic Justification**

The study hopes to contribute through research to the emerging field on the international law on the rights of the child.

### **1.3.2 Policy Justification**

The study aims to highlight the current policies and machinery which the Government is following in implementing the Convention. It will also propose policy alternatives for the effective implementation of the C.R.C in line with the realities of international cooperation into the twenty first century and beyond.

## **1.4 Hypotheses**

- 1 A strong policy and legal framework will guarantee the full implementation of the Convention on the Rights of the Child.
- 2 The socio-cultural and economic aspects of a society will impact on the implementation of the Convention on the Rights of the child.

## **1.5 Literature Review**

### **International law and human rights.**

The development of international law in the 20<sup>th</sup> Century is one of the outstanding achievements of the United Nations. International law seeks to regulate the behavior of states as they interact with each other. International law also

governs the conduct of non-state actors like individuals, and private bodies in the international environment.

The meaning of 'rights' is controversial and is a subject of intense jurisprudential debate. Some 'rights', for example, are intended to be immediately enforceable binding commitments; others merely as specifying a possible future pattern of behavior.<sup>7</sup> There are several theories which try to explain the concept of human rights.<sup>8</sup> These theories emphasize the complexity of the concept of human rights in the context of general legal and political processes.

There are three major approaches to human rights in international law, the Western view, the former Soviet view and Third World view. The Western view tends to emphasize the basic civil and political rights of individuals. These include the freedoms of expression, assembly and religion and political participation. Thus, the individual is the center of human rights in the Western approach.

The Former Soviet approach puts emphasis on state regulated rights. The Soviet approach sees States as the source of human rights. In the Soviet approach, emphasis is not on the individual as is the case of the Western

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<sup>7</sup> Compare, for example, article 2 of the International Covenant on Civil and Political Rights (1966) with article 2 of the International Covenant on Economic Social and Cultural Rights (1966).

<sup>8</sup> For a detailed discussion see Shaw M. N (1997), *International law 4<sup>th</sup> ed.* Cambridge University Press, p.197-198.

approach but on the State as the centre of rights. The Soviet approach therefore tends to put more stress on the economic and social rights.

The Third World approach combines both the Western and Soviet views. Concern is with the equality and sovereignty of states, together with a recognition of the importance of social and economic rights.

The body of international law on the protection of human rights contains a wide range of international and regional instruments. Certain rights in these instruments have entered into the category of customary international law. These rights include the prohibition of torture, genocide, slavery, and the principle of non-discrimination.

### **1.6 The Relationship Between Municipal Law and International Law**

Municipal law governs the domestic aspect of government and deals with issues between individuals and the administrative apparatus. International law on the other hand focuses primarily upon the relations between states. States are however not the only subjects of international law, but are the primary actors in the international system. The individual is also a subject of international law. The branches of international law that touch directly on the individual are international human rights law, and international humanitarian law, which is concerned with the conduct of armed conflicts. The child as an individual is therefore a subject of international law. The development of international

instruments protecting the rights of the child has made the child acquire the status of a subject. International law has thus come to recognize the child as a direct subject of human rights.

The relationship between municipal and international law can be analyzed through three approaches. The first approach known as dualism argues that, the rules of the system of international law and municipal law exist separately and cannot claim to have an effect on, or overrule the other. This argument is based on the notion that inter-state relations are different as are their legal structures.<sup>9</sup> It maintains that where municipal law allows the exercise of international law, the state is merely exercising its supreme authority and that international law does not necessarily influence the nature or manner of domestic jurisdiction.

The second approach, monism, views international law and municipal law as one and opposes the strict division of the dualist view. The monists advocate for the supremacy of international law. The monist approach can be further divided into two. The first approach advocated by Lauterpacht sees the basic function of all law as a concern with the well being of individuals, and advocates the supremacy of international law as the best method available for attaining this.<sup>10</sup> This approach is founded upon the respect of human rights. The other approach by Kelsen, regards international law as constituting an order, which lays down patterns of behavior to be followed, coupled with provisions for sanctions for

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<sup>9</sup> Shaw M. N (1997), *International Law*, 4<sup>th</sup> ed, U.K. Cambridge University Press, p.100

<sup>10</sup> Lauterpacht H. (1950). *International Law and Human Rights*. London. p.

illegal acts of omission or commission. This approach argues that since this definition of law applies to both the internal and international spheres, and because states owe their legal relationship to one another to the rules of international law, then international law is superior to municipal law.<sup>11</sup>

The third approach is a modification of the dualist approach. This approach denies that any common field of operation exists as between international law and municipal law. There is no question of one being supreme over the other. What happens is that if a state does not act in accordance to international law, its domestic position is unaffected, but the state as it operates internationally has broken a rule of international law and the remedy lies in only the international sphere.<sup>12</sup>

#### 1.6.1 The Role of Municipal Law in International Law

The general rule with regards to municipal law in international law is that a state cannot plead municipal law to justify a breach of an international obligation. Article 27 of *Vienna Convention on the Law of Treaties* (1969), asserts that in so far as treaties are concerned, a state party may not invoke provisions of municipal law as a justification for its failure to carry out an international obligation. The fact that international law has been given a status superior to that of municipal law does not however mean that the provisions of the municipal law are either irrelevant or unnecessary, since internal rules are vital for the workings

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<sup>11</sup> Kelsen (H). (1966). *Principles of International Law*, 2<sup>nd</sup> ed p.290-4.

<sup>12</sup> Shaw M. N. (1997). *International Law*, 4<sup>th</sup> ed, U.K. Cambridge University Press, p.100

of the international legal system. Municipal law can in fact be used as an evidence or an indication of compliance or non-compliance with international obligations. This is emphasized by the judgment of the Permanent Court of International Justice in the *Certain German Interests In Polish Upper Silesia Case*<sup>13</sup>

### 1.6.2 The Role of International Law in Municipal Courts

There are two approaches which states use to bring into force international law in their domestic sphere. The first is the transformation approach whereby a state makes use of the appropriate constitutional machinery such as an Act of Parliament to translate international law into municipal law. Kenya is an example of a state that follows this practice. The second approach is incorporation whereby an international law is considered a part of municipal law as such, and international law therefore automatically becomes part of domestic law without necessarily instituting changes in domestic law.

#### Customary International law

Customary international law is an example of an international law that is directly applicable to internal or domestic laws. Customary international law is part and parcel of municipal laws and do not need to be transformed. The incorporation doctrine has been accepted as an ideal in the application of customary

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<sup>13</sup> For discussion of the 'Certain German Interests in Polish upper Silesia Case' see Harris D. J. (1973) *case and materials on International Law*, Sweet and Maxwell. London p.397.



international law in municipal courts. This is best illustrated in the *Paquete Habana Case*.<sup>14</sup>

## Treaties

Treaties, unlike customary international law, are binding only upon the signatories. Customary international law on the other hand is binding to all states irrespective of whether states are parties or not to international instruments of customary law. Treaties require the legislation of the Executive in order to make them directly applicable to the domestic jurisdiction. This makes the incorporation approach to treaties unsuitable. By Executive is the one derogated with powers to enter into treaties and to conclude them. Treaty law thus requires the use of the transformation approach in order to make it applicable in the internal jurisdiction.

### 1.7 The International Law on the Rights of the Child

The international law on the rights of the child is fairly recent. Bueren (1998) notes that international law on the rights of the child is concerned with two branches of public international law: international human right law,<sup>15</sup> and international humanitarian law which is concerned with the conduct of armed conflicts.

<sup>14</sup> For a discussion of the 'Paquete Habana Case' see Harris D. J. (1973), *Cases and Materials on International Law*, London. Sweet and Maxwell p.82.

<sup>15</sup> Van Bueren G. (1998), *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, The Hague, p.xix.

The United Nations Convention on the Rights of the Child (1989), has defined, the rights of children. The Convention also serves as a facilitator for further developments in the international law on the rights of the child.<sup>16</sup> The CRC has recognized the child as one of the subjects of international law. The CRC sees the child as a bearer of rights as opposed to an object of charity. This means that the child is protected from violation of his/her rights by a legal framework.

African States have gone a step further and adopted a regional instrument on the rights of the child. *The African Charter on the Rights and the Welfare of the Child* is the first ever regional instrument on the rights of the child. The African Charter makes the CRC culturally specific to the African context.

### 1.8 The Basic Principles Governing the Protection of Children's Rights in International Law

Principles are extracted from a body of rules and provide the common denominator for a number of related legal norms.<sup>17</sup> The basic principles that govern the protection of children's rights in international law have been extracted from the CRC. These principles are: the best interests of the child principle; the non-discrimination principle; the right to participation in decision making, and the principle of the first call for children.<sup>18</sup>

<sup>16</sup> See for example, *UN Standard Minimum Rules for the Administration of Juvenile Justice (1985)*; *UN Guidelines on Refugee Children (1988)*, *The Hague Convention on International Cooperation on Inter Country Adoption (1993)*.

<sup>17</sup> *Parry and Grant (1986), Encyclopedic Dictionary of International Law*, (New York: Oceana Publications Inc. p.303.

<sup>18</sup> These principles are discussed in more detail in chapter two.



### 1.8.1 The Principle of the Best Interest of the Child

The best interest of the child is the most important principle as it forms the basic foundation in all actions concerning children. Article 3(1) of the CRC states that:

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

The principle of the best interest of the child can be traced back to when child rights became an international issue. The best interest principle was first upheld in 1924 in the *Declaration of the Rights of the Child (1924)* and later in 1959. The principle has since gained paramountcy in various international instruments. The *Convention on the Elimination of all Forms of Discrimination Against Women (1979)* and the *African Charter on the Rights and Welfare of the Child* reflect this principle.<sup>19</sup> The executive committee of the United Nations Human Commission on Rights (UNHCR) has stressed that all actions taken on behalf of refugee children must be guided by the principle of the best interest of the child.

### 1.8.2 The Principle of Non-Discrimination

Discrimination has been defined as "any distinction, exclusion, restriction or preference which is based on any ground such as child's or his/her guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all children on an equal footing of all human rights and fundamental freedoms".<sup>20</sup>

<sup>19</sup> Alston and Bridget (1996), *The Best Interest of the Child: Towards a Synthesis of Children's Rights and Cultural Values*. New York. UNICEF.

<sup>20</sup> Alston P (1992). 'The Legal Framework of the Convention on the Rights of the Child' in *Bulletin of Human Rights 91/2*. The Rights of the Child. UN. Geneva p.13.

The non-discrimination principle is reflected in Article 2 of CRC, Article 3 of *African Charter on the Welfare and Rights of the Child* (ACWRC), the *International Convention on the Elimination of all forms of Racial Discrimination*,

### 1.8.3 The Principle of the Right to Participate

The right to participation which is enshrined in article 12 of CRC is important in all aspects of the implementation of the Convention and to the interpretation of all other articles. The right to participation is a “cross cutting element” which supports and is supported by survival, development and protection.<sup>21</sup> Participation aims to enable children (and women) to become agents of their own development. Women are important and indispensable persons when it comes to the rights of the child. This is because they are the primary care givers for children. Therefore, as long as women do not participate in decision-making processes, children will not enjoy their rights to participation.

### 1.8.4 The Principle of the First Call For Children

The Declaration on the survival and protection and development of children arising from the World Summit for Children (1990) and the CRC constitute an ambitious agenda for the well being of children to be achieved by the year 2000. In committing themselves to pursue these goals, the leaders agreed to be guided by the principle of the “first call for children”.

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<sup>21</sup> UNICEF (1996). *Programming for children's and Women's Rights: UNICEF Mali's Experience*. Bamako. UNICEF p.9.

The principle maintains that the essential needs for children should be given high priority in the allocation of resources, in bad times as well as in good times, at national and international as well as at family levels.<sup>22</sup> The needs identified health provisions, food and nutrition, role of women, maternal health and family planning; role of the family which has the primary responsibility for the nurturing and protection of children from infancy to adolescence, the need for basic education and literacy, the need for protection of children in especially difficult circumstances, the need for protection of children in armed conflicts, the need for preservation of the environment, and the need for the alleviation of poverty and revitalization of economic growth.

This principle is only provided for in the world Declaration on the Survival Protection and Development of Children in the 1990's. International development agencies and all relevant United Nations agencies have been requested to ensure the achievements of the goals and objectives of the plans envisaged in the world's summit Declaration and Plan of Action.

These principles are central to the CRC. They are the general principles of implementation. The general principles of implementation form the basis when it comes to the implementation of the articles in the Convention. All rights of the child in the Convention should be observed within the domain of the general principles.

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<sup>22</sup> UNICEF (1990) *First Call for Children, World Declaration and Plan of Action from the World Summit for Children*, New York, P.I.

## 1.9 Linking Children's and Women's Rights

Women are important persons in the lives of children. In discussing children's rights, women's rights have to be brought in because the status of women impacts on children. The reason why women are vital to children is the fact that they are the mothers to these children. Women are the primary caregivers for children and are among the first persons that children establish contact with. It therefore goes without saying that if children's rights are to be established and the CRC implemented, the rights of the mother have to be guaranteed. For instance, if a mother is denied access to health care services the right of the child to health will be greatly compromised.

Article 25(2) of the *Universal Declaration of Human Rights* makes the most explicit link between children's rights and women's rights by recognizing that motherhood and childhood require special care and assistance. The article states:

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.

Mwagiru and Karuru have illustrated the linkage between children's and women's rights. The first illustration of this linkage is the right of the child before, during and after birth which makes the child's rights inseparable from those of the mother. Secondly women's rights and children's rights are fundamental rights which are binding on all states whether or not they are parties to particular treaties. Women's and children's rights are also linked at the cultural level.

Women and children face the same predicaments in culture. They are usually bundled together and their presence is hardly felt. Children and women rights interconnect in the context of survival, development protection and participation.<sup>23</sup> The rights of women are thus fundamental when discussing children's rights.

### 1.10 Treaty Practice in Kenya

The negotiation and conclusion of treaties is one of the most solemn manifestations of the sovereignty of the state. By signing or acceding to a treaty, states express those matters with regard to which they wish to be internationally bound by.

In their analysis of treaty practice in Kenya, Mwangiri and Hunja conclude that treaty practice in Kenya is confusing and wanting.<sup>24</sup> The negotiation of treaties is not uniform; indeed there exist different schools of thought on the matter. When it comes to the authority and power of negotiation, there is no clear statement either in law or in practice on who has authority and power to negotiate treaties in Kenya. This has led to the ratification of treaties in Kenya being *ad hoc*. This has to some extent been a departure from the classical position whereby it was the business of diplomats to negotiate treaties on behalf of their states. There

<sup>23</sup> Mwangiri and Karuru (1998), *Women's Land and Property Rights in Conflict Situations*, (Nairobi CRC-WLEA, Publications Nairobi p.23.

<sup>24</sup> Mwangiri M. and Hunja R. (1990), "Some Aspects of Treaty Practice in Kenya" in *Lesotho Law Journal* Vol.6 No.2 p.7-21.

seems to be a lack of any consistent practice on the subject of co-ordination between departments and in the preparation of briefs.

When it comes to the consent to be bound by a treaty in Kenya, two competing schools emerge. The first supports cabinet approval in the negotiation and ratification of a treaty. The second school of thought argues for non-approval by the cabinet. This goes further to show the confused nature of Kenya's treaty practice. Mwangi and Hunja argue that the question of ratification and transformation of treaties in Kenya has never received the legal attention that it deserves. This has been responsible for the uncertain treaty practice in Kenya. The process of treaty practice needs to be transformed and streamlined so as to have a consistent treaty practice.

Kiraitu Murungi argues that the Constitution of Kenya is silent on how international law should be incorporated or transformed into municipal law. It instead requires that guidance should be sought in the English common law whenever local legislation is silent.<sup>25</sup> Under this law, the conduct of foreign affairs and conclusion of treaties is the prerogative of the Crown. Where, the implementation of the treaty requires a change in the municipal law, parliament has to pass an enabling Act before the treaty can have legal force. Where such an enabling Act is missing the treaty is not part of the law of Kenya. It is of little

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<sup>25</sup> Government of Kenya. (1998) *The Constitution of Kenya. Revised Edition 1992*, "The Judicature Act (Chapter 8 –Laws of Kenya)", Government Printers Nairobi



consequence because it cannot be invoked or enforced in the Kenyan courts.<sup>26</sup> Although treaties, which have not been transformed into municipal law, have no consequence within the municipal jurisdiction, they however impose specific legal obligations on state parties enforceable at the international level. This has far reaching implications for the implementation of the CRC.

### 1.11 Human Rights in Africa

The African continent has experienced the worst violation of human rights. Human rights violation in Africa range from political detention, as widely experienced in military juntas, civil wars and genocide as it happened in Rwanda and Burundi. Most leaders of African states fear the language of human rights because of the duty it imposes on the observance and protection of human rights.

Human rights have not gained currency and wide support in Africa. Most African regimes continue to resist progress in their human rights record. Instead, they have feigned ignorance under the banner excuse of cultural relativism. The cultural relativism argument is based on the notion that human rights should be seen within the different social, communal and family contexts.

The cultural relativism argument, which has been embraced in Africa, has various weakness. For one, it assumes that cultural rights override all other rights. Yet it

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<sup>26</sup> Kiraitu Murungi (1998) *The Status of the Child in Kenya: The Legal Dimension in Report of a Workshop on the Kenyan Child*, Nairobi.

fails to acknowledge that the cultural values it protects have been surpassed by changes in society. Secondly the cultural relativism argument curtails the implementation of international instruments such as the CRC. The cultural practices and attitudes which it protects, interfere with the realization of rights in the CRC. Lastly, relativist arguments are at best superficial since they are used selectively. If women's and children's rights are fundamental human rights, and apply across cultures, then the cultural relativist stand is almost negated. With this kind of argument and the persistent objection of human rights in Africa, the implementation of human rights instruments like CEDAW and CRC becomes difficult.<sup>27</sup>

This resistance of the culture of rights and the reluctance of Governments to embrace human rights has been experienced in Kenya with respect to the current Bill of Rights. Katurima argues that the present Bill of Rights is faulty and is inadequate in the protection of human rights. For example, although the Bill offers protection from discrimination on the grounds of race, religion, sex, place of origin, political opinion, residence or any other local connection, color, creed or sex, it fails to recognize disability as a ground for discrimination. Also the Bill does not cover special categories of people who may need special protection. These include children and the disabled who need special protection and care

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<sup>27</sup> Makumi Mwangi (1997), "Women and Children in Conflict Situations. The Culture of Rights as a Missing Link in Africa". *Africa Media Review Vol.11* p.:14-15

because of their vulnerability.<sup>28</sup> The enforcement of Kenya's Bill of Rights has been frustrating.

The High Court has broad powers for enforcing the enjoyment of human rights. It has the powers to call for an investigation in all alleged cases of human rights violation. The High court has powers to enforce the observance of human rights laws. It has powers to protect human rights and individuals can access the High Court for protection. The High Court has however interpreted it's powers of enforcement in such a technical and restrictive way that it has become practically impossible to enforce the enjoyment of fundamental rights and to hold the state accountable for their violation.<sup>29</sup> For one, for a case to come before the High Court requires that the Chief Justice makes rules under section 84(6) of the Constitution, detailing the procedure for the enforcement of fundamental rights by the judiciary. If it fails to do so, the High Court cannot enforce the Bill of Rights. Secondly, individuals alleging violation of their fundamental rights and freedoms cannot access the High Court to enforce their fundamental rights under the Bill of Rights if they have not exhausted all other remedies like the police and the lower courts. Lastly, there is the technical demand that the person seeking to enforce the Bill of Rights must show interference with the enjoyment of these rights. A person must show the exact provision, which is violated, and specify in detail the manner in which it has been violated. This greatly interferes with the process of enforcement.

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<sup>28</sup> Kathurima M'Inoti (1997), "Constitutional Experience in Kenya from Independence to the Present: Success and Failures": in Gachanja (ed) *The Independent Review Vol. 1 no.2*

<sup>29</sup> *ibid* p.

## **1.12 The Conceptual Framework**

The conceptual framework guiding the present study is adapted from Mwagiru's study on the law relating to the child and women.<sup>30</sup> The conceptual framework was developed to study the response of governments towards the realization of international human rights standards within their jurisdiction. This conceptual framework has been adopted as the most suitable for the study on Kenya's implementation of the CRC. The conceptual framework details the various issues relating women and children which are vital in analyzing the situation of women and children. The conceptual framework brings out the interactions between the legal superstructures and the economic, social, cultural and other forces at play in the lives of children and women in Kenya. These interactions will aid in the study of the implementation process.

### **1.12.1 Rights Based Approach**

The rights based approach provides for the best basis from which to examine the implementation of the CRC. The rights based approach examines the issues of children's rights against the background of certain main themes and principles, which are sought to be attained, and which underlie the Convention. The approach begins with the child generally, and considers the principles that underlie the CRC. The CRC must then be examined against the general body of human rights.

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<sup>30</sup> Mwagiru M. (1997). *Situation Analysis of Women and Children in Kenya*. Nairobi

## Contents of the Rights Based Approach

The rights based approach contains a 'basket' of fundamental principles, which are central to a comprehensive understanding of the CRC and to monitoring its implementation. The first principle is that children's rights are human rights. Children are already entitled to all the human rights which apply to all people generally, and it is these which are considered further by the CRC. The CRC exists in order to address the specific rights of children based on their fragile and special condition.

A second important content of the 'basket' of principles' is that the human rights of children as conceptualized in the CRC and CEDAW are indivisible. The rights are not desegregated from each other, but are inter-related. Hence, in looking at children's rights, no division should be made between political (first generation), economic, social and cultural (second generation), or development (third generation) rights. These rights are all taken into account in looking at the status of the child, and they should therefore be considered to be interrelated and indivisible.

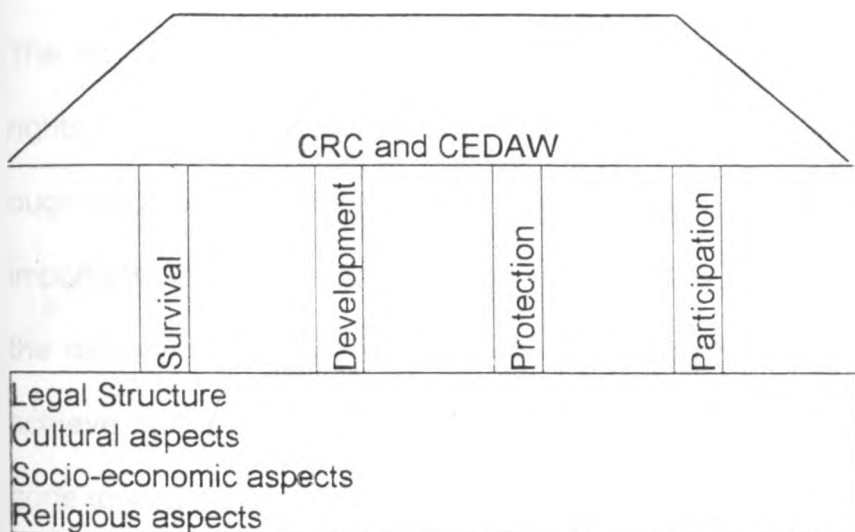
The third element is that at all times; the basic consideration should be the "best interests" of the child. The notion behind this is that all actions aimed at the child ought to be based on what is best for the child. In particular, this entails bringing children into decision-making about matters that affect and concern them. While the possibility of doing this depends on the circumstances and realities of each

case, it must not be used as a device to reduce the rights granted to children (as human beings) by other international instruments.

### The Structure

This conceptual framework is based on a three-tiered basic structure, containing the foundation, the roof and the pillars. This structure is intended to facilitate the process of assessing the implementation of the CRC and CEDAW, analyzing the problems and impediments to implementation and for future programming.

**Figure 1.10: The Basic Structure of the Conceptual Framework**



### The Foundation

The foundation consists of a whole group of super structures, including the legal superstructure, cultural aspects, and realities that underlay the Kenyan society.

The glue that holds the foundation together includes structures of knowledge at the community and cultural levels, and the cultural customary attitudes on various matters including the roles played by children and women in traditional African (and Kenyan) life. These include also cultural and other constraints on the

implementation of programmes at the national level, and of the implementation of the Convention on the ground in Kenya.

### **The Roof**

The roof of the structure is made up of the international Conventions relating to the status of women and children, namely the CRC and CEDAW. Other human rights instruments, especially the 1948 Declaration, support these. To these might be added *the African Convention on the Rights and Welfare of the Child*.

The Roof contains of the philosophical rationale for according protection and rights to the child and to women. It embodies the ideal situation, which states ought to strive for in offering protection to children and women. The Roof is also important since it offers protections whose realization does not rely entirely on the decisions of states. It enshrines the standards which all States must try to achieve in this field. This study project aims to investigate how far Kenya has gone towards attaining the requirements of the Convention.

### **The Pillars**

The ideals of the Roof (the Convention) must be directly related to the problems and realities of the Foundation. The linkage between these two structures is provided for by the Pillars. These represent the main themes that the Convention has articulated. These themes are embodied within the concept of certain rights, which the child is expected to enjoy. These are rights to survival, development, protection, and participation.

The four pillars give life to the Roof and meaning to the Foundation. These Pillars are at the heart of the rights based approach to monitoring implementation of the Convention. These Pillars will help to give a clear picture of the State of implementation of the C.R.C in Kenya.

## **Methodology**

This study employs qualitative methods in its analysis of the implementation of the CRC in Kenya. The study will source its data from published works relevant to the study. Policy and research documents of the Kenya Government as well as organizations concerned with children issues will be consulted.

## **Chapter Outline**

- Chapter One : Introduction.
- Chapter Two : The United Nations Convention on the Rights of the Child.
- Chapter Three : The Rights of the Kenyan Child.
- Chapter Four : Factors that impede the implementation of the Convention of the Rights of the Child in Kenya.
- Chapter Five : The State of Implementation: A critical analysis
- Chapter Six : Conclusions



# CHAPTER TWO

## THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

### 2.0 Introduction

This chapter analyses the UN Convention on the Rights of the Child. An understanding of children's rights is essential in analyzing the CRC. Thus the chapter begins by examining the concepts of children's rights as human rights in international law.

The main thrust of the chapter, which centers on the CRC, is to trace the origin of the idea of having an international Convention for the rights of the child, the subsequent development of the Convention up to its codification in international law. The chapter will also highlight those areas that generated a lot of debate and controversy during the drafting of the Convention. It will analyze the Convention from its legal framework, the major principles, to the different sectors and its significance.

### 2.1 The Concept of Children's Rights

Human rights are rights which every human being is entitled to enjoy and have protected. The *Universal Declaration of Human Rights* (1948) in its preamble emphasizes that 'recognition of the inherent dignity and of equal and inalienable right to all members of the human family is the foundation of freedom, justice and

peace in the world'. This idea that there are certain fundamental principles that should be respected in the treatment of all men, women and children exist in some form in all cultures and societies. There is therefore a widespread acceptance of human rights in the international sphere.

International human rights law grew out of a need to create an adequate international system to maintain international peace and protect human rights.<sup>1</sup> All human beings therefore have their rights protected by international law.

The concept of children's rights arose following the realization that the existing human rights instruments did not cover children adequately. The existing human rights instruments did not touch specifically on the child. And this despite the fact that children are among the most vulnerable people on the face of the earth and are frequently the defenseless victims of the most degrading abuses. This vulnerability and the special needs of the children induced a conceptualization of children's rights as a special category of general human rights.

The *Convention on the Rights of the Child* (CRC) is the central instrument governing the international law on children's rights. The CRC emphasizes the idea that children are bearers of rights rather than objects of charity and sympathy. The CRC advances the cause of children as a subject of international law who deserves or are entitled to the enjoyment of their own rights

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<sup>1</sup> For an account on the development of international law on human rights see, Shaw M. N. (1997), *International Law 4<sup>th</sup> ed.* UK, Cambridge University Press, p.200-202.

## 2.2 The United Nations Convention on the Rights of the Child

The international concern with child issues did not arise until the beginning of the twentieth century. Before then, life and matters relating to the child were not considered to be of international interest. Child issues were left to the family and the community. It was only in 1920 after World War I that an English child activist Englantyne Jebb appealed to the world to 'rescue the child' and this saw the setting up of the *Union International de Secures aux enfant* (International Save the Child Union-ISCU).<sup>2</sup> Three years later, Jebb stated that, "I believe we should claim certain rights for children and labour for their universal recognition". With this she issued a declaration on the rights of the child.

On 26<sup>th</sup> September 1924, Jebb's Declaration on the Rights of the Child under the auspices of ISCU was adopted by the League of Nations and came to be called the Geneva Declaration. This Declaration contained five principles. These were: the child should be given the means necessary for normal physical and spiritual development; a hungry child should be fed, a sick child cared for, a backward child helped, a delinquent child reclaimed, and an orphan or abandoned child given good care; in case of disaster the child must be the first to receive relief; (this was the earliest conception of the "first call for the child" principle). The child should be educated and protected against exploitation; and children should be brought up with the consciousness that their talents must be devoted to the service of their fellow people.

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<sup>2</sup> Lopatka A. (1992), 'The importance of the Convention on the Rights of the Child' Bulletin of Human Rights 91/2 The Rights of the Child, Geneva, UN.

The horrors of World War II led to a rethinking of the rights of the child. Thirty-four countries and fifty-four organizations came together and the ISCU was amended and succeeded by the International Union of Child Welfare (IUCW). IUCW persuaded the Economic and Social Commission of the United Nations of the need to make the 1924 Geneva Declaration, a United Nations Declaration. In 1924 a Declaration was produced and in 1959, the General Assembly passed resolution 1386 (xiv) on 20<sup>th</sup> November of that year adopting the *Declaration of the Rights of the Child*.

The 1959 U.N. Declaration contained 10 principles. These were that the child should not suffer discrimination; the child should receive every opportunity to develop freely and in dignity; should be entitled from birth to a name and nationality; the child should enjoy the benefits of social security; the handicapped child should receive the treatment(s) he/she requires, needs love and understanding and is entitled to education and recreation; should be the first to receive protection and relief; should be protected against all forms of neglect, cruelty or exploitation; should be brought up in a spirit of understanding; and that the best interest of the child should be the guiding principle.

### **2.3 Declaration and Treaties**

An important distinction must be made between a Declaration and a Treaty. This distinction will help in understanding why a children's rights treaty (such as the CRC) had to be made yet there was a children rights Declaration that was

intended to protect the rights of the child. A Declaration in international law is "one that declares existing law with or without modification or creates a new law or which affirms some common principle of policy".<sup>3</sup> A Declaration therefore contains agreements to do or not to do something and records agreement on a common policy. A Declaration therefore does not intend to establish binding obligations. A treaty on the other hand is defined as:

An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>4</sup>

A treaty is therefore binding upon the parties to the treaty and must be performed in good faith. This rule is known in legal terms as *pacta sunt servanda*

In commemoration of the twentieth anniversary of the 1959 Declaration on the Rights of the Child, 1979 was declared by the UN to be the International Year of the Child. A year earlier, the Government of Poland had submitted a *Draft Convention on the Rights of the Child* (DRC) to the Commission on Human Rights of the UN in a bid to have the 1959 Declaration recognized as a fully fledged human rights treaty specific to children.

For eleven years after the submission of the Draft Convention by Poland, the UN worked towards a universal instrument on children's rights. The Geneva Assembly by its Resolution 44/25 of 20<sup>th</sup> November 1989 unanimously adopted

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<sup>3</sup> Parry Grant (1986) *Encyclopedic Dictionary of International Law*. Ocena Publications Inc. New York p.85.

<sup>4</sup> Article 2 of the *Vienna Convention on the Law of Treaties*, 1969

the *Convention on the Rights of the Child (CRC)*. The Convention entered into force on 2<sup>nd</sup> September 1990, after it had been ratified by the required number of 20 States.

### **2.3.1 Areas of Contention during the Negotiations**

During the negotiations towards a children's rights treaty, there were areas which generated a lot of controversy. These areas of contention were central to the evolution of contemporary international law on children. These areas have led to the subsequent development of other international instruments concerning children. There was for example, the controversy regarding the minimum age of involvement in armed conflict. The Committee on the Rights of the Child had to draft an Additional Protocol to the CRC, which seeks to set 18 years as the minimum age for participation in any form of armed conflict.

The major bone of contention was the issue of whether or not to have a human rights treaty specific to children. On the one hand were the sceptics who argued against the drafting of a separate treaty protecting the rights of the child. They argued that existing human rights treaties already protected children and it was therefore unnecessary, repetitive and harmful to the existing human rights treaty making process to encourage the proliferation of a series of special constituent treaties.<sup>5</sup>

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<sup>5</sup> For further discussion see the International Save the Children Alliance Training Kit on the UN CRC, 1997 p.37.

The pro-children rights group on the other hand argued that although the existing treaties envisaged the protection of the child, they were too general to protect the special needs of children, and hence there was a need to have a separate children's rights treaty. At the end of the day the latter group got the upper hand. Whereas it was true that the children's rights in CRC were also protected by other human rights treaties, the latter set of treaties only did so as general concepts. The CRC hence spelt out the human rights specifically applicable to children.

There were other areas of controversy. These areas termed as 'hot spots' of children's rights, revolved around issues of: the rights of the unborn child; the right of the child to foster care and adoption; freedom of religion, and the minimum age of involvement in armed conflicts. The issue of the unborn child in particular created a lot of controversy. There were those who had argued that the unborn had equal rights to those already born (the pro-life activists) and others who maintained that those already born had no more rights than the unborn (the pro-choice activists). The main bone of contention in this controversy was in defining the beginning of childhood. Was it at the moment of birth or from the moment of conception? Apparently, the Convention did not strike a balance between the two contending positions. In the end, it was left to the discretion of individual national laws to adopt whatever position they felt was acceptable.

In the case of adoption and foster care, the main opponents of these provisions were the Islamic delegates who argued that under Islamic Law, the issue of adoption is illegal. They quoted from the Koran

...Nor hath He made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But God sayeth the truth and He showeth the way. Proclaim their real parentage. This will be more equitable in the sight of God. And if ye know not their fathers hen (they are) your brethren and your clients.<sup>6</sup>

Over the years, Islam has developed the *kafalah* concept to provide substitute care for children who cannot be cared for by their biological parents. According to *kafalah*, a family is able to take care of an abandoned child or a child without a family, but unlike adoption, the child is not entitled to use the family name or inherit from the family.<sup>7</sup> In order to accommodate the Islamic community, the CRC made a provision in this regard in article 20(3).

On the freedom of religion, some argued that realistically speaking, the child could not have a right to religion, as the child's religion is often that which its parents profess. The right to religion was so contentious that it risked obstructing the drafting and adoption of the entire Convention. At one time during the second reading, a split occurred between a number of Islamic and some secular states. In order to accommodate the diverse definition of religion and religious beliefs, a non-exhaustive definition was adopted. The CRC in a haste to strike a compromise between the rival delegates on the right to religion omitted any

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<sup>6</sup> Sura Ahzab xxxiii Verse 4 - 5

<sup>7</sup> van Bueren (1998). *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers. The Hague. p. 95.



express reference to having or adopting a religion. Instead, it was left to the individual's choice and only implicitly prohibited any coercion which could impair the child's freedom 'to have or adopt a religion' of the child's choice.<sup>8</sup>

The other area of controversy, which today is still an area of intense debate, is the minimum age of involvement in armed conflicts. There were those who maintained that the minimum age of recruitment should remain 15 as indicated by the *Optional Protocols on the Geneva Conventions Number 4 Relative to the Protection of Civilian Persons in Time of War* (1949). The argument for this position was mostly fronted by states where the children comprised the majority of the population. Their position was that if the international law sets forth the standard of involvement at 18 years then they would be deprived of a large pool of potential soldiers. They also argued that child soldiers were equally as effective combatants.<sup>9</sup>

On the other hand, a petition was presented during the debate on the armed conflicts by organizations representing young people. The petition was a demand to end the recruitment of all children into armed conflicts (this was in a bid to raise the minimum age to 18 years).<sup>10</sup> This created a lot of confusion during the drafting process. States parties agreed to maintain 15 as the minimum age of recruitment while endeavoring to give priority to the oldest children. The dissatisfaction with the current minimum age of recruitment by a

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<sup>7</sup> Ibid p.155-156.

<sup>8</sup> Bothby (1986), 'Children and War' *Cultural Survival Quarterly* 10, pp:-28.

<sup>10</sup> Van Bueren G (1998) *International Law on the Rights of the Child*. p.337

number of states parties<sup>11</sup> has led to the drafting of an Additional Protocol to the CRC to raise the minimum age from 15 to 18.

## **2.4 The Legal Framework of the Convention on the Rights of the Child**

The legal basis of the CRC is contained in articles 1-5 and 41. These provisions provide the framework for understanding and interpreting articles 6-40.

### **2.4.1 Article 1: Definition of Childhood**

Article 1 of the CRC defines a child as every human being below the age of 18 years, unless under the law applicable to the child, a majority age is attained earlier. In Kenya for example, there are certain instances where the age of majority is reached earlier. The Kenyan marriage laws tend to provide for a lower age. The Marriage Act (Cap 150 Laws of Kenya) sets the minimum age of marriage for girls at 16 years and 18 years for boys. This is the same with Hindu Marriage Act (Cap 157 Laws of Kenya). The Islamic Law allows for marriage after puberty. The customary law expects one to marry after undertaking initiation rites, which may be carried out before the attainment of 18 years.

although article 1 of the C.R.C sets the upper limit of childhood at 18 years it does not define the beginning of childhood. It allows governments a degree of flexibility in determining the lower age limits. The reason for this position was to avoid taking sides on abortion and other pre-birth issues, which would have

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<sup>11</sup> See Hodkin R. and Newell P. (1998) *Implementation Handbook for CRC*, UNICEF, GENEVA p.517-518 for these States

threatened the universal acceptance of the Convention. However, this flexibility is perhaps the C.R.C's major undoing because, while it appreciates that the foetus deserves appropriate protection, its right to life *per se* is not recognized. Therefore the rights of the unborn child are left to the whims and inclinations of individual states.

After the age of 18, the child leaves childhood and his/her rights become replaced by the general human rights law. It is important to note that even though there exists a specific Convention on the rights of children, it does not suspend the operations of the general human rights law, which also apply to children.

#### **2.4.2 Article 2: states parties Obligation and the Principle of Non-discrimination**

This article sets out the fundamental obligations of state parties in relation to the rights outlined in the remainder of the Convention to "respect and ensure" all the rights in the Convention to all children in their jurisdiction without discrimination of any kind.

The non-discrimination principle serves two functions.<sup>12</sup> It specifies the nature of the basic obligations to be undertaken by states parties to the Convention with respect to the rights of each child. The non-discrimination principle should apply to each child irrespective of the child's origin or background. The CRC must apply to all children in the state, be they permanent residents or visitors, refugees

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<sup>12</sup> Alston P. (1992). 'The Legal Framework of the Convention on the Rights of the Child' in *Bulletin of Human Rights* 91/2, The Rights of the Child. UN GENEVA p.4.

or those in the state illegally. Secondly, the principle ensures that the rights so recognized shall be accorded to, and enjoyed by, each child without discrimination on any grounds. This article ensures that all the rights in the Convention are protected and ensured for all children.

#### **2.4.3 Article 3: Best Interests, Responsibility for Care and Protection, and Standard of Care**

The 'best interest' principle is an umbrella provision which prescribes the approach to be followed in all actions concerning children. Article 3(1) of CRC emphasizes that governments, public and private bodies must have the best interests of the child as a primary consideration in all their undertakings. Article 3 should be used in relation to the rest of the provisions in CRC and in particular to situations relating to separation of the child from the family setting. Article 9(1) provides that the child shall not be separated from his or her parents against his or her 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. However the C.R.C provides also that the child's right to maintain contact with both parents must be respected "except if it is contrary to the child's best interest."<sup>13</sup>

The principle should also be applied in relation to the upbringing of the child by the parents. The "best interest of the child will be their basic concern" in the discharge of parental responsibilities. The child's best interest should also

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<sup>13</sup> Article 9(3) of the C.R.C.

prevail in situations of the deprivation of the family environment. Children deprived of their family environment "or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection"<sup>14</sup> In cases of adoption states should ensure "that the interests of the child shall be the paramount consideration"<sup>15</sup> The article is also related to articles 37 and 40, which deal with children involved with the police and the justice system. Children who are deprived of their liberty must be separated from adults unless it is considered in the child's best interest not to do so. During the hearing of penal matters in court concerning the juvenile, parents or legal guardians should be present unless it is considered not to be in the best interest of the child. The "best interest" principle also ensures that all institutions and facilities responsible for the care and protection of children meet health and safety standards and other standards set by the authorities.

#### 2.4.4 Article 4: Measures of Implementation

This umbrella provision outlines the means of achieving the provisions in the Convention. It obliges states parties to take all appropriate legislative, administrative and other measures necessary for the implementation of the rights specified in the Convention. The article also calls for States to take all the necessary measures to ensure the realization of the children's rights and where needed to do so within the framework of international co-operation. This

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<sup>14</sup> Article 20 of the C.R.C.

<sup>15</sup> Article 21 of the C.R.C.

provision according to Alston has several implications.<sup>16</sup> Firstly, it constitutes a general commitment to international cooperation: states commit themselves to advance the situation of the child. Secondly, it ensures that states parties not in a position to guarantee children rights because of economic and other resource deprivation should take the necessary measures "within the framework of international cooperation". This entails soliciting for funds and technical assistance to improve the standard of the children. Donor countries are also encouraged to ensure that their aid Programmes further the aims of the Convention by establishing a clear priority for children. Lastly, gives a commitment to other states to cooperate with the less fortunate states in ensuring the realization of the rights of the child. For instance, in a situation where there is a problem of abduction and sale of children, it is only through states co-operation that this problem can be effectively tackled.

#### 2.4.5 Article 5: Parental Guidance and the Child's Evolving Capacities

Article 5 outlines the state's duty to respect the responsibility, rights and duties of parents and other relevant persons and "to provide... appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".<sup>17</sup>

The article provides a definition of the family and introduces to the Convention two vital concepts: parental "responsibilities" and the "evolving capacities" of the

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Alston P (1992). "The Legal Framework of the Convention on the Rights of the Child" in *Bulletin of Human Rights* 91/2. The Rights of the Child. UN. GENEVA p.5.  
Article 5 of the C.R.C.

child. The article also acknowledges the child as an active subject of rights, emphasizing the exercise "by the child" of his or her rights. There are several articles which stress the primary responsibility of parents and place strict limits on state intervention and any separation of children from their parents (article 3(2), 7, 9, 10,18).

#### **2.4.6 Article 41: Harmonization of Children's Rights with other Laws**

This provision harmonizes the CRC with the municipal laws of the state or other international and regional laws in force for that state. It acknowledges that there may be other provisions, which protect the rights of the child, and thus should not be side stepped. They should be at par with the CRC as long as they are "conducive to the realization of the rights of the child.

### **2.5 The Major Principles Governing The Convention**

The Convention on the Rights of the Child contains four major principles, which govern the protection of children's rights in international law. These principles are: the best interest of the child, the non-discrimination, the right to participation, the first call for children

#### **2.5.1 The Best Interest of the Child**

The best interest of the child began essentially as a principle of compassion. It is as old as the international concern for the situation of children.<sup>18</sup> In its

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<sup>18</sup> Alston P. and Bridget G. (1996). *The Best interest of the Child: Towards a Synthesis of Children Rights and Cultural Values*, UNICEF, New York p.4.

application, the principle is articulated in article 3(1) of CRC, which provides that “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”. The reference to “all actions” is good enough to encompass all state agencies and includes both their actions and inaction. Less certain are the extent to which article 3 includes actions of non-state actors and individuals.<sup>19</sup> although the direct reference to parents and guardians is not present in article 3, it does appear in article 18(1) as a guiding principle for parents.

Article 3(1) does not create duties. It is an umbrella principle to be considered in all actions concerning children. It operates as a principle to be considered in relation to each of the rights in the Convention and in all actions concerning children. In interpreting this principle, a problem arises as to whether the “best interests” referred are those of the child or the adult. The best interest principle inadvertently provides the decision and policy makers with the authority to substitute their own decisions for either the child’s or the parents, providing it is based on what they consider to be in the best interest of the child.

Article 3(1) can be a base for regression rather than progress if states adopt an extreme cultural relativist stance to defend their actions. This danger is however averted under the *African Charter on the Rights and Welfare of the Child*

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<sup>19</sup> G. (1998) *The International Law on the Rights of the Child*, Martins Nijhoff Publishers. The  
146.



(ACRWC), which unlike the CRC, prohibits customs and practices affecting the welfare and development of the child.<sup>20</sup>

although the best interest of the child as found in the Convention raises more questions than answers, it serves several functions. First, it supports justice and clarifies a particular approach or issue arising under the Convention. For instance, if it is found just to separate a child from its parents because the parents are a source of abuse to the child, then the best interest principle will be used to support and justify such a course of action. Article 9(1) of the CRC supports the notion that the State shall ensure that the child is not separated from its parents "except when competent authorities see that such a separation is necessary for the best interest of the child".

Secondly, the principle mediates in resolving conflict which may arise within the Convention. Conflicts may arise between the state and the family on a decision concerning the child, since both the state and the family are recognized in the CRC as being vital in the provision of children's rights. A state's decision may be in contradiction with a family's values and interests. The best interest principle can be evoked to resolve this conflict in favor of the child. For example, the family may hold dear certain practices like female circumcision which are outlawed by the state. Thus when a conflict arises between the family and the state on cultural values, the best interest principle can be used to mediate this conflict in favor of the child's rights.

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<sup>20</sup> See Article 12 of *The African Charter on the Rights and Welfare of the Child*.

Lastly, the principle could be used as a basis for evaluating the laws and practices of state parties with regard to children's rights. This principle is used as a yardstick to assess whether all the laws and practices undertaken by a state are compatible with the best interest of the child.<sup>21</sup>

### 2.5.2 Non-discrimination

The underlying moral basis behind most international human rights law is to treat all humanity as being of equal worth. Hence most human rights treaties make provisions prohibiting discrimination. Discrimination against children occurs not only between adults and children but also between children. Children in rural areas for example are more discriminated against in the access to educational and health facilities than urban based children. International instruments have little to say in this regard since international law has focused only on discrimination where it is embedded in legislation and not as the result of a government's economic and urban rural policies.

CRD is the first international instrument to prohibit discrimination on the basis of disability. An additional prohibited ground of discrimination is provided in ACRWC, namely discrimination in the enjoyment of the Charter's provisions on the basis of "fortune"<sup>22</sup>

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(1994). *The Best Interest of the Child: Reconciling Culture and Human Rights*, Oxford, p 4.

2 of the *African Charter on the Rights and Welfare of the Child*

The scope of article 2(1) is limited to the rights set out in the Convention but article 2(2) creates an impact by requiring states parties to take all "appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members". This impact can spill over to regulate rights other than those enshrined in the Convention.

Non-discrimination principles serves two functions. Firstly it specifies the nature of the basic obligations to be undertaken by states parties to the C.R.C with respect to all the rights in the convention to "respect and ensure" all the rights in the convention to all children without discrimination. Secondly it ensures that the rights recognized shall be accorded to, and enjoyed by each child without discrimination based on any status which a child or the parents or legal guardians might have.

### 2.5.3 The Right to Participation

The CRC focuses on the expression rather than holding of an opinion. Article 12(1) provides:

The states parties to the present Convention 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...

Presumably, the Convention does not acknowledge the child's right to hold an opinion, perhaps because an opinion is in the realm of the mind and cannot be regulated by law or subject to any exception or restriction. As Bueren notes

“such an omission is not critical to the child’s enjoyment of the rights, as the mere holding of an opinion, as distinct from expressing an opinion, is a purely internal and personal ability uncontrollable by the state”.<sup>23</sup> Its omission therefore makes little sense. However, viewed differently, indirect restrictions (such as those mentioned) can impede not only the expression of opinions, but also the formation of opinions. Opinion formation is quite relevant to children, but international law does not seem to focus on it. The right to hold an opinion is a precondition of the right to freedom of expression. As Michael notes “conceptually and historically the right begins with the liberty to believe differently.”<sup>24</sup>

Article 12(1) refers to two measuring devices of the right to participation namely, age and maturity. This ensures that state parties do not have an unfettered discretion as to when to consider and when to ignore the views of a child. The views of the child should be “given due weight in accordance with the age and maturity of the child...” This ensures that young children who may be mature beyond their ages are listened to.

The right to participation requires that children have a voice in the political process and within decision making bodies. The right to participation finds its

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<sup>23</sup> Van Buuren G. (1998). *The International Law on the Rights of the Child*. Martinus Nijhoff Publishers. The Hague p.136.

<sup>24</sup> Micheal (1998). “The Right to Receive and Import Information and Ideas under Article 10 of the European Convention on Human Rights” to be published by Council of Europe. Human Rights File

fullest expression in nurturing in children a healthy self-esteem, and on evolving a sense of social responsibility.

Himonga attempts to show that most of the decisions concerning children are made in the private domain of the family. In the African traditional settings, things were done according to set patterns and hence there was little room for consultations over decision making. Today however, due to social changes, decisions have to be made every now and then. With decisions being made consulting in families, children still do not participate fully. The low involvement of children in decision making is severely limited by factors derived from traditional culture and social economic contexts within which decisions were made. Himonga asserts that the rights to participation as specified by C.R.C are not far removed from traditional ways.<sup>25</sup> In traditional settings children participated in society through singing and dances, but today the channels of participation have expanded. However, although today's children have wider channels of participation through cultural activities, children magazines and children's discussions, they are not fully being consulted.

Article 12(1) places a duty on state parties to "assure" children that their views in all matters affecting them shall be given "due weight". There are many instances where children are denied the opportunity to participate in decision-making processes. As Flekkoy argues, this may not be detrimental to the child but also

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<sup>25</sup> Himonga C. (1996). *The Child's Right to participate in Decision making in Families and Family Tribunals in Zambia*.

to wider sections of the community. In areas such as school, the family and neighborhoods, children not only have opinions by 'superior knowledge'.<sup>26</sup> With the right of expression assured, children become agents of their own development.

Article 12(2) applies to all judicial and administrative proceedings affecting the child. The administrative proceeding includes divorce and custody proceedings, care proceedings, serious disciplinary proceedings and proceedings determining the status of child asylum seekers.<sup>27</sup> This article provides the child with an opportunity to be heard in any judicial and administrative proceedings either directly, or through a representative or an appropriate body.

#### 2.5.4 The First Call for Children

The principle of first call for children is an umbrella provision, which recognizes the fundamental interdependence of the basic survival, protection and development rights. The first call for children principle was proclaimed in the World Summit for Children in 1990 when a *Declaration on the Survival, Protection and Development of Children and a Plan of Action for Implementing the Declaration* was issued. This Declaration is a reflection of the necessary political will of international cooperation in the survival, protection and development of the child. The principle reiterates that the child should be the first person to be considered in areas of protection, survival and development.

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<sup>26</sup> Flekkoy (1991), *A Voice for Children, Speaking out as their Ombudsman*, p.225

<sup>27</sup> Fawcett (1987), *The Application of the European Convention on Human Rights*, Section one. Article 6

The exploitation of children is a universal problem, be it as producers in the developing states or as economic dependants in industrialized societies. The exploitation of children is counterproductive as it involves the breaching of several other fundamental children's rights. These include the right to privacy, the right to education, and health all of which are essential for the development and survival of the child.

because of the child's vulnerability and immaturity needs to be protected against all forms of exploitation, the CRC develops the concept of protection by highlighting specific forms of exploitation and incorporating a general prohibition against all forms of exploitation.

Survival is a precondition of all other rights. The right to survival involves the state taking steps in order to secure the healthy development of children. The inclusion of survival right's in the CRC implies that individual rights such as the right to health cannot be protected in isolation. For instance it has been proved beyond doubt that female literacy has a positive influence on child survival.

Development, as a right, is the right of individuals and people to participate in, contribute to and enjoy continuous economic, social and cultural development in an environment in which all human rights can be realized.<sup>28</sup> The right to development reinforces the survival of the child. The right to development includes right to health and this is essential for the survival of the child.

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<sup>28</sup> UN Document E/CN.4/1990/9 Part III.

The first call for children principle maintains that the essential needs of children should be given high priority in the allocation of resources in bad times and in good times, at family national, and at international levels. At the international level, international law does not seem to have any provision on resource allocation by states for survival and development rights. What is in place are piecemeal provisions on health and education. The Organization of African Unity (OAU) has however made an attempt at requiring resources allocation by incorporating article 14(g) of the *African Charter on the Rights and Welfare of the Child*, the duty on states parties to integrate basic health service Programmes into national development plans.<sup>29</sup>

At the national level, National Development Plans are supposed to lay out the allocation of resources. Unfortunately, these are dominated by financial considerations rather than human rights obligations.<sup>30</sup> States especially in sub-Saharan Africa are hardly pressed to allocate resources for the welfare of children. The Structural Adjustment Programs (SAPs) being pursued by developing countries have tended to create havoc in the welfare of the populations. The SAPs have generally involved reducing public expenditure, devaluing the currency, and removing of subsidies on fuel and foodstuffs. These adjustment strategies have placed a disproportionate burden on the poor and the most vulnerable groups of which children are the most vulnerable. SAPs coupled

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<sup>29</sup> See Article 14 of the *African Charter on the Rights and Welfare of the Child*.

<sup>30</sup> See for example Kenya Development Plans for the years 1997-2001



with indebtedness are a big constraint in the allocation of resources, and thus in the adherence to the first call for children principle.

## **2.6 The Different Sectors of the Convention**

For easier study and assessment of the CRC, the provisions in the Convention can be grouped into 8 major sectors:

- a) General measures of implementation
- b) Definition of the child
- c) General principles of implementation
- d) Civil rights and freedoms
- e) Family environment and alternative care
- f) Basic health and welfare
- g) Education, leisure and cultural activities
- h) Special protection measures

### **2.6.1 General Measures of Implementation**

The general measures of implementation are covered under articles 4 and 42 of CRC. They call upon states parties to take all appropriate measures to implement the rights specified in the convention and to make the Convention widely known to both adults and children.

The implementation measures basically involve reporting, combined with the provision of technical advice and assistance rather than the reception of complaints. States parties are obliged to report to the Committee on the Rights

of the Child on measures which they have taken to give effect to the Convention. The first report is due two years after ratification or accession to the Convention and thereafter every five years.

The reports which states parties are to make "widely known" in their own states should include information on how the Conventions is being implemented domestically. The reports should include both "factors and difficulties, if any affecting the degree of fulfillment of the obligations under the present Convention"<sup>31</sup> These factors can help to contribute to national debates and the prioritization of such difficulties and the measures necessary to overcome them. They can also be used as an indicator of, a need of technical advice and assistance. These factors can also be used to measure the progress a country has achieved in the area of children's rights.

The general measures of implementation include measures to be undertaken to harmonize national law and policies; mechanisms at the national and local level for monitoring the implementation of the Convention; the measures taken to make the Convention widely known by all appropriate means to children and adults; and the measures undertaken to make the reports(s) widely available to the public.

Article 4 of the CRC focuses on the manner in which respect for the rights of children is to be achieved. States parties are under a duty to take all "appropriate

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<sup>31</sup> Article 44(2) of the *Convention on the Rights of the Child*.

legislative, administrative and other measures” for the implementation of the Convention. The question of which measures are “appropriate” is within the discretion of individual states. However such discretion may be subject to the scrutiny of the Committee on the Rights of the Child. The article also acknowledges the importance of international cooperation in implementation. International cooperation includes technical assistance and the transfer of resources between states to the child’s benefit.

### 2.6.2 Definition of the Child

A child is defined by article 1 of CRC is anybody below the age of 18. This article creates two points of contention. The beginning of childhood and the end of childhood. States hold fundamental conflicting views as to when childhood begins. Some States believe that the concept of childhood includes the entire period from the moment of conception, others limit it to a specific period in the womb, whilst others believe childhood begins at birth. In order to accommodate the conflicting views of states, article 1 specifies that a ‘child means every human being below the age of 18 years’. This still does not say much about when childhood begins because of the same problem of defining a human being. Whether a human being includes the born, the unborn or the embryo is a contentious issue. The Convention has therefore left it to the discretion of states to provide under their domestic law the point in time when childhood begins.

The end of childhood or the attainment of adulthood is the other area of contention. There are wide differences between societies and cultures as to the

role of children within the family and the community. This leads to differences in how communities view the duration of childhood. The end of childhood can be determined by different factors: for instance, the attainment of a particular age, the ability to perform specific acts or ability to perform particular functions. The ages set cannot reflect the speed of development of individual children. There are those who develop fast while others are slow.<sup>32</sup>

The Convention establishes eighteen as the standard to which states parties should extend their special protection. However article 1 of CRC allows states to set a lower age for the end of childhood. This flexibility creates a lacuna. If a child attains majority age earlier, then those rights in the Convention which do not mention a specific age will be inapplicable, since according to certain national laws, that individual is not a child.

International law is still some distance away from agreeing on a universal definition of childhood. There does, however, appear to be a trend emerging in contemporary international law that the rights of the child should be applicable to under eighteen this as evidenced by the adoption of recent standards on juvenile justice and the definition of child in the ACRWC.<sup>33</sup> The proposed Additional Protocol to the CRC seeking to raise the minimum age to 18 for participation in armed conflict also reflects this trend.

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<sup>32</sup> Van Bueren (1998) *International Laws on the Rights of the Child*, p.36.

<sup>33</sup> See Article 2 of *The African Charter on the Right, and Welfare of the Child (ACRWC)*, it does not allow for any exceptions.

### 2.6.3 General Principle of Implementation<sup>34</sup>

The general principles of implementation refer to the defining principles guiding or governing the Convention. These have been dealt in an earlier section of this chapter.<sup>35</sup>

### 2.6.4 Civil Rights and Freedoms

This category of rights contains those rights and freedoms which every child is entitled to enjoy by virtue of living in a civil society. These rights include the right to a name, nationality and preservation of identity (article 7 and 8), the right to freedom of expression (article 13), right to freedom of religion, thought and conscience (article 14), freedom of association and peaceful assembly (article 15) right to privacy (article 16), freedom of access to information (article 17) and freedom from torture (article 37(a)).

The right to a name is fundamental as it is the first point of acknowledgement of a person's existence. International and regional instrument stress that the child is entitled to a name. But because of the incapacity of the child at birth, parents exercise this right on behalf of the child. This implies that although children have a right to a name, they do not necessarily have a right under international law to a name of their choice.

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See p.13-17 for discussion of the general principles.  
See pp.53-54.

Article 7 of CRC provides that the child should be registered immediately after birth. Registration is one of the most effective methods of protecting the child's identity. Registration assists in the prevention of all forms of abduction, sale and trafficking in children. Registration is particularly important in refugee situations where children and parents may easily become separated. In such cases the register later becomes important in reunification of children with their parents or families. Registration of children is vital as it provides policy makers with the number and ages of child citizens. This data is important in planning a government's economic and social policies concerning children.

Article 8(1) of CRC places a duty on states parties to "undertake to respect the right of the child to preserve his/her identity, including nationality, name and family relations as recognized by law without unlawful interference". The second paragraph of article 8 provides that where a child is illegally deprived of some or all of the elements of his/her identity, states parties shall provide appropriate assistance and protection with a view to speedily establishing their identity. The term "illegally" applies to both when the deprivation of identity is illegal under domestic and international law.

Article 13 of CRC gives the child the right to freedom of expression, which traditionally was not associated with childhood. This article enhances the participatory role of children in decision making in matters concerning them. The rights of children to participate in decision making affecting them is often

regarded with skepticism. It is wrongly argued that to allow children to participate in decision making would mean a loss of an element of adult power and control. However if the aim of a democratic society is to allow a plurality of opinions and contributions by its members, then the participation of children ought to be valued.<sup>36</sup>

The freedom of thought, conscience and religion is similar to the freedom of expression, because both are theoretically exercisable by children but are rarely considered in relation to them<sup>37</sup> international law specifies that religious education is the right and responsibility of parents without considering the child

The right of children to adopt a religion raises some issues. The first is whether a child can, and if so at what age, choose a religion. Secondly, which religion are children to be brought up in if those responsible for the upbringing do not seem to agree on the religion? International law does not seem to give a clear cut answer as to when a child can adopt a religion. Neither does it offer any guidance for cases where parents disagree on which religion to introduce to the child.

A wide range of global and regional treaties prohibits torture. Article 3(a) of CRC reiterates, "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment". The prohibition on torture, cruel, inhuman

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<sup>36</sup> Van Bueren (1998) *International Law on the Rights of the Child* p.131.

<sup>37</sup> *Ibid*, p.151.

and degrading treatment or punishment is so fundamental that it is a non-derogable right under article 4(2) of the *International Convention on Civil and Political Rights*. Despite this kind of international framework, children continue to suffer from torture, cruel, inhuman, degrading treatment or punishment, or from other forms of abuse and neglect. in both times of peace and war.

#### **2.6.5 Family Environment and Alternative Care**

International law acknowledges the family as the basic unit in which children are cared for. The definition of a family is as diverse as the different concepts of family: single parents, nuclear family, polygamous family and extended family. The Convention accommodates the differing concepts of family by not giving a definite definition of what it means by the term 'family'.

Article 5 of CRC recognizes the rights and responsibilities of parents to provide direction and guidance to children in a manner "consistent with the evolving capabilities of the child". That is, parents should acknowledge the fact that as children develop and mature, the child is more able to participate in the decision-making processes. This does not mean there is an age below which a child's views should not be taken into account, rather an adult's assessment has to be made about a child's maturity.

International law though while holding the family to be the principal environment for securing the rights of the child, nevertheless protects the child from abuse and neglect arising within the family. Article 19 of CRC contains a non-exhaustive list



of protective measures necessary to support the child. The major challenge is to identify, prevent and respond to situations where members of the family may be endangering the child. However, international law has bestowed upon the state the duty to intervene and separate a child from his or her family, if the child is in danger. International law has provided States with the criteria of doing this.<sup>38</sup>

Children who are permanently or temporarily deprived of their family environment are entitled under article 20 of CRC to special protection and assistance provided by the State. States are required to ensure alternative care for such a child separated from the family environment. According to article 20(3) of the C.R.C., The alternative care includes adoption, foster placement and placement in suitable institutions for the care of children.

#### 2.6.6 Basic Health and Welfare

Health has been defined by the World Health Organization (WHO) as "a state of complete physical, mental and social well being".<sup>39</sup> Health is no longer defined as the absence of diseases. Article 24 of CRC incorporates the right to health into international law. It calls upon state parties to ensure that "no child is deprived of his or her right to access such health care services". Health care services include facilities for the treatment of illness and rehabilitation of health.

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<sup>38</sup> See article 9 of the *Convention on the rights of the Child*.

<sup>39</sup> World Health Organization. *Basic Documents*. Geneva WHO 1984.

The term “a standard of living” is broad and includes nutrition, clothing, housing and aspects of health.<sup>40</sup> Article 27 of CRC places a duty to state parties to recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. The states duty is secondary since the primary duty is on parents. However states are required to assist parents and others responsible for the child in ensuring the child’s right to an adequate standard of living.

In order to maintain a child’s right to an adequate standard of living, both children and adults may benefit from social security, including social insurance. Article 26 of CRC only places a duty on states parties to “take necessary measures to achieve the full realization of this right in accordance with national law”. This implies that social security entitlements are measured against national law rather than international standards. The failure of international law to set standards for social security leaves the choice of providing or not providing social security to individual nations, who might choose to provide or not to do so.

#### **2.6.7 Education, Leisure and Cultural Activities**

Education plays an important role in both the individual’s and national development. Education is the engine of development. Article 28 of CRC puts a duty on states to provide education at specific levels: primary, secondary and higher education.

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<sup>40</sup> See article 11(1) of the *International Convention on Economic, Social and Cultural Rights*.

Article 13 and 14 of the *International Covenant on Economic, Social and Cultural Rights* establishes the duty on states parties to provide different levels and types of education. It also sets out the time frame for the provision of free primary education.<sup>41</sup> The implementation of these aspects of the right to education is progressive and states parties are under a duty to improve the existing conditions relating to education to the maximum possible level relative to their available resources, but bearing in mind the best interests of the child when allocating the scarce resources.

States have a duty to provide free education to children, but this varies according to the level of education. The duty is strongest with respect to primary education and weaker in relation to secondary education.<sup>42</sup> Article 26(1) of the Universal Declaration of Human Rights provides that education should be free "at least in the elementary and fundamental stages". Article 13 of the International Covenant on Economic, Social and Cultural Rights also provides that, "with the view of achieving the full realization of this right, primary education shall be compulsory and available free to all". This standard is reiterated in article 28 of CRC.

The right to education applies to both adults and children, but the principle of compulsory education is only applicable to children. This principles consider that it is in the best interests of the child not to be denied education below a certain or

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<sup>41</sup> See *International Covenant on Economic, Social and Cultural Rights*, Articles 13 and 14.

<sup>42</sup> This is because higher education affects mostly people above the age of 18.

specified age.<sup>43</sup> This reality is usually an illusion especially to children in the developing world. Many children can not attend school because of the many inhibiting factors. These factors include among others, child labor, long distance of rural schools from the home of the children, traditional practices that hinder especially girl education and imposition of unaffordable school fees. The concept free education and compulsory education are interrelated in international law. If primary education is made free, then attendance can be made compulsory by law.

The equal access to education is vital to the child's right to education. Article 28(1) places a duty on states parties to recognize the right of the child to education with a view to achieving the right progressively "in the basis of equal opportunity". This is in recognition of the fact equality in access to education is not universal. Certain categories of children are more likely to be victims of education discrimination. These include girls, children with disabilities, refugee children, indigenous and minority children and children living in rural communities.

#### **2.6.8 Special Protection Measures**

These categories of provisions of the CRC cover the rights of children with special needs. This implies that there are some groups of children who are particularly vulnerable because of their status as children and because of other factors. Such status includes among others refugee status, children with

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<sup>43</sup> Van Bueren (1998). *The International Law on the Rights of the Child* p.237.

disabilities, children in conflict with the law and abused/exploited children. These categories of children have special needs, which have to be met so that they are able to benefit from the exercise of their rights.

Children involved with the administration of juvenile justice are a category of children who need special protection. According to rule 2(2)(a) of the Beijing Rules, "a juvenile is a child or young person who under the respective legal system may be dealt with for an offence in a manner which is different from an adult".<sup>44</sup> The CRC acknowledges that children can be accused of infringing the penal law. The CRC gives special protection measures to a child who is in conflict with the law. Article 40(2)(a) of the CRC protects the child from wrongful accusation. A child should not be accused or alleged to have infringed the penal law by reasons of acts or omissions which were not prohibited either by national or international law at the time they were committed. The second paragraph of article 40(2) places a duty on the State Party to inform the child immediately of the charges against him or her and if appropriate through his or her parents or legal guardians and to have legal or other appropriate assistance given to the child in preparation and presentation of his or her defense.

Where the child has a case to answer, the child is entitled to have the matter determined by a "competent independent and impartial authority or judicial body determining the charges need not be judicial provided the authority's procedures

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<sup>44</sup> *United Nations Standards Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*. Rule 2(2)a.

comply with the safeguards enshrined in the Convention. The lengthy formulations found in article 40(1) of CRC reflect the diversity in the types of juvenile proceeding throughout the world responsible for determining the penal responsibilities of children. The article (40 of CRC) also specifies the guarantees entitled to.

Children because of their vulnerability need to be protected against all forms of exploitation. The *Convention on the Rights of the Child* develops the concept of exploitation. It highlights specific forms of exploitation and incorporates a general prohibition against all forms of exploitation. Article 32 of the CRC specifies the child's right to be protected against economic exploitation, whilst the other articles, place a duty on the State to protect the child against exploitation without incorporating the phrase of rights.<sup>45</sup> Where protection against exploitation is regarded as a right, it is a right, which is usually associated with economic, social and cultural rights. Children lack an international forum in which to reinforce these entitlements of protection. They have to rely directly on States and non-governmental organizations to cover these protections.

Children who find themselves in emergency situations also need special protection. The child has a right to be protected during armed conflicts. Article 38 of CRC protects children caught in both international and internal armed conflicts. The CRC is an unusual treaty because it is expressly concerned both with international human rights law and international humanitarian law. These

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<sup>45</sup> See article 40(b)(iii) of the Convention on the Rights of the Child.

two bodies of law are vital in the protection of children in armed conflict. The CRC covers children caught up in international and internal armed conflicts. Internal disturbances and tensions such as riots, isolated and sporadic acts of violence, which have not reached the level of internal armed conflicts, are not at present regulated by the international humanitarian instruments. However article 22(3) of the *African Charter on the Rights and Welfare of the Child* covers lower levels of violence in of reference to "tension and strife".

Most of the world refugees are children under the age of eighteen.<sup>46</sup> As with other groups of children with special needs, child refugees as a group are doubly vulnerable, first as children and then as refugees. The 1951 Convention relating to the status of Refugees defines a refugee as any person who,

Owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable owing to such fear, or is unwilling to return to it.<sup>47</sup>

Article 22 of CRC focuses on child refugees. This article provides equality in the enjoyment of their applicable rights to both children recognized as refugees and children seeking asylum. In addition the non-discrimination principle in article 2 of the CRC is equally applicable to all children regardless of their citizenship, immigration status or any other status Child refugees, asylum seekers and rejected child asylum seekers are entitled to all the rights in the Convention on

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<sup>46</sup> Reoch R. (1994) *Human Rights: The New Consensus*. London, Regency Press p.81.

<sup>47</sup> 1957 Convention Relating to the Status of Refugees.

the Rights of the Child. Article 22 however has two weaknesses in regards to the general international legal protection of refugees. First, it still adopts the outdated definition of refugee and secondly it does not place a duty on states to provide asylum.

Lastly this category covers the rights of children belonging to a minority or an indigenous group. Article 3 of the CRC places a duty on states to respect the right of the child to associate with members of his or her group. The CRC recognizes that children of minorities or indigenous groups are likely to be overlooked in the realization of their rights to culture, language and religion. The CRC thus gives special protection measures to protect the identity of these children.

## **2.7 The Importance of the Convention on the Rights of the Child**

The *Convention on the Rights of the Child* seeks to establish international standards for the promotion and protection of the rights of the child. The Convention makes it clear that the child is a subject of international law and that all human rights are necessary for the child's survival, development, protection and participation.

The Convention is unique because it stresses international cooperation in the implementation of the provisions of the CRC. Paragraph 13 of the preamble recognizes the need for international cooperation. It states that:



Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries.

The call for international cooperation is mentioned in several articles. These articles include articles 22 on refugee; article 34 on sexual exploitation; article 35 on sale and trafficking of children and article 45 on implementation. International cooperation<sup>48</sup> is important not only in the realization of the rights of the child but also in creating peaceful co-existence among states. Co-operation is one of the modes of state interaction that does not involve conflict.

The Convention reverts to the futuristic vision of the United Nation to "save succeeding generations". The CRC is a body of international law, which safeguards the rights of the children now so that they can have a better future tomorrow. The CRC fulfils the United Nations Charter's aspirations of saving 'succeeding generations'.

The integrated approach to children rights, which the CRC adopts, sets standards for the present, by rehabilitating the children and restoring their rights as human beings. Children can now be seen as bearers of their own rights and not as objects of charity. This approach also believes in the indivisibility and interdependence of human rights. Thus, the rights categorized as first, second and third generations are interdependent. The CRC gives a good illustration of

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<sup>48</sup>For a discussion on the international cooperation principle see p 42 of the present chapter

this interdependence by embodying a whole set of rights from the first generation to the third generation.<sup>49</sup>

The Convention also gives an account of the challenges faced by millions of developing, vulnerable and dependent human beings. These challenges include armed conflict, economic and sexual exploitation, abuse and neglect. By identifying these challenges, the CRC seeks to protect children and offer the means to help overcome these challenges.

The CRC is not just a catalogue of the rights of the child. It also specifies duties for families, societies, states and the international community towards children. The Convention brings out especially the importance of the family, which is the basis of child development and the fulfillment of children's needs.

The CRC, which is a category of human rights specific to children, is universal in nature. Just like other international and fundamental human rights, the CRC is applicable to all states regardless of their economic, social or political status. The Convention is important because it opposes the unjust discrimination against the child. The principle of non-discrimination enshrined in the Convention protects the child from being discriminated against. The CRC is also protective. It protects the child from various forms of exploitation including economic exploitation. By protecting children from such forms of exploitation, their well being is assured.

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<sup>49</sup> See chapter 1 p.1-2.

The Convention addresses the special needs of children who appear to be beyond the reach of protection and development. These children include among others the rural child who has no access to services, resources and faces economic exploitation; the street child; the girl-child; the child-worker; the child prostitute; the handicapped child; the refugee (Stateless child); the child in prison; and the abused and neglected child.

# CHAPTER THREE

## THE RIGHTS OF THE KENYAN CHILD

### 3.0 Introduction

The previous chapter analyzed the *Convention on the Rights of the Child*. It traced the development of the convention from 1924 when the first Declaration on the Rights of the Child was issued up to 1989 when the United Nations adopted the C.R.C. The chapter looked at the legal framework of the C.R.C, the major principles that govern the rights of the child in International Law and the different sectors of the Convention.

An understanding of the Convention is important at this stage for the effective study of rights of the Kenyan child and the implementation of the C.R.C. It is after understanding the C.R.C and the provisions in it, that the study of the rights of the Kenyan child can be focused using the C.R.C as the frame.

Africa has joined hands with the rest of the world in declaring its determination to promote and protect the rights of the child. Kenya was among the first African States to ratify the *Convention on the Rights of the Child*. Indeed, its ratification as the twentieth ratifying state in 1990 brought the Convention into force. Despite Kenyan initiatives, some aspects of children's rights in Kenya are still wanting.

This chapter explores the rights of the Kenyan child in particular. The rights are analyzed within the framework of the CRC. The chapter begins by examining the perception of childhood in Kenya. The perception of childhood is important in understanding the rights of the child. Veerman maintains that the way children are conceptualized in a given community constitutes that society's 'image of childhood' and that the rights of children recognized in that society largely depends on the prevailing image of childhood.<sup>1</sup>

### 3.1 The Perception of Childhood in Kenya

Kenya like most African countries places a high value on children. Children play an important role in the stability of a marriage.<sup>2</sup> Children enhance the social status of the mother and secure her position in the husband's lineage. A marriage without children is often considered incomplete. Childhood is a time to learn, to build character and to acquire the social and technical skills necessary to perform the future roles of adulthood.<sup>3</sup> This is best illustrated by the Kipsigis children who perform several tasks like herding for boys and taking care of children for girls. The children show endless interest in the plant, animal and insect worlds among which they spend their days.<sup>4</sup>

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<sup>1</sup> Veerman P. (1992), *The Rights of the Child and the changing image of childhood*, Martinus Nijhoff Publishers, Dordrecht, p.398

<sup>2</sup> Rwezaura B. (1994) 'The Best Interest of the Child in the Changing Social and Economic Context of Sub-Saharan Africa' in P. Alston (ed) *The Best Interest of the Child: Culture and Human Rights*, UNICEF, Clarendon Press, Oxford pp.:87.

<sup>3</sup> Rwezaura B. (1998), "Competing 'images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa" *International Journal of Law Policy and the Family*, Vol.12, Oxford University Press, Oxford pp.:255.

<sup>4</sup> Orchardson I.Q (1961), *The Kipsigis*, East Africa Bureau, Nairobi p.49.

The perception of childhood in Kenya is varied since it depends on the various cultural definitions of children and childhood. The different ethnic groupings in Kenya define children and childhood differently. These definitions are based on a particular community's rite of passage. The rites of passage, which occur at different stages, often signify the end of childhood, and confer adulthood status on the individual irrespective of his/her numerical age.

Traditionally children performed economic and social roles in their families. Children provided the much needed labor for their families and the community. Children were expected to give support to the older generation, the sick and needy.<sup>5</sup> This had both an economic and social implication. Because of the crucial role played by children, importance was placed on having as many children. As Rwezaura argues, "the entire social system as well as its survival was organized around and geared towards the objective of acquiring as many children as the community could get."<sup>6</sup>

This traditional view of children still exerts an influence in our modern society. Many people still cling to the idea that children are important in the economic and social sphere. As long as this notion continues, the prevailing attitudes and trends towards child labor will be on the increase. The existence of child workers cannot be denied in Kenya. One of the reasons for child labor as Lisk argues are

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<sup>5</sup> Armstrong et al (1995), 'Towards a Cultural Understanding of the Interplay Between Children's and Women's Rights: An Eastern and Southern African Perspective'; *International Journal of Children's Rights* Vol.3 pp.:338

<sup>6</sup> Rwezaura B. (1994); *The Best Interests of the Child in the Changing Social and Economic Context of Sub-Saharan Africa*; in Alston (ed). *The Best Interest of the Child: Reconciling Culture and Human Rights*, UNICEF, Clarendon Press. Oxford pp.:92

economic hardships and social dislocations confronting the African region during the last two decades.<sup>7</sup> Economic hardships and social dislocation coupled with the traditional attitude towards children has resulted in children being sought as a cheap source of labor. Child labour interferes with the enjoyment of rights by the child as set out in the CRC. A child worker is denied many rights including the right to education, the right to experience proper and healthy childhood, and is often vulnerable to abuse and neglect.

With the ratification of the *Convention on the Rights of the Child*, it can be said that there has been some minimal shift in the perception of childhood. The CRC confers on children the status of bearers of rights as opposed to objects of charity. The Kenyan Government in its attempt of drafting a Bill on children's rights and a vision to amend the Constitution to include the child shows some kind of acknowledgement that children are indeed bearers of rights.

The draft Bill on Children Rights 1998 is meant to translate the CRC into the Kenya local jurisdiction. The Bill covers a wide range of rights and protections. It also outlines parental responsibilities. The 1998 Bill deals with the administration of children's services, institutions and courts. The Bill makes provisions for children in need of care and protection. The Bill however still has some anomalies. These anomalies impact on the realization of rights by children. For one, the Bill is silent on the girl child who needs special protection. Secondly the Bill does not make a

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<sup>7</sup> Lisk, IEP (1995), "Children in Especially Difficult Circumstances" in A. Baunham (ed) *The International Survey of Family Law* 1995, Martunus Nijhoff Publishers, Dordtretch pp.:457.

provision for a child to report an adult to the police. In a case where an adult is the perpetrator of the abuse.

### **3.2. The Rights of the Kenyan Child**

Children constitute a large proportion of the Kenyan population. According to the Kenyan Population Census 1989,<sup>8</sup> the total number of children was estimated at 15.1 million and is projected to increase to 16.2 million in the year 2003. Their proportion to the total population is expected to decline from 52 percent to 48.7 percent in 2003.

#### **3.2.1 The Constitution and Children Rights**

The present Constitution of Kenya, which should provide the legal framework for the protection of children rights, is silent on the child; it does not make specific mention of the child. A country's Constitution is vital in the protection of freedom and rights of its citizens. The Constitution by specifying rights and freedoms of individuals ensures that the law explicitly protects the human rights of its citizens and that the law enforces those rights.

The child as a special category of humanity needs special care and protection. The child because of his or her immaturity and vulnerability requires special protection measures. Although the child is implicitly covered by the present Constitution by virtue of the fact that children are members of civil society, by not

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<sup>8</sup> *The Kenyan Population Census 1989 Analytical Report vol.III, 1997.*



mentioning children specifically or denies them special protection measures. The present Constitution assumes that the general rights and freedoms provisions apply to the child. Although this may be correct, these rights and freedoms do not center on the needs of the child. They are too general and omit the special needs of the child. A constitutional basis is important for the protection of children's rights. The present constitution by not mentioning the child denies the child the rights to enjoy special treatment and protections, which are specified in the CRC.

Chapter V of the Constitution of Kenya, which covers the fundamental freedoms and rights of the Kenyan people, does not make specific mention of the child. However the Kenyan law that accords special treatment and protection to the child derives from the Constitution. The sections from the Constitution, which form the basis for child law in Kenya, include sections 70, 80 and 84 on fundamental rights and on the protection from all forms of discrimination.

The right to a name and nationality of the child in articles 7 and 8 of CRC and article 9 of CEDAW are guaranteed in Chapter VI of the Constitution of Kenya and the Citizenship Act (Cap 170 Laws of Kenya). The provision on the rights to nationality as specified by the Constitution and the Citizenship Act discriminate on the ground of gender. A child whose father is Kenyan automatically becomes a Kenyan citizen regardless of where he or she is born. But a child born outside Kenya to a Kenyan mother and a foreign father only becomes a Kenyan on applying applies for citizenship. This has several implications. Firstly, the child's

rights to a nationality are not guaranteed. Secondly, the child may not enjoy adequate protection from the state, which the mother belongs to. Thirdly, the child may be unable to enjoy the special treatment accorded to children by the state. There is a need therefore to make this provision on citizenship gender sensitive in order to guarantee the fundamental right to a nationality to every child regardless of parentage.

### **3.2.2 The Best Interest Principle**

The principle of the best interest of the child is upheld in various statutes. Under the Children and Young Persons Act (Cap 141 laws of Kenya), a court dealing with a child must take into consideration the best interest of the child by disassociating children from adult offenders. The Guardianship of Infants Act (Cap 144 Laws of Kenya) recognizes that the welfare of the child is the first and paramount consideration in matters of custody and upbringing. The Adoption orders under the Adoption Act (cap 140 Laws of Kenya) are based on the underlying principle of the best interest of the child. The Matrimonial Causes Act (Cap 152 Law of Kenya) calls for courts to safeguard the interests of the child when making orders for custody and maintenance of children.

Although the principle of the best interests of the child is easily applicable in the courts, it has not been extended to the policy areas and the family spheres. Most of Kenya's Development Plans and Policy Papers do not focus on the best interest of the child. They for example, require that children be provided with education, but fail to specify how all children will gain access to this education. Maintaining

the best interest principle is proving to be difficult at the national and community levels. This is due to the low budgetary allocation to child services. The Structural Adjustment Programs have also played havoc on resource allocation to promote children's rights. At the family level, the best interest principle is curtailed by financial constraints and cultural practices. The failure to uphold the best interest principle at the various levels hinders the realization of the other rights specified in the CRC.

### 3.2.3 The Right to Participation

The right of the Kenyan child to participation cannot be said to be guaranteed. There is a minimal involvement of children in decision making on matters that concern them. Many decisions continue to be carried out by older family members and adults. Although the rights to participation maybe protected by law in Kenya, it is usually not the case when it comes to the exercise of that right by the child. For example there is a policy for provision for student's council and unions, but students are rarely involved in the decision-making processes in their respective institutions.

The Nyeri High School tragedy where some students burnt some four prefects to death raised more question than it answered. Most of the people who tried to answer the question posed by the Daily Nation article titled 'why did students resort to such a horrendous act?'<sup>9</sup> attributed the act to drug abuse of the arsonist. Drug abuse may however be a symptom of deeper problems among the Kenyan

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<sup>9</sup> Daily Nation

youth. A more likely cause of drug abuse among Kenyan youth is turning out to be the denial of young people's right to participate in important issues that affect them.

#### **3.2.4 The First Call for Child**

The first call for the child principle calls for the prioritization of children's needs in the allocation of resources in both the bad times and in good times. The principle of first call for children goes beyond the allocation of resources. It also involves the inclusion of children's needs in all the policy and legal frameworks

In the area of resource allocation, the disbursement of resources to children in Kenya has remained low. This has diverse effect on the realization of children's rights to education, health and nutrition. This is indicated by the resource allocation in the financial years from 1990/91-1995/96 as shown in the table below

Table 1

Table of Real Government Expenditure on Basic Social Services (BSS), 1990-1995

SOCIAL SECTORS	1990	1991	1992	1993	1994	1995
Basic health care expenditure as percent of Real GDP	0.4	0.5	0.6	0.6	0.7	0.8
Basic health care services as percent of Government budget	1.4	1.4	1.3	1.2	0.9	1.3
Multinutrition services as percent of GDP	0.0	0.0	0.0	0.0	0.0	0.0
Multinutrition services as percent of Government budget	0.0	0.0	0.0	0.0	0.0	0.0
Reproductive health and FP services as a percent of GDP	0.1	0.1	0.1	0.1	0.0	0.1
Reproductive health and FP services as a percent of Government budget	0.3	0.3	0.3	0.3	0.0	0.3
Water and Sanitation as a percent of GDP	0.5	0.5	0.3	0.3	0.2	0.3
Water and Sanitation as a percent of Government budget	0.2	1.4	0.7	0.6	0.3	0.4
Basic education as a percent of GDP	3.3	3.9	4.5	4.7	6.2	6.8
Basic education as a percent of Government budget	12.1	10.6	10.3	8.9	7.7	10.6
All BSS as a percent of GDP	4.3	5.0	5.4	5.7	7.2	8.1
All BSS as a percent of Government budget	15.8	13.8	12.6	11.0	8.9	12.6
Total Government Expenditure	4223.7	4311.5	4332.2	4343.3	4474.4	4692.7

Source: BSS Report 20/20 Compact Study.

Since the 1990s when the Government of Kenya took up the Structural Adjustment Program, it has been reducing government expenditure on social services and transferring the responsibilities to users or communities. With this kind of approach at the national level coupled with an increase in the incidence of poverty at the household level, the rights of many Kenyan children continue to be violated. For example there has been a decline in primary school enrolment from 95 percent in the 1980s to 76 percent in the 90s. This shows that many children are being

denied their right to education. In health, there has been a decline in infant mortality and under five mortality rates in the 1990s.<sup>10</sup>

In the area of legal and policy framework, the special needs of the child are not reflected. The National Development Plans do not reflect the first call principle. They for example provide that children should have access to basic elements like education, food and health services, but do not say how they are to get access to them.

This clearly shows that the 'first call' principle is not well articulated. Children continue to be sidelined. The sidelining of children will interfere with the child's right to survival, development and participation. The child cannot be able to survive if his/her right to basic health is not realized. Neither can the child develop and be able to participate in society if he/she is denied access to education.

### 3.2.5 Definition of the Child

Article 1 of the CRC defines a child as anybody below the age of 18 years. The Kenyan definition of a child is quite diverse. The child can be defined from two perspectives: the legal dimension and the cultural dimension. The legal dimension on who a child is, is quite broad. The different statutory laws on the child give different definitions of who a child is. The Age of Majority Act (Cap 33 Laws of Kenya) defines the child as one under 18 years. The Children and Young Persons

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<sup>10</sup> G.O.K., *First Kenya Country Report on the Implementation of the UN Convention on the Rights of the Child* p.13.

Act (Cap 141 Laws of Kenya) defines a child as one below 14 years, a juvenile as one aged between 14-16 years and a young person as one between 16-18 years. The Penal Code (Cap 63 Laws of Kenya) defines the unborn child as a child. The Marriage Act (Cap 150 Laws of Kenya) gives different ages for girls and boys at which they may engage in marriage: 16 years for girls and 18 years for boys. The Kenyan Constitution's definition of childhood is quite ambiguous.. From the cultural dimension, definition of a child depends on how various ethnic communities define the transition from childhood to adulthood.

A definite definition of a child implies that children are able to enjoy additional rights which are only applicable during the period of childhood. The definition of childhood is critical in determining which specific rights are attached to the status of childhood and which legal remedies are available to children as a class of persons.

The lack of uniformity in the definition of a child in Kenya creates problems. It becomes difficult to apply the provisions of CRC across the board to all under 18. This is because; according to the national laws some children are termed as 'adults' before the age of 18. This implies that certain categories of children may be left out from the special protections of the CRC.

The early marriage of girls in Kenya is a common phenomenon. Such early marriage interferes with the enjoyment of other rights of the girl-child. The girl's

right to education is curtailed; she is able to enjoy her childhood. This jeopardizes the girl's chances of survival and development. The wide ranging definitions of childhood create loopholes for the abuse of children's rights.

### 3.2.6 The Absence of a Children's Bill

At the moment Kenya lacks a consistent body of laws relating to children. What is in place are scattered statutes. These are not adequate in protecting and ensuring the rights of the Kenyan children. A body of laws reflecting the CRC will ensure that people will not get away with violation of children's rights since there is a legal basis in place for the protection of children's rights. The statutory laws do not reflect some of the provisions in the CRC. This means that the rights of the Kenyan children will continue to be violated. For example, Kenya does not have a specific provision protecting children in situations of armed conflict, and yet the CRC places a duty on state parties to take measures including legal and administrative ones to ensure the protection and care of children who are affected by the armed conflict.<sup>11</sup>

The Government of Kenya in 1995 drafted a Bill on Children's Rights to reflect the CRC but it was rejected by parliament. Parliament argued that the Bill was short of the expectations expressed in the CRC. The Bill dealt with laws relating to certain aspects of the child's problems, but it ignored other problems that children in the society face. The Bill did not for example address the economic issues that affect

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<sup>11</sup> See article 38 of the *Convention on the Rights of the Child*



the child. It did not mention the rights of the child to education, shelter, health or even nutrition. Whereas the Bill was meant to streamline and consolidate all the different laws relating to children, it did not meet this expectation since it only reflected four of the 66 statutes on children's law. The Bill for example left out a provision on births and deaths. The danger which could have been created by the Bill if adopted was that it could have taken away from the child certain rights meant to protect him/her.

The NGO fraternity in Kenya was also instrumental in the rejection of the Bill. They argued that the Bill failed to provide for social security, and free and compulsory education of the child. Refugee children and the displaced children were also not adequately covered. The Bill also did not address the special needs of disabled children and children accompanying their mothers to jail. The Bill further failed to provide special protection to the girl child. It was also argued that the Bill was insensitive to religious concerns.

The rejection of the Bill meant that the Kenyan child's his/her rights were still not legally protected. The Kenyan child is thus still vulnerable to abuse. The Kenyan child cannot therefore enjoy the special treatment as envisaged by the CRC.

In 1998 the Government re-drafted the children's Bill. The 1998 Bill addressed some of the anomalies with the 1995 one.<sup>12</sup>

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<sup>12</sup>See *Table 2* for a comparison of children's bill 1995 with that of 1998.

The 1998 bill is yet to be presented in parliament for debate and adoption. In the mean time, the Kenyan child does not have a body of laws to protect all his/her rights as spelt out in the CRC.

**Table 2**

Table showing a comparison between the 1995 Children's Bill and the 1998 one.

Anomalies with the 1995 Bill	Responds in Revised 1998 Bill	Contents
Sec 8: Prevention of Children associating with adult offenders	No provisions made	No change
Sec. 22 National council of children service	Local trust and charitable organization not included NGO's not given 50 percent	Some change
Sec. 40(3) removal to hospital	No clarification made status the same	No change
Sec. (51) protection/discipline	Separation between children in need of protection and children offenders	There is change
Sec. (101) adoption	Non-citizen can't adopt unless given leave by the high court	
Clarification definition and gender sensitization	Clarification made and bill made gender sensitive	There is change
Sec. 7(1) prohibition of publication	No mention of publication	
Sec. 9(1) children not allowed in court	No mention of this provision	
Sec. 18(4) restriction of punishment	Provisions made for child not to be ordered to improvement or detention camp	There is change
Sec. 23(1) functions of council	The wordings remains the same as '95 bill'	No change
Sec. (36) release on license	Provision left out	
Sec. 37(1) revelation of approved school order	It has been redrafted/rephrased	There is change
Sec. 42(1) appointed local authorities	The wordings remains the same	No change
Sec 42(3), record keeping	No provision of record keeping	
Sec. 42(4), insert a 4	No provision made	
Sec 52(7) b penalty for cruelty and neglecting children	Word 'reasonable' maintained child to report adult to police	No change

Sec 53(1) proceedings in respect of children in need of protection and discipline	No provision or child to report adult to police	No change
Sec. 53(12) c make additions	No additions made	No change
Sec. 76(1) legal aid	No additions made	No change
Sec. 77(d) regulations	Additions not made	No change
Sec. (78) rules	No provisions	No change
Sec 142(2) general provision on adoption	Deletion not made	No change
Provision of education	Sec (7) primary education compulsory	There is change
Health and health services	Sec (8) right to health and medical care to be provided by State a parent	There is change
Standard of living	Provided in parental responsibility	There is change
Administration of juvenile justice	Included in the guarantees of a child accused of an offence	There is change
Child labor	Sec (9) under 16 years not allowed to work	There is change
Protection from abuse and neglect	Sec (12) protection from abuse and neglect	There is change
Sexual exploitation	Sec (14) protection from sexual exploitation	There is change
Drug abuse	Sec (15) protection from drug abuse	There is change
Rehabilitative care	Provisions made for rehabilitation center	There is change
The girl child	No provision for the girl child	No change

### 3.2.7 Right to Education

The right to education is spelt out in article 28 of the CRC. In Kenya every child has an equal right to education as specified by the Education Act (Cap 11 Laws of Kenya). Although the law holds that every Kenyan child has a right to education this is not necessarily the case.

At the national level, the Kenya Government has made it clear that primary education should be compulsory. Unfortunately primary education is not free. It is therefore very difficult to attract the attendance of all children given that the cost is exorbitant for many of the children's parents or guardians. It could have been

easier to make primary education compulsory if it was free. The introduction of cost sharing policies by the Government has meant that many children go without education. Many children in Kenya today have their right to education violated because of the unaffordable cost of school fees.

At the district/provincial level the right to access educational institutions is unevenly distributed. Some provinces like Nairobi and Coast are more endowed with educational institutions than in the North Eastern province. This implies that not all Kenyan children have equal access to educational facilities. Children in the rural areas are disadvantaged as they have to walk long distances to school. This impacts negatively on the child's enjoyment of his/her rights especially the right to education.

At the family level, the right to education is divided. For some children the right to education is guaranteed and protected. While for others this right is denied. Some of the factors that impede the implementation of the right to education at the family level include poverty and child labor which is a consequence of declining family income and cultural values.

The 8-4-4<sup>13</sup> model of education which Kenya has adopted has proved to be too wide and demanding. First, the system of education is resource based and requires a lot of input in terms of equipment. Because of this, the acquisition of

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<sup>13</sup> 8-4-4 stands for eight years in primary education, four years in secondary education and four years in university education.

skills on numeracy and literacy is difficult especially for students in the deprived or arid and semi arid areas. The workload associated with the system greatly interferes with the child's right to rest and leisure.<sup>14</sup> The system does not guarantee a child's right to participation. Students hardly participate in school decisions. Most of the decisions are made by the school administration with little if any consultation with the students. Protection rights are also not well guaranteed. There are cases of teachers abusing students both sexually and physically in institutions. The child's right to education in Kenya cannot be said to be fully secured.

### 3.2.8 Right to Health

Article 24 of the CRC obligates states parties to ensure the child's right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. In Kenya, the right to health is covered in the Public Health Act (Cap 242, Laws of Kenya), the Local Government Act (Cap 265, Laws of Kenya) and the Food, Drug and Chemical Substances Act (Cap 254, Laws of Kenya). These provisions are too general and do not lend themselves to the specific protection of children.

A sound health policy ensures survival and development of the child. The survival rights of a number of children in Kenya are denied. It is estimated that 115,000 children in Kenya are denied this right.<sup>15</sup> Factors that impede the enjoyment of this

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<sup>14</sup> See article 13 of *Convention on the Rights of the Child*

<sup>15</sup> G.O.K./UNICEF (1998), *Situation Analysis of Children and Women in Kenya* p.124.

right include among others inadequate knowledge among child caretakers on the need to access health services, resources availability and socio-economic factors. The low utilization of health facilities also interferes with the survival rights of the child. Lack of basic drugs, essential supplies at health centers and dispensaries have caused this low utilization.

Children from poor families suffer most from the violation of their right to health. This is as a result of the introduction of the policy of cost sharing in public health centers. It therefore means that children from poor families cannot access health facilities. The decline of government allocations to the health sector has also worsened the realization of this right. The Government's allocation to health has for example declined from 9.26 percent in 1979/80 to 7.61 percent in 1995/96. In any case, most of the money allocated to the Ministry of Health is spent on personnel's emoluments –about 70 percent –leaving a mere 30 percent on purchase of drugs, medical supplies, operational cost and physical facility maintenance.<sup>16</sup>

The child's right to freedom from malnutrition through provision of adequate and quality nutritious foods is not well protected. It is estimated that 38 percent of all deaths of fewer than 5 years are caused by malnutrition, 4 percent being from severe malnutrition and 34 percent from mild and moderate malnutrition.<sup>17</sup>

Micronutrient deficiency interferes with the survival and development of the child.

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<sup>16</sup> Ibid p.125.

<sup>17</sup> G.O.K./UNICEF (1998), *Situation Analysis of Children and Women in Kenya* p.131.

Some traditional beliefs, attitude and practices deny children their right to be protected from malnutrition.<sup>18</sup> For example some communities do not feed children on foods like eggs and paw paw despite their high nutritious value. This is because these foodstuffs are believed to delay teething and make the body swell.

### 3.2.9 Right of Children in Especially Difficult Circumstances

Children in especially difficult circumstances are those whose basic needs such as food, shelter, education, medical care and security are not met due to the adverse conditions in the society. Because Kenya is still undergoing rapid urbanization, a process which is associated with rapid socio-economic, cultural and political transformation this has brought about both positive and negative changes such that some families have not been able to cope with the pace.

There has been a shift in concept from Children in Especially Difficult Circumstances (CEDC) to the Children in Need of Special Protection (CNSP). The shift goes beyond the description of CEDC as merely needing special protection measures for their survival, development, protection and participation. CNSP is forward looking since it involves "poverty mapping" and continuous assessment to enhance capabilities of the local, physical administration and human infrastructure to protect the rights of the children.<sup>19</sup>

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<sup>18</sup> Kuna et al (1997), An Investigation of the Services Provided by Extension Workers to Women Farmers on Food Storage/Preservation and Nutrition in Bungoma District, Research Report No.25, African Academy Publishers Nairobi.

<sup>19</sup> The CNSP Concept was coined by UNICEF in 1996.

### a) Causes of Children in Need of Special Protection in Kenya

The failure of the families and communities in their primary responsibilities of ensuring child survival, protection and development tend to generate CNSP. Poverty deprives families of basic needs such as food, health, shelter, water and sanitation and education. Most of Kenya's family poverty levels have been owed to the short-term effects of the Structural Adjustment Programs (SAPs) whose net effect has been to reduce the ability to provide basic services.<sup>20</sup>

Family disintegration leading to single parent families, families headed by grandparents and child headed families is a major cause of CNSP. A survey of CNSP conducted in Kenya shows that most children aged between 0-18 years and CNSP are found in these types of families.<sup>21</sup>

Situations of CNSP are more likely to present themselves in areas of conflict, both structural and violent. Children are victims of conflict when they are either maimed or killed. They can also become agents of the internationalization of conflict, when they cross international borders as refugees to escape from conflict situations at home. In other cases they become internally displaced as a result of internal conflicts. Although all these situations affect all persons, women and children bear the worst hardships, since they are the most vulnerable.<sup>22</sup>

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<sup>20</sup> G.O.K/UNICEF (1998), *Children and Women Rights in Kenya: A Situation Analysis*, UNICEF-KOF, Nairobi.

<sup>21</sup> G.O.K/UNICEF/Family Support Institute (1997), *Survey on Children in Especially Difficult Circumstances*, Nairobi.

<sup>22</sup> Mwangi M. and Karuru N. (1998), *Women's Land and Poverty Rights in Conflict Situations*, CCR/WLEA, Nairobi p.15.



## *b) Categories of Children in Need of Special Protection*

Children who constitute CNSP overlap and one child may be found in several groups. CNSP comprise both male and female children. While male children often dominate the streets, female children dominate the households. Urban areas have a disproportionately large numbers of CNSP cases compared to the rural areas. According to a study done by G.O.K/UNICEF and family support institution in 1997, between one-fifth and three-quarters of CNSP lacked access to critical child protection and development amenities. More than three-quarters of children (83 percent) participated in child labor, while 85 percent did not live in family nor received parental care. About 51 percent lacked access to schooling while 50 percent lacked access to shelter and ate only once or twice a day.<sup>23</sup>

Street children constitute a large number of CNSP. These children are normally dirty, have poor health, and are stunted. They come from poor backgrounds and single parent families. Being young and without adult company, street children face many risks since nobody protects them. Adults and drug peddlers expose them to exploitation. Some are used in drug trafficking and in the process become addicted. In some cases they are used by adults in criminal activities such as robbery and stealing and have ended up losing their lives in the process.

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<sup>23</sup> G.O.K/UNICEF/Family Support Institution (1997), *Survey on Children in Especially Difficult Circumstances*, Nairobi.

The child worker is another category of CNSP. It is estimated that there are 4-6 million child workers in Kenya.<sup>24</sup> They are to be found mostly in the agricultural sector, domestic services, informal sector, street children and commercial sexual work.

Disabled children who include the visually handicapped, auditory handicapped, physically handicapped, children with internal disorders, mentally handicapped and multiple handicapped are in need of special protection. Ten percent of the Kenyan child population is estimated to be handicapped. These children are vulnerable to mistreatment, abuse, neglect, abandonment and discrimination.

Adolescent mothers, child brides, abandoned and neglected children, battered children and orphaned children are another category of children in need of special protection. Others include juvenile drug users and traffickers, children of imprisoned mothers, refugee children, children infected and affected by AIDS and lastly children living in the remote areas.

### *c) Rights Analysis of Children in need of Special Protection*

Children in need of Special Protection have their rights to survival, development and protection threatened. The various categories CEDC do not enjoy the rights guaranteed by CRC. The position in which they find themselves hinders the enjoyment of these rights.

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<sup>24</sup> G.O.K (1997), *National Development Plan 1997-2001*, Government Printers, Nairobi.

The children in the various categories of CEDC face a lot of discrimination from the family and the community at large. Article 2 of CRC deals with the discrimination of the child. It provides that the child should not be discriminated against on whatever grounds. This is hardly the case with the disabled child, children affected with AIDS, the street children, refugee children and the child worker. CEDCs instead face a lot of discrimination. Article 2 of the 1966 *International Covenant on Civil and Political Rights*, prohibits distinction of any kind or status. This was long before the 1989 CRC and it affirms that no person should be discriminated against. Article 24(1) of the *International Covenant on Civil and Political Rights* also requires that children should not be discriminated against.

Alston argues that in terms of international law, the obligation to 'respect' requires states to refrain from any actions that would violate any of the rights of the child under the CRC. The obligation to 'ensure' goes well beyond that of 'respect', since it implies an affirmative obligation on the part of the state to take whatever measures it deems necessary to enable individuals to enjoy and exercise the relevant right.<sup>25</sup> Article 2 of the CRC should be read together with other articles ensuring that all rights mentioned are available to all children without discrimination of any kind.

Article 6 of CRC contains a general principle guaranteeing the child the fundamental right to life, upheld as a universal human rights principle in other

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Alston P. (1992), "The Legal Framework of the Convention on the Rights of the Child" in *Bulletin of Human rights* 91/2, *the Rights of the Child*, UN, Geneva p 5.

instruments, and to survival and development to the maximum extent possible. The various categories of CNSP are not guaranteed survival, development, and protection. The child worker for example, because of his/her vulnerability and tender age, is likely to work in conditions which threaten his/her life, interfering with his/her development, and lacks protection from the adults. The same applies to other categories of CNSP.

The CRC Committee sees development as a holistic concept, and many articles of the Convention (CRC) specifically refer to the goal of development.<sup>26</sup> Protection from violence and exploitation is also vital to the attainment of maximum level of survival and development. The right to life is also not guaranteed because of the circumstances they are in. The right to life is upheld as a universal human right principle in Article 3 of the *Universal Declaration of Human Rights*. Article 6 of *International Covenant on Civil and Political Rights* shares the same principle. The inherent right to life of the child is reflected in article 24 of the CRC.

CNSP have the right to be cared for by their parents but this is rarely the case. Article 7 of the CRC provides for the registration of children and for the children's right to acquire nationality, and as far as possible, the right to know and be cared by his/her parents. The right to know one's parents is at times not realized especially for the babies of young girls. The right to be cared for by parents is not realized for the street child, the child worker, the child bride, the abandoned and

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<sup>26</sup> Hodgkin R. and Newell P (1998), *Implementation Handbook for the CRC*, UNICEF, New York.

neglected child and the disabled child. These categories of CNSP do not enjoy their right to be cared for by their parents. Many a times these children fend for themselves, and the right to be cared for by their parents is not realized.

Article 9 of the CRC enshrines provides essential principles. First, that children should not be separated from their parents unless it is for their best interest. Secondly, all proceedings to separate children from parents on that ground must be fair. Article 6 of the 1959 *Declaration on the Rights of the Child* stresses that "the child, for the full and harmonious development of his personality, needs, love and understanding. He should wherever possible grow up in the care and under the responsibility of his parents". This suggests that any separation of the child from the parents is an infringement of the child's right.

Parents in extreme circumstances of poverty, violence or armed conflict may abandon the children or the children. Parents and children may also simply lose contact with each other as a result of the pressures of such events. Sometimes children leave home for the streets because of violence or exploitation by the parents. Article 19 of the CRC requires that children be protected from all forms of physical or mental violence while in the care of parents or others. This is usually not the case with CNSP. They are often exploited and abused by adults who come into contact with them. Their rights to protection under article 19 are not therefore met. The child has a right to be protected from injury and abuse, neglect, maltreatment or exploitation, including sexual abuse. The right of CNSP to

protection is curtailed. Because they lack protection, they become vulnerable to all kinds of abuses and exploitation.

Refugee children are among the most vulnerable groups. Article 22 of CRC addresses the rights of refugee children to appropriate protection and humanitarian assistance including tracing family members. Refugee children in most cases do not have their rights met. This might be due to pressures, which the receiving state face in providing for them. These children go without education, receive minimal health care, and live in poor environments.

Article 24 of CRC guarantees children's rights to health and related services. Almost all the categories of CNSP lack this right. For many cases CNSP do not have access to health services. Their right to health is therefore not met. Many face health problems like infections, malnutrition and other ailments. Their position makes it difficult for them to get access to medical care, and thus their right to survival and development is interfered with.

CNSP have their rights violated and that is precisely why they need special care and protection. The children's right to life is threatened and not guaranteed. They lack access to basic education, medical care and health facilities. These children are often discriminated against, and do not have a chance to participate in decision-making. These children also do not get the chance to enjoy their childhood.

There is a need for policy makers to put up policies to address the CNSP situation in Kenya. Also, the advocacy for the rights of the child needs to be championed in the Kenyan citizenry.

# CHAPTER FOUR

## FACTORS THAT IMPEDE THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN KENYA

### 4.0 Introduction

It was argued in the previous chapter that the rights of the Kenyan child are not well protected. The child's right, especially with regard to survival, protection, development and participation have not been fully met. One of the major reasons why Kenyan children do not enjoy their rights to the maximum is because the Convention on The Rights of The Child (CRC), which is meant to protect the rights of the child, has not been fully implemented.

The rights of the Kenyan child could be guaranteed if the CRC is implemented to the fullest. Kenya, in upholding the right of the child, ratified the Convention in 1990. Almost a decade after the ratification, the situation of the rights of the child in Kenya is still wanting. This has been because of the slow implementation of the CRC. This chapter will discuss in detail the factors that have impeded the fast implementation of the CRC

It is ironic that Kenya, which was on the forefront during the drafting of the African Charter on the Rights and Welfare of the Child, has not yet ratified the Charter.



This may be what Kattambo calls an 'administrative oversight',<sup>1</sup> but it raises an question of whether Kenya finds principles enshrined in the charter relevant to its situation.

#### **4.1 Factors That Impede the Implementation of the Convention on the Rights of the Child**

##### **4.1.1 The Constitution of Kenya**

The Constitution of Kenya is not clear on how international law should be applied in the municipal jurisdiction. And neither does the Constitution accord international law any superiority over municipal law. The lack of a clear constitutional framework undermines the implementation of the CRC.

The *Judicature Act* (Chapter 8 , Laws of Kenya) requires that guidance should be sought in the *English Common Law* whenever the local legislation is silent. The common law itself specifies that the conduct of foreign relations and conclusion of treaties is the prerogative of the crown that is the executive. Where the implementation of a treaty requires a change in the municipal law, parliament has to pass an enabling act before the treaty can have the force of law. Where such

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<sup>1</sup> Kattambo V. W (1991). 'Gaps in the Law and Policy for the Implementation on the Treaty-Based Rights of Children in Kenya' (A paper prepared for the workshop on the implementation of Treaty Based Rights of African Women and Children, organized by LETWAL International).

an enabling act is absent, the treaty cannot be said to be part of the Kenyan law and cannot therefore be invoked before or enforced by Kenyan Courts.<sup>2</sup>

This argument is simplistic at least to the extent that it treats all treaties as being the same. In dealing with the CRC, we are dealing with a human rights treaty. Certainly human rights treaties qualify to be subjected under the category of customary international law. These would include the prohibition of torture, genocide and slavery and the principle of non-discrimination. These are reiterated in articles 37, 35, and 2 of the CRC.

As earlier mentioned, in principle customary international law is binding to all states. The rules of customary international law should be applied in municipal courts whether transformation has been effected or not. Thus the argument that an international law or agreement that has not been transformed cannot be invoked in local courts does not apply in the case of customary law. Kenya cannot plead domestic procedures to overrule the implementation of customary laws enshrined in the CRC.

#### 4.1.2 Treaty Practice in Kenya

Kenya has been able to transform some treaties into municipal law. These include the *Vienna Convention on Diplomatic Relations* (1961) to be found in the Immunities and Privileges Act (Chapter 179, Laws of Kenya). The four Geneva

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<sup>2</sup> Kiraitu Murungi (1988), *The Status of the Child in Kenya: The Legal Dimension* in Report of a Workshop on the Rights of the Kenyan Child. Nairobi.

Conventions on armed conflicts have been transformed to the Geneva Conventions Act (Chapter 198, Laws of Kenya). Despite having developed some kind of framework to transform these treaties, Kenya still lacks clear policy guidelines on the implementation of human rights treaties. Kenya in its practice of transforming treaties has adopted a combination of the three approaches. The first holds that no ratification is necessary for permissive treaties whose provisions are not inconsistent with any law in force in Kenya. The second approach requires an Act of Parliament to give a treaty legal effect in Kenya. This is applicable for treaties that require an act or omission not expressly authorized by the laws of Kenya. The third approach caters for treaties that contain a provision or provisions not catered for by the existing legislation, and then the relevant ministry introduces a Bill in Parliament to give legal effect to such provision(s).<sup>3</sup>

This above state of affairs creates uncertainties on the modality to be adopted in implementing human rights treaties. True, the three modalities of transformation can all be effectively used to translate the CRC into municipal law. The problem is choosing which of the three to follow since they all seem to be relevant. Kenya needs to develop a specific approach of transforming treaty based rights into municipal law.

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<sup>3</sup> Mwagiru M. and Hunja R. (1990), 'Aspect of Treaty Practice in Kenya' in *Lesotho Law Journal* Vol.6 No.2 pp.:20.

The transformation issue aside, although the Constitution of Kenya guarantees fundamental rights and freedom to all, it does not make specific mention of the child. The non-inclusion of the child in the Constitution denies the child special treatment and protections. Children's rights are different from adults' rights because they include protection. The lack of Constitutional protection of children's rights it impacts negatively on the implementation of the CRC. The absence of special protection measures in the constitution implies that the CRC lacks a firm constitutional basis on which to ground its provisions.

#### **4.1.3 The Multiplicity of Personal Laws**

Section 82(4) of the Constitution of Kenya recognizes the application of multiple systems of personal laws in order to accommodate the views of its various communities' diverse cultural and religious backgrounds. The personal laws applicable in Kenya include African customary law, Hindu law, Islamic law, and statutory law. This multiplicity of personal laws presents a problem of providing uniform standards in a multi-cultural or multi-religious state such as Kenya. It becomes difficult to implement uniform standards across the board without infringing on some personal laws.

The multiplicity of personal laws implies that the CRC, which may demand changes in attitude and traditional practices, must be implemented cautiously in order to accommodate the different cultures. If this be the case, there might be a possibility of leaving out some provisions of the CRC in the implementation process in order to cater for the different personal laws. This will greatly

compromise the rights of the child as specified in the CRC. For instance Article 24(3) of CRC calls upon states parties to abolish traditional practices prejudicial to the health of children. Yet some sections of the Kenyan customary law uphold certain traditional practices that are prejudicial to the health of the child. For example, female circumcision and harmful rites of passage among the boys. The Babukusu of Western Kenya have very agonizing practices which boys must undergo before circumcision.<sup>4</sup> Some of these practices are detrimental to the health of the child. In such a case where the CRC demands the abolition of traditional practices yet the customary law protects them, there is bound to be a conflict. There is therefore a real danger of compromising the rights of the child in order to accommodate the different personal laws.

The different personal laws need to be harmonized in order to provide a conducive environment for the implementation of the CRC. The aspects which need harmonization include the definition of the child or childhood, and attitude towards children and other practices that are injurious to the child. The harmonization of the personal laws, if it is to be done, will take long protracted legal battles. Before such a harmonization could be attempted, the implementation of the CRC will continue to be impeded. Going by Kenya's past experience on the setting up of Commissions and Task Forces to review laws and investigate issues, the harmonization of these personal laws may take quite some time.

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<sup>4</sup> For an insight of Babukusu Circumcision practices see Meritt J. H. (1976), *A Study of Change of Circumcision Rituals among the Abaluhya of Buhgoma and Kakamega District of Western Kenya Since 1900 AD* (Thesis).

#### **4.1.4 The Multi-Sourced System of Law**

Kenya has a multi-tiered and multi-sourced system of law. The sources of law include the Constitution which is the supreme law of the land, Acts of parliament provided in the Judicature Act (Chapter 8, Laws of Kenya), the substance of common law, doctrines of equity and statutes of general application in force in England as of 12<sup>th</sup> August 1897, the procedure and practice observed in courts of Justice in England at that date, customary and religious personal laws.

The nature of the legal system in Kenya does not focus on the rights of the child as articulated in the CRC. The scattered nature of child law in Kenya demonstrates the lack of a firm conceptual base of the law relating to children. A clear-cut conceptual framework on child law is essential for the implementation of the CRC. The framework is the starting point in the implementation process. It is from such a framework that the provisions in the CRC can be implemented. The lack of such a framework greatly interferes with the implementation of the CRC.

#### **4.1.5 Inadequate Law on Child Survival and Development**

The law relating to the child's right to survival and development can be traced to the Constitution and various statutes including the Penal Code (Cap 63, Laws of Kenya), the Children and Young persons Act (Cap 141, Laws of Kenya) the Public Health Act (Cap 242, Laws of Kenya) the Guardianship of Infant Act (Cap 144, Laws of Kenya), the Adoption Act (Cap 143, Laws of Kenya), the Education Act (Cap 211, Laws of Kenya) and the National Social Security Fund Act (Cap 258, Laws of Kenya). These statutes have inadequacies which have far reaching

implications for the implementation of the CRC. These statutes do not give specific obligations to the state or the family to provide these rights. For example, the Public Health Act is concerned with the monitoring of disease epidemics, their management and the provision of preventive, promotive and curative health services, but it does not specify any specific obligation to the state or family to provide for the child. As long as the statutes do not specify obligations on the state and/or the family, the implementation of the CRC will be quite difficult.

A link between the responsibility of state and family responsibility is vital in the realization of the survival and development rights of the child. Both the state and the family should coordinate their efforts in ensuring the survival and development of the child. This coordination can be assured if there are laws establishing the link between the responsibility of the state and that of the family responsibility. Unfortunately, the law relating to the child's right to survival and development does not establish a clear link between the two levels of responsibility. The poor linkage is detrimental to the realization of the best interests of the child.

The Constitution of Kenya while it guarantees fundamental human rights and freedoms which apply to both children and adults, fails to mention social and economic rights. Social and economic rights are necessary in providing the child with survival and developmental rights. Perhaps this omission is understandable

given the fact that the provision of survival and development rights entails a lot of resources on the part of the state. This may therefore discourage a state party from taking active steps towards implementing the CRC.

#### **4.1.6 Legal Technicalities and Administrative Problems**

Legal technicalities and administrative problems undermine the implementation of legal protection rights. The right to protection in Kenya is widely covered in statutory law. Protection rights encompass the issues of citizenship, birth, identity, protection from neglect and all forms of abuse including sexual abuse; protection from economic exploitation; protection from use of illicit drugs or narcotics and trafficking in such substances, abduction; sale or other forms of exploitation.

Legal technicalities arise in the provision of protection rights to children. These technicalities hinder the full realization of the right specified in the CRC. For example in the area of citizenship, the Kenyan Citizenship Act (Cap 170, Laws of Kenya) does not guarantee equal citizenship to every child. Children born of Kenyan fathers whether in or outside Kenya automatically become Kenyan citizen. This is not the case with children born outside Kenya to a Kenyan mother and a non-Kenyan father, for they have to apply for citizenship. This means that children born of Kenyan mothers and non-Kenyan fathers don't have their citizenship protected so is their state identity.



Legal technicalities in the prosecution of sexual offences against young girls create obstacles in the realization of their protection rights. The requirement of corroborating the evidence of a child is a major constraint to the prosecution of sexual offences on children. It is also unfair and unrealistic. The provision for corroboration causes a lot of injustice especially in sexual offences against young girls where they are single witnesses. The Evidence Act should be amended to remove the provision of corroboration of evidence for children below 12 years.

Administrative problems that undermine the implementation of protection rights include the lack of enough resources to guarantee the right to privacy, police stations and shelter or homes for the abused children, the difficulty in detecting cases of abuse and exploitation especially in the family setting, the inadequacies of various implementing agencies, and the social attitudes towards abuse and exploitation of children.

#### **4.1.7 Inadequate Policy Framework**

The policy framework is concerned with issues of governance, resource mobilization, resource allocation and utilization and accountability. The government of Kenya Policy Framework is usually contained in the National Development Plans, Laws, Sessional Papers and budget speeches.

A sound policy framework is essential for the implementation of the CRC. A country's policy framework reflects its perception of an issue and the importance which it attaches to that issue. The policy framework is meant to act as a guide

to the public and private sectors as well as other stakeholders on how to make children realize their rights as stipulated in the CRC. A policy framework is also meant to outline the responsibilities of all stakeholders towards the child. The policy framework which is usually made at the national level must be informed by the requirements and statements of the international law on the rights of the child. It is only when the policy framework is informed by international law on the rights of the child that the implementation of the CRC provisions be met more effectively.

The current policy framework in Kenya does not emphasize the rights of the child. Sessional papers, budget speeches and other policy framework papers rarely mention the child, and if they do, it is only in passing. The current (1997-2001) Development Plan makes superficial reference to the child and it does not specify any approach to be taken to facilitate a comprehensive policy on children. It in fact acknowledges this when it notes, "there exists no child welfare policy"<sup>5</sup> Kenya does not have a sessional paper specifically on children's rights. The lack of adequate policy frameworks impedes the implementation of the CRC since key actors in the implementation process do not feel that they have an obligation to provide for the rights of the child.

Earlier, in 1992, the Kenyan government pursuant to the World Summit for Children in 1990 established the National Programme of Action for Children (NPAC). The NPAC outlines goals and strategies needed to respond effectively

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<sup>5</sup> G.O.K, *Kenya National Development Plan (1997-2001)*, Government Printers, Nairobi, para 6.10.1.

to the objectives agreed on during the summit.<sup>6</sup> The Kenya's NPAC goals include reduction of infant mortality, reduction of maternal mortality, reduction of malnutrition, increased immunization coverage, reduction of acute respiratory infections rate, achievement of universal access to primary education and increased participation of girls in education, provision of access to safe drinking water, enactment of legislation to protect the rights of children, design more gender-sensitive development programmes which recognize women's productive and reproductive roles and reduce incidences of poverty. The NPAC was to be implemented by the government in collaboration with Non Governmental Organizations (NGOs).

The implementation of children's rights cannot be restricted to only the government and the NGOs, but must be extended to other actors which could equally play a vital role. These include public and private institutions, community based organizations, life ministries and the family. Apparently, the NPAC has not acknowledged the importance of coordinating the roles played by these actors. In the absence of such coordination efforts, the policy formulation goal is bound to be elusive.

#### 4.1.8 Poverty

The prevalence of high rates of poverty in Kenya interferes with the realization of CRC provisions. According to 1994 economics statistics, 47 percent of the rural

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<sup>6</sup> G.O.K (1992), The National Plan of Action for Children in the 90s.

population and 29 percent of the urban population were identified as poor.<sup>7</sup>

Poverty in Kenya is caused by several factors which include the lack of access to factors of production (land, capital, skills and education), sluggish economic growth, rapid population growth coupled with diminishing resources, low incomes and poor income distribution, and the increasing rates of HIV/AIDS infections and other disabilities.

Poverty impedes the realization of the rights of the child. Poverty at the household level interferes with the provision of nutrition and health services which is essential for the survival of the child. Many children die because of malnutrition and poor health standards. Families with low incomes find it difficult to provide adequate food to their children. The right of the child to good nutrition and health as stated by article 24(2(c)) of the CRC becomes impossible to implement especially in poor households.

Poverty at the family level, coupled with the slow pace of a nation's development process greatly contributes to child labor. Child labor in Kenya is increasing because of the rising levels of poverty. There are several statutes which protect the child from economic exploitation. These include among others the Employment Act (Cap 226, Laws of Kenya), the Employment of Women, and Young persons Act (Cap 227, Laws of Kenya), the Trade Unions Act (Cap 233, Laws of Kenya) and the Children and Young Persons Act (Cap 141, Laws of Kenya). Despite these laws, children in Kenya are still found working in

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<sup>7</sup> Kenya Welfare Monitoring Survey (WMS 11) 1994

plantations, mines and quarries, hawking and in most households they are domestic helps. In fact in 1996 Kenya was ranked the 6<sup>th</sup> state in Africa in terms of child labor for children aged 10-14 years.<sup>8</sup> With the prevalence of poverty in Kenya, the implementation of article 32 of CRC which protects the child from economic exploitation is bound to be elusive. Families send out children to work so as to supplement the family income. Employers also prefer child labor because it is a cheap source of labor. Moreover, children do not strike or disrupt production and they are the easiest to sack from employment. Child labor which is a consequence of poverty also impacts on the enjoyment of other rights by the child. A child worker is for instance denied the right to education and to enjoy childhood.

Poverty is a major cause of sexual exploitation today. Young girls have been forced into prostitution to earn income to support their families. Sexual exploitation can amount to economic exploitation where money, goods or services are used as payment either directly to the child or indirectly to others. Street children are in particular risk of sexual exploitation. The children of women who are themselves in prostitution and housemaids are equally at risk. Article 34 of CRC obliges states to protect children from sexual exploitation and abuse. Despite having statutes which seek to protect children from sexual exploitation in Kenya, for example the Penal Code and the Children and Young Persons Act)

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<sup>8</sup> See G.O.K (1999), *First Kenyan Report on the Implementation of the UN Convention on the Rights of the child* p.88.

children in Kenya continue to be sexually exploited. Sexual exploitation has adverse consequences on the health of the child.

These examples show that poverty interferes with the enforcement of the protective rights of the child. Inasmuch as the need to protect children from economic and sexual exploitation is there, poverty has forced children to work and this has greatly interfered with the realization of other rights in the CRC. Poverty, especially at the household level is making implementation of the CRC quite difficult.

#### **4.1.9 Decline in Government Expenditure**

Kenya's poor economic performance in the last five years or so has forced the government to reduce its expenditure on social services to counter its budgetary deficits. In 1992, Kenya recorded in real GDP a growth rate of 2.8 percent and 0.2 percent in 1993. The growth rate for 1995 was 4.8 percent while that for 1996 was 4.6 percent. In 1997, the economy recorded a decline of 2.3 percent against a projected growth of 5.0 percent in 1996.<sup>9</sup>

The economic crises facing the country has led to the reduction of government expenditure on social services and the responsibility has been transferred to the public. This shift coupled with the increase in poverty levels of most of Kenyan families has meant a decline in access to social services such as education, health, nutrition, water sanitation and security. Children from poor families have

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<sup>9</sup> Economic Surveys of 1992-1997.

been hit hard because their families can hardly pay for the provision of these basic services; hence, their rights as enshrined in the CRC are greatly compromised. In this event, the implementation of the CRC's provisions has become almost impossible, thus greatly disadvantaging children's enjoyment of their rights.

Apart from the decline in government expenditure, the introduction of Structural Adjustment Programs (SAPs) has affected the implementation of the CRC. Structural adjustment has led to a decrease in the average income of the majority of the Kenyan population especially with regard to the poorest of the poor. This means that poor families cannot satisfy the nutritional needs of their children. If these children fall sick they have no access to either curative or preventive medicine. The introduction of SAPs resulted in the principle of cost sharing. The cost sharing principle is where the user of social services provided by the government pay a certain fee in order to access those services. Before the introduction of the SAPs in Kenya, health services and education in the public institutions were free. This meant that no section of the population could be locked out from the provision of basic social services. With the introduction of SAPs which were meant to correct ailing or non-performing economies, one of the requirements was the reduction of government expenditure. In order to meet this requirement, the government had to introduce user fees on social services in order to share the cost.

#### 4.1.10 Corruption

Corruption is yet another factor that is slowing down the progress of the country not to mention its effect on the realization of children's rights. Corruption has gained ground in Kenya and thus greatly affected the implementation of the CRC especially at the national level.

High levels of corruption have led to the importation of duty free or highly subsidized goods which have competed unfairly with locally produced commodities. This has led to a decline of the indigenous Kenyan manufacturing and agricultural sectors. High-level corruption has also severely discouraged foreign investment and led to the withdrawal of the donor development assistance or aid by the International Monetary Fund and other donor agencies. This has affected Kenya's macro economy stability. The net result of these withdrawals has been to increases in taxes and a reduction of the government expenditure on social services. Consequently, the implementation of CRC has become quite difficult.

Corruption further impedes the implementation of the CRC especially when it comes to the allocation of resources for enhancing child welfare. For instance, funds meant for development may be misappropriated and this interferes with provisions like health and education facilities. The mischannelling of funds meant for basic services provision to other projects can all be attributed to corruption. Kenya is now ranked as one of the most corrupt country in the world. The Kenyan government has connived willingly or unknowingly with thieves to swindle



the public coffers of money meant to finance development projects. The corrupt nature of the Kenyan society has impacted negatively on the implementation of the CRC.

#### 4.1.11 Culture

Culture is a people's way of life. Culture entails a whole range of a people's perception of the world, their behavior and practices, their beliefs and relations. The Kenyan society is composed of diverse cultures. The Kenyan communities hold their cultural practices dear. Despite the influence of western ideas, most of the Kenyan population practices and adheres to their cultural attitudes and practices.

Traditional cultures in themselves are not bad. Indeed some like those which hold that a child belongs to the community are positive. Here, every member of that community has an obligation to ensure the well being of the child. This is in harmony with the provisions of the CRC which calls upon the family, community and states to cooperate in bringing up children.

Culture can be an impediment to the realization of the rights of the child when certain practices interfere with the rights of the child. Cultural arguments have been used to deny children their rights. For example some have argued that, educating girls is a waste of resources, since a girl will get married and her education will not benefit her family but will benefit her husband's family instead. This has been used to deny girls their rights to education. Cultural arguments

have also been developed to defend practices which are detrimental to the health of the child. One of the arguments used to justify female circumcision (Female Genital Mutilation (FGM) among cultures which practice it is that, if that particular rite is not carried out the girl cannot graduate to womanhood nor get married.<sup>10</sup>

The practice of 'son preference' is yet another cultural practice that interferes with children's rights and especially the rights of the girl child. The preferential treatment given to male children especially in rural areas jeopardizes the equal rights of the girl child. The girl child will often receive less care and is denied certain rights like education. This greatly interferes with the survival and development of the girl child.

Many communities regard many of these cultural practices as the core material binding the community together. Hence it is important for the state to consider how these practices may be eliminated whilst preserving traditional lifestyles.

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<sup>10</sup> Van Bueren (1998) *International Law on the Rights of the Child*.

# CHAPTER FIVE

## THE STATE OF IMPLEMENTATION: A CRITICAL ANALYSIS

### 5.0 Introduction

Chapter four found that the rights of the child are still wanting in many aspects. The reason as to why the rights of the Kenyan child are not guaranteed is because the CRC has not been implemented fully. Chapter four sort to explain the reasons as to why the CRC has not been implemented fully. The slow implementation of the CRC in Kenya is due to a combination of factors ranging from weak legal and policy frameworks, poverty, and economic hardships to corruption and cultural attitudes.

Having examined the Convention on the Rights of the Child in detailed rights of the Kenya child and the factors that are impeding the implementation of the CRC, this chapter will discuss the state of implementation. It analyses critically Kenya's achievement in its implementation of the CRC. The chapter examines the extent to which Kenya has responded to the requirements of the CRC, and what has not been done. It will seek to explain why Kenya has not achieved the standards required by the CRC.

## 5.1 Kenya's Achievements in the Implementation Process

One of the greatest achievements Kenya has made towards the realization of children rights is the ratification of the *Convention on the Rights of the Child*. In ratifying the CRC Kenya expressed its desire to be bound by the international law on the rights of the child. The ratification of the CRC clearly shows that Kenya has a concern (at least theoretically) for the welfare of its children.

The ratification of a Convention is however just the first step towards the achievement of the main goal. The main issue is the implementation of the provisions set out in the Convention. As long as the Convention has not been implemented on the ground, it continues to remain as an obstruction and has very little impact on or consequence for the population at which it is targeted. Although Kenya might boast as one of the first nations to ratify the CRC, the question is how much it has fulfilled its obligations towards the development of children's rights. Kenya might not have done so much in the last 10 years since the ratification but at least it has tried.

In 1997 the Government of Kenya made a great leap forward by amending the Constitution to include sex as one of the grounds on which discrimination is prohibited. Before this amendment the Constitution did not recognize sex as a ground for discrimination. This allowed for discrimination on the grounds of sex and women and the girl child received unfair treatment from the society. This meant that women could not compete equally with men for resources and

opportunities like education and employment. Discrimination against women and the child is prohibited by human rights instruments including the CEDAW and CRC which Kenya is party to. By prohibiting sex discrimination in Kenya, it means that Kenya is in tune with the CRC. Today both the girl and the boy child have equal opportunities in education. although law prohibits discrimination on the ground of sex, cases of discrimination still persist. Discrimination of girls has been kept alive by the cultural practices of the Kenyan people. Traditionally boys are valued more than girls. This notion still lingers on the minds of many and girls continue to receive unfair treatment. This is especially so in the rural areas where traditional practices are still held dear unlike in the urban areas where western ideas have influenced the lifestyle. Given time, and with campaign for the rights of the girl child, it is possible to achieve equality of opportunities for both boys and girls.

Since the introduction of the registration of birth in the country in 1963, the exercise has not gained momentum. It is estimated that only 30 percent of birth are registered annually.<sup>1</sup> This is quite low. In order to fulfill the child's right to recognition (article 7 of CRC) the Government has started to use Assistant Chiefs as registration agents. This has had some positive impact although people still see Assistant Chiefs as law enforcement officers (keen on monitoring or controlling the birth rates ) and this has hampered their effectiveness. The poor pay which Assistant Chiefs receive is demoralizing enough and they have often

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<sup>1</sup> Government of Kenya (1999) *Kenya County Report of UN CRC* p.32.

seen children's registration as an added burden for which they are not compensated. This has greatly hindered the registration of births.

The Government has also trained and put into use Assistant District Registrars (ADRs) to carry out the registration of births. The ADRs visit locations with a mission of registering births. This has had a positive impact on registration of birth. The ADRs have been supplied with motorcycles by UNICEF, which they use to reach even the remotest of villages. Their noble mission is however curtailed by the fluctuating climatic conditions and the poor terrains which limits the number of visits they can make.

The high incidences of child abuse have led the government to setting up special programmes to solve the problem of child abuse. A government crisis desk with a hotline to receive reports of child abuse for action has been set up at the Ministry of Home Affairs National Heritage, Culture and Social Services, in the Children's apartment. The personnel in this department receive complaints of child abuse and take the necessary action to help the child victim. The majority of the Kenyan population is however not aware that such a facility exists. there is hence a need to make this programme widely known. This programme is nonetheless a great step towards protecting children from abuse and neglect.

Another achievement in the protection from child abuse and neglect is the development of peace houses for the abused children. These peace houses are

run by the Child Welfare Society of Kenya. A peace house is an institution which takes care of abused children. This institution takes in victims of any kind of abuse whether they suffer from economic, sexual, physical or emotional abuse. Once in the institution, the child victim is rehabilitated and reintegrated back into society. While in the institution the child victim receives medical attention if necessary. The child also receives psychiatric attention to help overcome psychological traumas experienced during the abuse. The child is also given education on top of other basic needs provisions like foods, clothing and shelter. The best interest of the child is usually upheld in these peace houses. After the child victims have been rehabilitated they are handed over to their relatives, given for adoption or put in children's homes. This is done with the best interest of the child in mind. The child is placed where he/she will receive the best care and be protected from any kind of abuse. These peace houses are a great achievement although more peace houses should be set up in different parts of the country.

In response to the needs of Children in Need of Special Protection (CNSP), various NGOs have formed coalitions and networks to enhance their service delivery. These include the Coalition on Child Rights and Child Protection under the umbrella of the ANPPCAN regional office, Nairobi, The Girl Child Network, and the National Child In Need Network. These coalitions and networks of NGOs coordinate the identification and service delivery for CNSPS. This work is

commendable since CNSPS receive some attention and their rights are protected.

When looking at the achievements Kenya has made so far, the awareness campaign on child abuse as created by both the print and electronic media is worth mentioning. The print media has played a vital role in highlighting the plight of abused children. This has resulted in action being taken by relevant authorities to save the children. The electronic media has also been on the forefront in exposing cases of child abuse, thus saving the lives of many children. Apart from saving the lives of abused children, the exposure by the media has led to the arrest of the perpetrators of child abuse.

Kenya, in a bid to promote child survival and development has managed to establish programmes to cater for the health of the child. The Maternal Child Health (MCH) programme has been set up in all public health facilities. Under this programme, mothers are given neo-natal and post-natal care free of charge. Here infant immunization and child growth monitoring are routinely carried out. Malnutrition and vitamin deficiency are curbed by the provision of iron, folic tablets and vitamin A tablets to pregnant mothers and their children. This programme has greatly enhanced child survival and development.

Kenya in honoring the right of the child to have his/her views respected has set up different forums for children to express their views. These include different



clubs like debating, science and associations like boy scouts and girl guides. although the child has a right to form his/her views and participate in decision-making, this right is severely limited by factors derived from the cultural and socio-economic context within which decisions are made. In the traditional setting, decisions are made by adults according to set patterns. Children therefore have limited room to make decisions.<sup>2</sup> Overall, children's involvement in decision-making is minimal. This is especially so in educational institutions where students are rarely involved in decisions which affect them. This respect for the child's view is yet to be implemented to the fullest.

## **5.2 Kenya's Response to the Requirements of the CRC**

This section basically examines how Kenya has responded to the CRC after its ratification.

### **5.2.1 Task Force on Review of Child Law in Kenya**

After Kenya's ratification of the CRC, in 1991, the Attorney General directed the Kenya Law Reform Commission to review the existing laws concerning the welfare of children and make recommendations for improvements so as to give effect to the principles enshrined in the CRC.

The Commission pursued its mandate by setting up a multi-sectoral and multi-disciplinary Task Force to Review Child Law in Kenya. The Task Force

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<sup>2</sup> See Rwezaura B (1996), 'The Duty to hear the child before making a Decision: A View from Tanzania' (paper prepared for presentation on the Children and Law in Eastern and Southern Africa, Research Network, Harare).

comprised government officials, children rights activists and advocates, experts and representatives of key child welfare organizations as well as academics. After a long consultative process, a Report was submitted to the government in 1994 recommending a Children's Bill. Some of the recommendations of the Task Force Report included suggestions to have a uniform definition of a child as one below 18 years in keeping with article 1 of the CRC in all purposes be it marriage or employment; cases of child offenders below 12 years should be considered in juvenile courts; laws should be enacted to enhance penalties against persons violating children with the intention of maiming or killing them; the Succession Act should be reviewed to bring the children born outside marriage as close as possible to those within the institution; that the Evidence Act should be amended to give courts full discretion to receive evidence from a child of tender years in sexual assault cases and to rely on it, with or without corroboration, as a basis for reaching a verdict; and that the judicial discretion to commit a child to prison should be exercised after the court has been duly informed of an existing facility for the custody of children, in some particular prison.

The Task Force also made some policy, administrative and programmatic recommendations to the government. It urged the government to design micro-level training schemes for children who had been unable to gain entry into secondary schools or vocational training institutions. It also recommended that the government should institute practical measures to give access to pre-school education for children in rural areas; phase out large slum dwellings in urban

areas and provide appropriate services such as water and sanitation; and take all necessary measures to enhance national economic productivity for the purpose of improving the material conditions of families and eliminating child labour.

The Task Force paid special attention to street children and observed that the street children problem resulted from socio-economic problems, which required solutions within the domain of governmental policies, programmes and administrative arrangements. The Task Force called for the coordination of child rehabilitation programmes with internal mechanisms for generating income. Special facilities for imprisoned mothers were also recommended

By setting up the Task Force, the government showed its commitment to the implementation of the CRC. After extensive work and research, the Report was presented to the government. Despite all these efforts, very little has been said and done on the recommendations. The government seems to have put the Task Force Report in its locker and simply forgotten about it. By shelving the Report, the Government has not enhanced its cause of improving the welfare of children in Kenya.

The recommendations of the Task Force were meant to be a starting point in the implementation process. By failing to take advantage or heed of the Task Force Report's recommendations, the Kenyan Government had lost a golden chance to lay a sound foundation for the realization of the other rights in the CRC. This

goes to show that the state of Kenya's implementation of the CRC is still wanting.

### 5.2.2 The Children's Bill

One of the recommendations from the Task Force was the enactment of a Children's Bill. In 1995 the Government published the Children's Bill. The Bill was aimed at consolidating, amending and updating the law relating to children. The objects of the Bill as set out in clause 3 were: to promote the well-being of children; to implement the provisions of the *UN Convention on the Rights of the Child*; to promote the welfare of the family; to assist parents in the discharge of their parental responsibilities; and to establish and promote the use of services and facilities.

The Bill was tabled in Parliament soon after its publication. The Bill went through the first reading but unfortunately it did not go beyond the second reading.<sup>3</sup> The Bill was rejected by parliament. In 1998 a new Bill was drafted for consideration. The fate of this new Bill is unknown. It is yet to be published and presented for debate in parliament. The fact that the Bill has not yet been presented to parliament for debate and consequent enactment emphasizes the fact that the CRC is yet to be fully implemented.

The delay by parliament to provide a legal protection framework for the child appears to be political. While the Government has for example successfully

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<sup>3</sup> See Chapter Three.

enacted Bills touching on tourism and wildlife, it has paid only lip service to the Children's Bill. This clearly shows that the Kenyan parliament has put away the problems of the child as a non-issue. The child has not been considered to be an integral part of the political agenda. This is mistaken. Children are an important part of the political agenda since they are the ones mostly affected by policies especially on socio-economic issues. Yet the politicians are not making the issue of children a priority. The obvious sidelining of children's issues by politicians has had a direct effect on the implementation of the CRC.

The failure to provide for a legal framework and the subsequent implementation of the CRC can be attributed to the attitude adopted by leaders in most African states towards human rights. Most African Governments fear human rights because they create a responsibility on the state to observe and maintain certain internationally set standards. In reference to children's rights, African states see children's rights as optional rights that states may implement if and when they wish.<sup>4</sup> This kind of thinking may be taken as an indication of why the government is taking its time to enact the needed legal framework, in the form of the Children's Bill.

### 5.2.3 The Constitution

In an effort to streamline and update the Constitution of Kenya, the government set up to review the Constitution. Two issues that were to be reviewed and which

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<sup>4</sup> Mwangi M. and Karuru N. (1998), *Women's Land and Property Rights in Conflict Situations*, (Nairobi: CCR-WLEA Publications) p.24.

touch on the CRC and its implementation were the provisions for incorporation into national law of treaties and Conventions ratified by the government and make reference in the Constitution of children's rights. The present Constitution is silent on how international instruments ratified by the state should be applied in the domestic sphere. The Constitution does not also mention the child as a special category in need of special rights and protections. These shortcomings of the Constitution impact negatively on the implementation of the CRC and the realization of children rights.

The constitutional review process was to amend these and other provisions which are colonial and obsolete. The constitutional review idea was noble and justified since some of the provisions made in the present Constitution are out dated and do not reflect the present state of affairs and therefore need to be amended. At the beginning, the idea was welcomed and both the ruling party and the opposition. After some time, the constitutional review process was hit by a wave of political bickering and mistrust among the various stakeholders. The review process took a nose-dive and the whole process was thrown into confusion. There was a lot of tussle between the stakeholders about who should sit on the Constitutional Review Commission, and how to proceed with the review process. The president added his voice to the already process when he suggested that the Review Commission be suspended altogether and that it be reverted back to parliament. This resulted in a further outcry from especially the civil society and the religious leaders who feared that their contributions would be

ignored. It was also thought that by taking the constitutional review to parliament, the KANU Government wanted to hijack the whole process so as to amend it to their own advantage. This has led to the current derailment and stalling of the constitutional review process..

Just like the Children's Bill, the fate of the constitutional review process remains unknown. The constitutional review process seems to have been forgotten for now. This continues to impact negatively on the implementation process of the CRC.

### **5.3 What Kenya has not done?**

A better understanding of what children's rights mean in the rich variety of Kenyan cultures has the objective of providing tools for implementing children's rights instruments and ultimately for monitoring the effects of policy and programme interventions. Children's rights are too often interpreted as 'children being allowed to do what they like'. Yet there are no problems when rights are expressed as 'needs'. Unfortunately, in many cases the idea of 'rights' is viewed as un-African. When children's rights are interpreted as western rights, there is a danger of adopting the idea that giving children rights may be teaching them wrong moral values. Therefore unless the entire Kenyan population understands what constitutes children's rights and comes to appreciate them, then the implementation of the CRC will be informed and punctuated by suspicion. This partly explains why the realization of children's rights at the family level has been

difficult. There is a need therefore to sensitize the entire population on children's rights. Once it is clear what constitutes children rights then it will become easier to implement the CRC.

### 5.3.1 Definition of Childhood

The wide definition of childhood in Kenya based on the different personal laws, and the statutory laws have single handedly militated against the full and successful implementation of the CRC in Kenya. In the absence of a standardized legal definition of childhood, then it is doubtful that all Kenyan children will equally enjoy their rights as children. There is a need therefore to have a standard age limit on childhood so as to ensure that all children enjoy their rights without the danger of some being left out.

### 5.3.2 Non-Discrimination

The basis of the non-discrimination provisions of the is that, all human beings are of equal worth. although the Constitution of Kenya prohibits discrimination, this is merely theoretical as in practice, a lot of discrimination against children is exhibited. For instance, children living in urban centers have far greater access to better education and health facilities than those living in the rural areas. children in Kenya are also discriminated against on grounds of the marital status of their parent(s). children born out of wedlock are normally not fully accepted in their mother's home. If the mother later marries a man who is not the biological father of the child, that child suffers further discrimination in the new home. Children of incestuous relationships are considered taboo children and are



discriminated against. Boys are often preferred to girls especially in the rural areas, and this leads to discrimination against girls.

The disabled child is discriminated against both within and outside the family. In some communities, the disabled child is considered a taboo since disability is associated with bad luck. Often these children are hidden away from the public making it impossible for them to get assistance. Their rights to survival, development and participation end up being violated.

generally, Kenya's reluctance to implement most of the children rights as spelt in the CRC can be said to constitute discrimination against children.

### 5.3.3 Best Interest

Kenya still regards the best interest principle as a principle of compassion since it is couched in the traditional concept of welfarism. Children are thus seen as objects of compassion who beg for sympathy and not as bearers of rights. This greatly affects the children's enjoyment of their rights.

Perhaps as a result of Kenya's cultural practices, adults still regard children as incompetent or inept decision makers. It is assumed that children cannot judge what is or is not right for them, and that consequently thus adults have to make decisions for them. Even in those circumstances where the best interest principle has been allowed to operate, for instance in courts when deciding child custody, there have been disagreements over what constitutes the child's best

interest. This has led Elster to describe the application of the best interest principle as a 'solomonic judgment' where the child's interests have to be balanced against those of the parent's rights and against those of the state.<sup>5</sup>

Kenya has no firm guidelines on what values it would use to measure the application of the child's best interests. Nor is there a guidance denoting the criteria to be adopted in overriding the best interests of the child. The state of the best interest of the child is blurred by the non-mention of the principle in policy papers and national development plans.

#### 5.3.4 Participation Principle

The current social, political and economic conditions in Kenya offer insufficient possibilities for the realization of this principle. Children are often viewed as objects and treated with lack of tolerance. The socio-political and economic attitude of the typical Kenyan is typified by the media hype about the 'adventurous mischievous and careless youths'. The media often accuses the youth of being morally decadent, forgetting that the adults and society as a whole are actually the ones responsible for imbibing the wrong morals in their children.

The Kenyan society appears to be waging a war against children. Adults design policies to 'tame' the youth instead of encouraging them to get involved in the designing of policies that affect them. This encourages the youth to feel 'dumb'

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<sup>5</sup> Elster, "Solomonic Judgment: Against the Best Interests of the Child", *54 University of Chicago Law Review* 1 (1978).

and useless since they are not allowed to do the thinking. The youth today are thus finding it difficult to identify specific institutions, be they religious organization, school or family units, from which they could learn the mores about responsibility.

Children make up at least half the population of Kenya. Yet this demographic reality is not reflected in the current policies. If democracy is defined as the rule of the majority, this becomes paradoxical where children and young people constitute the numerical majority, as is the case with Kenya. Their participation in the political life of the nation as citizens whose voice matters is therefore crucial.

#### **5.3.5 Economic Context of Childhood**

Children make a great contribution to both national and household economies through the work they perform, yet their contribution is ignored. Like the domestic work of women, the considerable economic contribution of children remains undervalued, and, unlike the case of women, is seldom even acknowledged. There is so little information available that the national economic value of children remains invisible, to the extent that children are often accounted for as a net cost to national education, health and welfare budgets. This has contributed to the low status of children in society in general, and thus acts as a barrier to the achievement of their rights.

By examining the national budget, it is possible to deduce the extent to which the government is prioritizing children in its policy planning and budget allocation.

The budget is a powerful tool to redress socio-economic inequalities and also to advocate for particular social groups such as children. How much the state sets aside for the well being of the children determines the state of implementation of the CRC. Unfortunately for Kenyan children, they have not been prioritized in the national budget.

### 5.3.6 Child Abuse and Exploitation

The prevalence of child abuse and exploitation is evidence that Kenya is not implementing the CRC. Almost everyday in the dailies, incidents of child abuse are highlighted. Stories are carried out on child assaults, neglect, abandonment and sexual abuses on children. This is but a tip of the iceberg. Child abuse is rampant in Kenya, and because most occur in family settings, they go unreported.

Incidences of exploitation continue to be experienced among Kenyan children. It is estimated that about 3.5 million children in Kenya are engaged in child labour. Child workers are to be found in salt mines in the Coast province and in families as house helps, on streets as hawkers of peanuts and plastic bags. Poverty may be blamed for the increase in child labour, but there may be more to it. The ideological position taken by many African societies that child work should be seen within its cultural context as an essential part of the community and family membership, and socialization and education has been used to justify child labour.

Children in every social group and class are always vulnerable because of their dependent and powerless status, although their situation improves as they get older. They therefore need protection. There is a need to put up protection measures to guard against child abuse and exploitation in Kenya. The Children and Young Persons Act merely provides penalties for abuses after they have already been committed. The Penal Code on the other hand outlines acts, which are offensive to the well being of child. These two legal provisions however, say very little on the specific measures of protecting of children against abuse and exploitation. A legal provision from abuse and exploitation is in order.

### **5.3.7 Report on the Implementation Process**

Article 44 of the CRC requires states parties to report to the Committee on the Rights of the Child within two years of ratification and thereafter every five years. State parties are also required to make their reports widely available to the public in their own countries. Kenya ratified the CRC in 1990 thus its first report was due in 1992/93 and the subsequent one in 1997/98. Almost a decade down the lane Kenya is yet to submit the initial report on the implementation of the CRC.

Kenya is currently preparing its initial report for presentation to the Committee on the Rights of the Child. The Report has been compiled and edited and presented to the Attorney General for further recommendations and approval. The Report seems to have taken a longer time to process than expected at the Attorney General's chamber and this has slowed down the pace of reporting. The reason

as to why Kenya has taken so long to report is best known to the bureaucrats of the nation. Although Kenya is currently preparing its initial report for presentation, the question arises as to how long it will take, and whether it will ever be made public, given the fate many of the Kenyan government's Commission and Task Forces reports.

# CHAPTER SIX

## CONCLUSIONS

This study set out to investigate the state of Kenya's implementation of the United Nations Convention on the Rights of the Child. The study's major focus was therefore on the 'international' framework of children's rights as spelt out by the CRC. This chapter is a reflection of the whole project; it proposes some strategies which can be adopted to ensure the full implementation of the CRC.

The project's mission was to analyze the state of Kenya's implementation of the CRC and by extension, the factors impeding the full implementation of the CRC. On the first objective, of the state of implementation, Kenya's case was found very wanting. For one, the laws relating to the child's right are not explicitly stated in the constitution of Kenya. The end result is that, the Kenyan child lacks sufficient constitutional protection. Secondly, even the few constitutionally recognized rights have not been zealously implemented, perhaps as a result of the loopholes arising from the first reason. Thus, it can be argued that at the first level, very little impact has been registered on Kenya's policy papers with regard to children's rights. Second, and arising from this, the implementation of Kenya's children's rights has also been found wanting.

On the second objective, of factors hindering the implementation of CRC, the study found out that a combination of factors contributed to the slow

implementation. These factors range from the state of the present Constitution, the lack of a comprehensive body of laws on children's rights, gaps in the legal and policy institutions, poverty, corruption, decline in government funding and cultural practices. although these factors emerged as the major impediments to the full realization of the CRC, the lack of a political good will by the government to protect the child was clearly the biggest cause of the violation of the children's rights.

The importance of goodwill in protecting and giving children their rights as being vital in the implementation of the CRC is not an understatement. Without the will to enhance the status of the child, little can be done to improve the situation. This in turn calls for sufficient good will from both the legal and policy instruments and the government and the civil society to change their attitudes and practices to meet the interests of the child.

The fact that Kenya experiences increasing incidences of child abuse and exploitation and a diminishing supply of basic necessities like health, food, shelter and education to the majority of its children clearly indicates a wide lacuna in the implementation of the CRC so far undertaken by Kenya.

Much more needs to be done to implement children's rights and improve their situation in Kenya. The fact that Kenyan children continue to be sidelined in decision-making about matters that affect them can only make matters worse. In



conclusion, the partial implementation of the CRC in Kenya calls for more drastic action by all the concerned parties.

### **Way Forward**

Although the Kenya government can be commended for taking some meaningful steps in trying to implement the CRC, the following policy recommendations if taken will aid in furthering the implementation process. First, there is the need to foster debates on the meaning of children's right in African Societies with special emphasis to the Kenyan context in particular. This will aid in correcting certain misunderstandings and misinterpretations of issues that have arisen in the field of children's rights. Moreover some of the cultural hiccups towards realizing children's rights may be reduced. Fostering a debate on the subject of children's rights could produce a common vision and understanding among all the stakeholders.

Secondly, mechanisms should be established for monitoring interventions designed to bring about the achievements of children's rights. this means, the strengthening of mechanisms for the enforcement of children's rights at all levels starting from the national to the provincial, community and family levels.

Thirdly, there is a need to explore and utilize possibilities for effective children's participation in the decision-making processes that affect them. Such consultation of children about issues concerning them will also create a sense of

responsibility in them. The right to participate is intimately and inevitably linked to the psychological and sociological needs of all persons including the young. Participation trains young people to develop self-respect and social responsibility since they are allowed a free hand in developing their own lives. Thus, some of the behavioral problems currently being witnessed in Kenyan schools could be curtailed. Increasing opportunities for the youth's participation will reduce the chances of them developing behavioral problems.

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