

**LLM (Human Rights and Democratisation in Africa) 2006**

**TOWARDS EFFECTIVE IMPLEMENTATION OF CHILDREN'S RIGHTS IN  
TANZANIA: LESSONS AND OPPORTUNITIES FROM GHANA AND SOUTH  
AFRICA**

Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

**By**

**Benjamin Jonas**

**Student No. 26499828**

**Prepared under the supervision of**

**Ms. Christine Dowuona-Hammond**

**At the Faculty of Law, University of Ghana, Legon**

**27 October 2006**

## TABLE OF CONTENTS

Table of contents.....	ii
List of abbreviations.....	iv
Declaration.....	v
Dedication.....	vi
Acknowledgements.....	viii
<b>Chapter one: Introduction.....</b>	<b>1</b>
1. Background to the study.....	1
1.1 Statement of the problem.....	3
1.2 Literature review.....	3
1.3 Methodology.....	5
1.4 Research question.....	6
1.5 Objectives of the study.....	6
1.6 Limitations of the study.....	6
<b>Chapter two: Analysis of the provisions of the CRC and ACRWC.....</b>	<b>7</b>
2. Introduction.....	7
2.1 Rights and the corresponding implementation mechanisms under the CRC and ACRWC.....	7
2.1.1 Nature of the rights.....	7
2.1.2 Implementation mechanisms.....	9
2.2 States obligations and the monitoring mechanisms.....	12
2.3 Conclusion.....	16
<b>Chapter three: The Tanzanian situation.....</b>	<b>17</b>
3. Introduction.....	17
3.1 Tanzania's obligation under international human rights law on children.....	17
3.2. Implementation mechanisms of CRC and ACRWC in Tanzania.....	19
3.3. Problems with existing national legislative and institutional framework.....	21
3.4 Conclusion.....	29
<b>Chapter four: Comparative analysis of the laws and institutions concerning children in Ghana and South Africa.....</b>	<b>30</b>
4. Introduction.....	30
4.1 The legislative and institutional framework in Ghana and South Africa.....	30
4.1.1 South African legislative and institutional framework on children's rights.....	31
4.1.2 Ghanaian legislative and institutional framework on children's rights.....	35
4.2 Challenges and opportunities to Tanzania.....	38
4.3 Conclusion.....	40

<b>Chapter five: Findings, conclusion and recommendations.....</b>	<b>42</b>
5.1 Findings.....	42
5.2 Conclusion.....	42
5.3 Recommendations.....	43
Bibliography.....	45

## **List of abbreviations**

ACHPR-	African Commission on Human and Peoples' Rights
ACRWC-	African Charter on the Rights and Welfare of the Child
Cap-	Chapter of the Laws
CESCR-	International Covenant on Economic, Social and Cultural Rights
CHRAJ-	Commission on Human Rights and Administrative Justice
CHRG-	Commission for Human Rights and Good Governance
CJ-	Chief Justice
Const.-	Constitutional
CPA-	The Criminal Procedure Act
CRC-	Convention on the Rights of the Child
DED-	District Executive Director
Doc.-	Document
DPP –	Director of Public Prosecution
DSW-	Department of Social Welfare
GLR-	The Ghana Law Reports
GNCC-	Ghana National Commission on Children
ICCPR-	International Covenant on Civil and Political Rights
ILO-	International Labour Organisation
IMCYPR-	Inter Ministerial Committee on Young People at Risk
LMA -	The Law of Marriage Act
LRC-	Law Reform Commission of Tanzania
LRC-	Law Reports of the Common Wealth
MCDG-	Ministry of Community Development, Gender and Children
MYLS-	Ministry of Youth Development Labour and Sports
NGO-	Non Governmental Organisation
NPASC-	The National Steering Committee for a national Programme for Children
RSA-	Republic of South Africa
SA-	South Africa
SOSPA-	The Sexual Offences Special Provisions Act
TLR-	Tanzania Law Reports
UNDP-	United Nations Development Programme
UN-	United Nations

## Declaration

I, Benjamin Jonas, do hereby declare that this dissertation is my original work. It has not been submitted and is not currently being submitted either in whole or in part for Masters of Law Degree or any other degree or award whatsoever in any other University or institution. Where any secondary information is included, it has been duly acknowledged.

This dissertation is hereby submitted in partial fulfilment of the requirements for the award of the Master of Laws (LL.M) Degree in Human Rights and Democratisation in Africa.

Signed at Legon, Ghana

By ..... Date.....  
Benjamin Jonas  
(Student).

And

..... Date .....

Ms. Christine Dowuna-Hammond.  
(Supervisor).

## **Dedication**

The way a society treats its children reflects not only its qualities of compassion and protective caring, but also its sense of justice, its commitment to the future and its urge to enhance the human condition for coming generations. This is indisputably true of the community of nations as it is of nations individually

(Perez de Cuellar cited in S Asquith & M Hill (eds) *Justice for children* (1994) 15)

The...rights of the child is standing at a cross road but the challenges and the obstacles...must not be used 'as a pretext for failure to take appropriate measures at national level'.

G Van Bueren *The International Law on the rights of the child* (1995) 413)

**Dedicated to all the children living in poverty.**

## **Acknowledgements**

This study was conducted partly at the Centre for Human Rights (CHR), University of Pretoria and partly at the Faculty of Law, University of Ghana. I am grateful to both institutions for according me the opportunity and facilities without which it would not have been possible to accomplish this feat. It has been a worthwhile experience-one to savour for a lifetime.

There are also individuals who offered me inestimable assistance that greatly contributed to the accomplishment of this study. It is impossible to mention all of them in this small space. In the same breath, it is unjust not to mention a few who I owe great debts. I would, therefore, like to extend my sincere and profound gratitude to my supervisor, Ms. Christine Dowuna-Hammond, of the Faculty of Law, University of Ghana for her ever-present support and prompt comments during the writing process.

I would also like, in a very special way, to thank Professor Frans Viljoen of the CHR for the unabated pressure- I came out stronger and better for it.

My appreciations also to Professor Abdul Rayees Khan of the Faculty of Law, Mzumbe University, Chacha Bhoke, an alumna of the CHR Human Rights and Democratisation in Africa (2005) programme for devoting their valuable and precious time to comment on my drafts.

Hye-Young Lim and Karen Stefiszyn both at the CHR supplied me with every scrap of material that they came across, I thank them very much.

To the LLM (2006) family, my housemates; Thabang, Clement, Okello, Kenechukwu (KC) and Simon, the Ghana family; Edward Okello, William Tumwine, Ambani John Osogo, Mbololwa Wamunyima and Simon Mebrahtu, tutors at the CHR and members of academic and administrative staff of the CHR, it has been a wonderful experience and I would not have asked for anything less

Finally but not least in any way, to my treasured family, friends and colleagues, your faith in me is my motivation for excelling in life.

To all the above and others not mentioned here I heartily thank them.

I, however, remain personally responsible for any error whatever the nature, in this work.

## CHAPTER ONE

### INTRODUCTION

#### 1. Background to the study

Children's rights have been on the international agenda since shortly after the First World War.<sup>1</sup> Thus, declarations on the rights of the child have been adopted by both the League of Nations (1924)<sup>2</sup> and the United Nations (UN) (1959).<sup>3</sup> Also, specific provisions concerning children were incorporated in a number of human rights and humanitarian law treaties even before the adoption of the Convention on the Rights of the Child (CRC).<sup>4</sup>

These developments notwithstanding, states still held the view that there was a need for a comprehensive statement on children's rights which would be binding under international law. This view was influenced by reports of grave injustices suffered by children who were being abused and exploited.<sup>5</sup> Their status was passive and they were considered property of the parents and, therefore, the parents were the right bearers through whom the rights of the children were to be conceived.<sup>6</sup> Children could thus be sold into slavery, shipped off to sea or apprenticed at an early age by their parents or guardians.<sup>7</sup>

Efforts to offer better protection and recognition to children's rights resulted in the adoption of the CRC by the UN General Assembly in Resolution 44/25 of 20 November 1989. The CRC remained open for signatures and ratification as from 26 January 1990 and entered into force on 2 September 1990.

In Africa, the African Charter on the Rights and Welfare of the Child, 1990 ('ACRWC') was adopted by the 26<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU on 11 July 1990 and entered into force on 29 November 1999.

---

<sup>1</sup> LC Reif *Good governance and international human rights system* (2004) 290.

<sup>2</sup> Geneva Declaration of the Rights of the Child, League of Nations O.J Spec.Supp.23 (1924).

<sup>3</sup> Declaration of the Rights of the Child, GA Res.1386 U.N. GAOR, 14TH SESS.Supp.No.16.

<sup>4</sup> These include, among others, Art 77 of the Protocol to the Geneva Convention of August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Art 24 of the International Covenant on Civil and Political Rights (ICCPR) and Art 1 of ILO Convention (No.138) concerning minimum age for admission to employment.

<sup>5</sup> <<http://www.unhchr.ch/html/menu6/2/fs10.htm>> (accessed on 12 August 2006).

<sup>6</sup> B Franklin (ed) *The rights of the children* (1986) 1.

<sup>7</sup> CP Cohen 'The developing jurisprudence of the rights of the child' (1993) 6 *St Thomas Law Review* 19.



The ACRWC was born out of the feeling by African member states to the UN that the drafting of the CRC missed important socio-cultural and economic realities of the African experience.<sup>8</sup>

The ACRWC therefore, recognizes all the rights guaranteed in the CRC, but specifically applies them to the African culture. For example, Article 21 of the ACRWC addresses harmful traditional practices common in many African countries that can violate the rights of children such as early marriage, female genital mutilation (FGM), and 'discrimination against female children'. It is for this reason that the ACRWC has been described as a classic instrument in the African context.<sup>9</sup>

In their focus, the CRC and ACRWC provide an express departure from the domain where children's rights are to be subsumed in the rights of the adults to a phenomenon where children are 'now owners of rights enforceable against the state and other individuals'.<sup>10</sup>

As they stand, the two instruments do not constitute a panacea for children's agonies but springboards for action. State parties to both instruments are thus left with the responsibility of examining their legislation, policies and practices in the light of children's rights, and accordingly evaluating the nature and level of changes needed to accommodate the rights more effectively.<sup>11</sup>

So far 191 countries have ratified the CRC making it 'the most rapidly and universally accepted human rights document in the history of international law'.<sup>12</sup> The ACRWC had until February 2004 received 39 signatures and 37 ratifications.<sup>13</sup>

Despite the adoption and wide ratification of the CRC and ACRWC the miseries identified and intended to be dealt with by the two instruments are still rampant in many parts of the globe. Tanzania, as will be clearly shown in Chapter three of this study, is not an exception in this regard.

---

<sup>8</sup> A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *The International Journal of Children's Rights* 179.

<sup>9</sup> PM Nyaundi 'Circumcision and the rights of the Kenyan boy child' (2005) 5 *African Human Rights Law Journal* 171-172.

<sup>10</sup> SO Von Struensee 'Violence, exploitation and children: Highlights of the United Nations Children's Convention and International response to children's human rights' (1995) 18 *Suffolk Transnational Law Review* 589 590.

<sup>11</sup> SH Hamad 'The CRC: Words on Paper' or a reality for children? A case study of Jordan (1999) 7 No 3 *International Journal of Children's Rights* 215.

<sup>12</sup> LA Spits 'Implementing the United Convention on the Rights of the Child: Children's rights under the 1996 South African Constitution' (2005) *Vanderbilt Journal of Transnational Law* 853.

<sup>13</sup> C Heyns(ed) *Human rights law in Africa* (2004) 107. Also see:< <http://www.africa-union.org/child/home.htm>> (accessed on 2 October 2006)

This study therefore draws inspirations from the laws and practices on children's rights in Ghana and South Africa and explores the most effective mode of implementation that can ensure the translation of the noble intentions in the two instruments into genuine effective tools for enhancing the well being of the children in Tanzania.

### **1.1 Statement of the problem**

Tanzania has ratified both the CRC and ACRWC without reservations.<sup>14</sup> In relation to international law, Tanzania follows a dualist approach.<sup>15</sup> Despite the fact that Tanzania has ratified the two instruments to date, it does not have a specific comprehensive law on children's rights.<sup>16</sup> That notwithstanding, various laws have been enacted, others amended and several programs put in place to protect children from exploitation and safeguarding their interests.<sup>17</sup> However, these measures have not yielded any feasible results since their adoption. There are still cases of discrimination in respect of girls, children born out of wedlock, non fulfilment of the principle of best interests of the child, socio-economic difficulties threatening children's right to life, survival and development of the child; police brutality against street children; the increasing number of children deprived of a family environment especially AIDS orphans and an increase in the incidence of child prostitution, early marriages, and various cultural practices which are harmful to children.<sup>18</sup>

This situation necessitates investigation of the mechanisms which could be adopted, to assist in the successful implementation of children rights in Tanzania.

### **1.2 Literature review**

The impact of international human rights instruments at the domestic level in ensuring the realization of the norms they espouse arise from a number of factors which include the incorporation of the norms in domestic laws, the implementation of international mechanisms

---

<sup>14</sup> Heyns, n 13 above, 49, 58, 197, 109. Tanzania ratified the CRC in 1991 and the ACRWC on 16 March 2003.

<sup>15</sup> Art 63 (e) of the Constitution of the United Republic of Tanzania empowers the parliament to deliberate upon and ratify the International treaties to which Tanzania is a party.

<sup>16</sup> U.N. Doc.CRC/C/15/Add.156 (2001). In its concluding observations, the Committee on the Rights of the Child (CRC Committee) urged Tanzania to adopt a comprehensive children's Code.

<sup>17</sup> Some of the provisions regulating children rights in Tanzania may be found in the Education Act, 1978, Sexual Offences Special Provisions Act, 1998, The Marriage Act (LMA), 1971, The Land Act, 1999, The Village Land Act, 1999. Policies include Child Development Policy, Tanzania Development Vision 2025, and the Poverty reduction strategy Programme which are intended, inter alia, to improve the standard of living of Children.

<sup>18</sup> CRC Committee, n 16 above.

for enforcement and the internalisation of the norms of the instruments norms in the culture and traditions.<sup>19</sup>

In order to ensure realization of the rights espoused by the children's rights instruments there are varying views as to what particular structure may best serve the purpose. There are views that domestication of the instrument is important.<sup>20</sup> However, while legislation has the advantage of providing an important framework for action against violations of children's rights, it remains ineffective in detecting and addressing instances where those violations are concentrated and most hazardous.<sup>21</sup>

There are also views expressed by Hodgkin and Newel which find support in RV Makaramba's thesis that the existence of laws is not enough if those pieces of legislation do not provide all the legal powers and institutions necessary to ensure effective realization of the rights espoused by such laws.<sup>22</sup> Hence, the need for the state party to an instrument to establish a national infrastructure including relevant institutions which can promote, protect and enforce the rights stipulated in the instrument. This view also finds support in the recommendation of the CRC Committee that:<sup>23</sup>

An independent children's champion at national level, either in the form of children's commissioner, ombudsperson or as part of the national human rights institution is regarded ... as central to the implementation of the UN convention on the rights of the child.

Establishing the mechanism or infrastructure to enable the country to improve the situation of children, as advocated above, is viewed by Hamad as an important first step. She argues that after that step there is a need to ensure that this infrastructure will be sustained through long lasting structures and institutionalised system. Also that resources and policies advocating a rights approach for children are to be enforced by 'professionals who draw upon them in their work with and for children'.<sup>24</sup>

---

<sup>19</sup> C Heyns & F Viljoen *The Impacts of the United Nations human rights treaties on the domestic level* (2002) 1.

<sup>20</sup> See n 16 above.

<sup>21</sup> SH Hamad, n 11 above.

<sup>22</sup> R Hodgkin & P Newel *Effective government structures for Children* (1996) 40; Unpublished: RV Makaramba 'The efficacy of human rights protection mechanism', A paper presented in the Annual Human Rights Conference 10-11 December 200 Karimjee Hall Dar Es salaam Tanzania.

<sup>23</sup> In J Williams 'Effective government structures for children? The UK'S four children's commissioners (2005) 17 *Child and Family Law Quarterly* 37.

<sup>24</sup> SH Hamad, n 11 above 221.

In his analysis, Fottrell, apart from dealing with the historical background of the CRC and its substantive provisions also touches on the issue of implementation.<sup>25</sup> He discusses at length the implementation system envisaged under the CRC and its weaknesses at the level of the CRC Committee. He, however, does not attempt to deal with measures of implementation at the national level.<sup>26</sup> Bueren canvasses similar issues and goes further to make a comparative analysis between the CRC Committee practice and procedure and other United Nations' treaty monitoring bodies. She also discusses regional mechanisms for the implementation of the rights of the child.<sup>27</sup> Just as it is in the case of Fottrell, Bueren does not deal with experiences at the state level.

Another attempt to deal with the issues of implementation was made by Doek in the book *Children on the move'. How to implement their rights to family life*. The issues he dealt with, however, are limited to how to implement the provisions relating to child abduction, inter country adoption and rights of refugee children including experiences from various parts of the world.<sup>28</sup>

In his endeavour to deal with the issue of implementation of children's rights, Welshman argues that it is important for the norms to be translated to the specific social traditions and cultural imperative contexts in terms of legal pluralism and cultural relativism of the society concerned so as to ensure acceptance of the norms by the society.<sup>29</sup>

As to which method is efficient and effective and in what circumstances, there is no literature that offers an answer. This study, therefore, investigates some of the appropriate methods in the light of the obligations under the ratified treaties and circumstances in Tanzania that may ensure effective implementation and the promotion of children's rights in Tanzania.

### 1.3 Methodology

The study applies the 'legal centralism approach' which focuses on state-recognized and enforced laws and mechanisms and institutions for implementing these laws.<sup>30</sup> In applying

---

<sup>25</sup> D Fottrell 'One step forward or two steps sideways? Assessing the first decade of the children's Convention on the rights of the Child' in D Fottrell (ed) *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* (2000) 1.

<sup>26</sup> As above.

<sup>27</sup> G Van Bueren *The International Law on the rights of the child* (1995) 378.

<sup>28</sup> J Doek et al (eds) *Children on the move. How to implement their right to family life* (1996).

<sup>29</sup> W Ncube 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International human rights norms and domestic law, tradition and culture' in W Ncube (ed) *Law, Culture, Tradition and Children's rights in Eastern and Southern Africa* (1998) 1.

<sup>30</sup> AW Bentzon et al *Pursuing grounded theory in law: South-North experiences in developing women's law* (1998) 31.

legal centralism, state laws, norms, institutions, international and national publications and other legal instruments relating to children's rights and implementation are examined in order to analyse what the law provides and uncover gaps in the state's laws and practice in relation to the implementation of children's rights.

The study also employs a comparative study method in which the laws and practice in relation to children's rights in South Africa and Ghana are examined to identify a better approach in implementing children rights instruments in Tanzania.

The primary source of data for this study is library research which involved perusing and analysing international human rights instruments, domestic legislation, law reports, textbooks, journals, declarations, general comments, state reports and materials from the internet.

#### **1.4 Research question**

What should be the nature of the legislative and institutional structure to be created to ensure effective implementation of children's rights in Tanzania?

#### **1.5 Objectives of the study**

The study seeks to examine the existing legal framework involved in the promotion, protection and enforcement of children rights in Tanzania and in a comparative analysis draws lessons from Ghana and South Africa to come up with possible alternatives and options to ensure effective implementation of children's rights in Tanzania.

#### **1.6 Limitations of the study**

Effective implementation of international human rights instruments domestically may be achieved through various measures including legislation, cultural and traditional changes, through creation of institutions to ensure and oversee implementation of the provisions of a given instrument and other measures. Due to limited time and space of this study, it is not possible to explore all the measures that may ensure effective implementation of children rights instruments. For that reason, therefore, the study is confined to the institutional structures and the legal framework in Tanzania mainland and assessment of the nature of legislative and institutional framework that can provide an answer to children's problems in Tanzania.

## CHAPTER TWO

### ANALYSIS OF THE PROVISIONS OF THE CRC AND ACRWC

#### 2. Introduction

This chapter provides an analysis of the provisions of the CRC and ACRWC. The rights contained in the CRC and the ACRWC and their corresponding implementation mechanisms are explored to provide the basis for analysis of the nature of state parties' obligations and the implementation monitoring mechanisms under the two instruments.

#### 2.1 Rights and the corresponding implementation mechanisms under the CRC and ACRWC

The CRC has been described as containing a wide variety of rights and therefore the most comprehensive human rights treaty.<sup>31</sup> It lays down common standards and takes into account the different cultural, social, economic and political realities of individual states so that each state may seek its own means to implement the rights common to all.

As has been elucidated in Chapter one of this study, the ACRWC is not opposed to the CRC. Instead the two instruments are complementary to each other. They both set out rights for children. These are human rights in general and specific rights entailing the defence and protection of children, their full development as persons in their own right with recognition and respect of their own individuality. These rights include a variety of rights contained under the substantive provisions of the two instruments.<sup>32</sup>

How are the rights in the CRC and ACRWC formulated? What are the implementation mechanisms stipulated to ensure realisation of such rights? The following part addresses these questions.

##### 2.1.1 Nature of the rights

Each of the two instruments combines, in one instrument, civil and political rights as well as social and economic rights similar to those contained in the ICCPR and CESCR. However, there are rights in the two instruments that cannot be found in the ICCPR and CESCR.

---

<sup>31</sup> JE Doek 'What does the Children Convention require?' (2006) 20 *Emory International Law Review* 199.

<sup>32</sup> For a detailed discussion on specific rights see; JD van der Vyver 'Municipal legal obligations of states parties to the Convention on the Rights of the Child: The South African Model' (2006) 20 *Emory International Law Review* 9.

These rights include, the right to rest and leisure<sup>33</sup>, the right to be protected against abduction and sale<sup>34</sup>, the protection from all forms of exploitation<sup>35</sup> and the right to integration and social recovery<sup>36</sup>.

None of the two instruments categorise the rights in the traditional categories of civil and political rights on one hand and social and economic rights on the other. Available literature on the nature of the rights expounds largely on the CRC. However, due to similarities between the rights contained in the CRC and those in the ACRWC, the exposition on the nature of rights in the CRC may, in appropriate circumstances, be useful and similar in clarifying the nature of rights under the ACRWC. This part therefore is dealt with on the basis of such an assumption.

Many rights in the CRC and ACRWC cannot be identified simply as only civil, political, economic or cultural rights but encapsulate different aspects of both sets of rights. It is in this regard that in its reporting guidelines, the CRC Committee has not always grouped rights in terms that are clearly associated with one or the other set of rights. For example, the Committee's guidelines include the heading 'family environment and alternative care' which covers several provisions of the CRC including those related to family reunification, adoption, illicit transfer and non return, as well as periodic figures on children placed on protective care or custody. Additionally, economic exploitation of children is included under 'special protection measures' together with many other forms of exploitation, including children in conflict with the law, armed conflict, refugee children, and sexual exploitation. It therefore combines areas that are traditionally classified as economic, together with those pertaining to civil rights.<sup>37</sup> This particular approach and formulation of rights echoes the approach suggested by the Vienna World Conference on Human Rights, 1993 that:<sup>38</sup>

'All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis'

---

<sup>33</sup> Article 31 CRC and 12 ACRWC.

<sup>34</sup> Article 35 CRC and 29 ACRWC.

<sup>35</sup> Article 36 CRC and 27 ARWC.

<sup>36</sup> Article 39 CRC and 25 ACRWC.

<sup>37</sup> M Rishmawi 'Article 4: The nature of state parties obligations' in A Alen et al (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 16.

<sup>38</sup> In M Scheinin 'State responsibility, good governance and indivisible human rights' in HO Sano & G Alfredson *Human rights and good governance: Building bridges* (2002) 29.

The CRC Committee admits that 'there is no simple or authoritative division of human rights in general or of the Convention rights in the two categories'.<sup>39</sup>

As pointed out earlier, the rights contained in the CRC and ACRWC are, to a great extent, formulated in a similar fashion. The only difference is the absence of the phrase 'measures to the maximum extent' and 'progressive realization' in the ACRWC. Lloyd argues that this makes ACRWC a more progressive instrument than the CRC as inclusion of such a phrase might jeopardize implementation of all socio economic rights.<sup>40</sup> This particular phrase is normally associated with social and economic rights for purposes of determining the nature of state obligations in relation thereto and has been employed, though with varied formulations, in various provisions of the CRC. This particular aspect will be reverted to at a later stage in this study for the purposes of determining the nature of states' obligation in relation to the rights under the two Conventions.

### 2.1.2 Implementation mechanisms

Implementation, in relation to CRC and ACRWC, is the process whereby state parties take action to ensure the realization of all rights in the CRC and ACRWC for all children in their jurisdiction.<sup>41</sup> The importance of implementation is summarised by Flekkoy in the following words:<sup>42</sup>

'Laws, national and international, are after all, words on paper. They may codify attitudes, but the real results depend on how they are implemented, and what is done to follow up to reach the ideals'

The process of implementation of human rights treaties may take different forms depending on the circumstances of a given country. It involves various sectors employing different measures. Implementation is therefore by no means straightforward process. It needs to be seen as a 'policy/action continuum in which an interactive and negotiated process is taking place over time between those seeking to put policy into effect and those upon whom action depends.'<sup>43</sup> Lane perceives implementation as 'coalition', 'learning', 'all of which emphasize a process that must be interactive, on going, and essentially collaborative in order to give meaning to the policy objective'.<sup>44</sup>

---

<sup>39</sup> Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (U.N. Doc. CRC/GC/2003/5) (General Comment No. 5) para 6.

<sup>40</sup> Lloyd, n 8 above.

<sup>41</sup> General Comment No. 5, n 39 above.

<sup>42</sup> MG Flekkoy *A voice for children: Speaking out as their ombudsman* (1991) 218.

<sup>43</sup> Barret and Fudge (1981) 25 cited in H Michael *The Policy Process in the Mobilisation in Low Income Countries* (1997) 137.

<sup>44</sup> Cited in Michael, n 43 above.



The two instruments, CRC and ACRWC, stipulate various measures for the implementation of children's rights which include, among others, law reform, establishment of national independent human-rights institutions for children, national plans of action, and coordinating bodies; allocation of resources for children; monitoring mechanisms on implementation of the Convention; awareness raising and advocacy; and measurement of the involvement of civil society, including children, in the realization of children's rights. The measures are complementary and are a sign of the indivisibility of children's rights. These measures are evident under articles 4, 42, and 44(6) of the CRC as well as article 1(1) and 43 of the ACRWC.

The CRC Committee under its reporting guidelines, groups article 4 with Article 42 and 44(6) under the heading 'General measures of implementation'. The Committee has also requested governments to pay particular attention to the full implementation of Article 4 in light of general principles of the CRC which include prohibition of discrimination<sup>45</sup>, best interests of the child<sup>46</sup>, right to life, survival and development.<sup>47</sup> These principles are also contained under articles 3, 4 and 5 of the ACRWC.

The CRC and ACRWC also acknowledge the context in which laws and legal authority operate, and that must also be addressed for children to be protected. This is clear in the provisions of article 3 of the CRC and 4 of the ACRWC respectively which require authorities to consider the best interests of the child as paramount in every action they take.

States are also required to describe measures taken to ensure survival and development of the child spiritually, mentally, morally, psychologically and socially.<sup>48</sup>

Furthermore, states are required to provide information in initial reports on 'existing or planned mechanisms at national or local level for coordinating policies relating to children and for monitoring the implementation of the Convention.'<sup>49</sup> According to the guideline, the measures to be adopted include, among others, mechanisms and structures to coordinate and monitor the implementation of the CRC.

As a measure of implementation, state parties to human rights conventions, including parties to the CRC and the ACRWC, have invariably embarked on law reforms, the ultimate aim

---

<sup>45</sup> Article 2.

<sup>46</sup> Article 3.

<sup>47</sup> Article 6.

<sup>48</sup> General guidelines regarding the form and contents of periodic reports to be submitted by state parties under article 44(1)(b) of the CRC (Guidelines for state reporting).

<sup>49</sup> Guidelines for state reporting, n 48 above, para 9.

being to bring conformity between their legislations and the international treaties to which they are parties. However, the magnitude of continuing child protection failures indicate that, law reform alone falls short of adequately addressing children's rights issues. It is therefore astute that states move decisively beyond traditional approaches of implementation which centre on law reform.<sup>50</sup> The Committee has stated that, 'rigorous monitoring of implementation is required, which should be built into the process of government at all levels and also independent monitoring by national human rights institution.'<sup>51</sup>

In the African context, there is no specific jurisprudence in relation to implementation of the ACRWC. However, there is a general approach that may be gathered from the jurisprudence of the African Commission on Human and People's Rights (the Commission). This jurisprudence may later be useful in dealing with issues of implementation of the rights under the ACRWC. The Commission's view is to the effect that, states are under the obligation to enact legislation at the national level and also ensure full participation in government at various levels.<sup>52</sup>

Apart from the general and specific measures of implementation of children's rights, there are general principles that must always be considered to ensure effective implementation. Among these principles are the imports of articles relating to prohibition of discrimination, best interests of the child and the children's right to survival and development.

Another fundamental requirement for the implementation is that the child is recognized and fully respected as a human being with rights.<sup>53</sup> In that regard articles 12 of the CRC and 7 of the ACRWC become very important. These articles are indicators of the degree to which a state party recognises a child as a right holder and also lay the foundation for the implementation of other rights. The articles provide for the rights of the child to express his/her opinion and to have them taken into account in all matters affecting the child. This means, among other things, that the implementation of these instruments is a process in which children should be involved by providing them opportunities to express their views freely. Underscoring the importance of respecting the provisions of articles 12 of the CRC and 7 of the ACRWC, Doek asserts:<sup>54</sup>

---

<sup>50</sup> General Comment No.5, n 39 above, para 9.

<sup>51</sup> As above.

<sup>52</sup> UO Umozurike *The African Charter on Human and Peoples Rights* (1997) 240.

<sup>53</sup> Doek, n 31 above.

<sup>54</sup> As above.

Equally important is that their views are taken into account and given due weight in accordance with their age and maturity. An important consequence of fully respecting these rights will be the development of children who will build self-esteem and acquire knowledge and skills such as those for conflict resolution, decision-making, and communication to meet the challenges of life. This knowledge and skill set will also be important for the exercise of their rights...in accordance with their evolving capacities.

The ratification of the CRC and the ACRWC is a commitment to the rights of the child and a pledge to undertake all the measures, those encompassed under the instruments and those recommended by the monitoring bodies, with a view to ensuring full realization of the rights envisaged. The nature of this obligation and how it is formulated is therefore put into context in the next discussion.

## **2.2 States obligations and the monitoring mechanisms**

Articles 4 and 1(1) deal with the nature of states obligations under the CRC and the ACRWC respectively and place all kinds of obligations on States Parties to ensure their effective implementation at the municipal level.

The first paragraph of Article 4 of the CRC provides that 'state parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'.

The above requirement used in the CRC is meant to be inclusive of any measures that should be taken to implement the Convention. The use of 'other measures' in the CRC is meant to ensure consistency of the CRC with other international human rights instruments which often specify other measures that go beyond legislation.<sup>55</sup> The reference to 'appropriate measures' in other provisions of the CRC is intended to include consideration of those provided by the Constitution.<sup>56</sup> The CRC therefore allows for measures to be adopted in anyway that the national system requires as long as it fulfils the requirements of article 4 of the CRC.<sup>57</sup>

The second paragraph of article 4 of the CRC states:

'with regard to economic, social and cultural rights, states parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation'.

---

<sup>55</sup> Rishmawi, n 37 above, 4.

<sup>56</sup> S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 104.

<sup>57</sup> Rishmawi, n 37 above, 5.

The above formulation is to a very great extent similar to the one under article 2(1) of the CDESCR. Article 2 of the CDESCR requires states to take steps to the maximum of their available resources, with a view to achieving progressively the full realization of the rights. The main notable difference between the second sentence of article 4 of the CRC and article 2(1) of the CDESCR is that the aim of achieving the full realization of the rights is not explicitly included in the CRC as it is in the CDESCR.

Article 1(1) of the ACRWC defines the nature of states obligations in the following terms:

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

Although the ACRWC is a catalogue of rights and freedoms largely similar to the CRC, it does not have a specific provision qualifying the nature of states' obligations in relation to economic, social or cultural rights.

As it has been noted in other parts of this study, the African Committee on the Rights of the Child (ACRWC Committee) is a newly established committee and therefore there is to date no jurisprudence by it elaborating the nature of state obligations.

A general human rights instrument in Africa is the African Charter on Human and Peoples' Rights (ACHPR) which as it is the case with the CRC and the ACRWC combines all the three generations rights in one instrument. In relation to the nature of the states obligation, article 1 of the ACHPR states:

'The member states...to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.'

The above formulation is similar to the one used in the CRC in relation to legislative and other measures but just as it is the case with the ACRWC the above article does not include a specific provision relating to the nature of state obligation regarding economic, social and cultural rights.

The only available jurisprudence with regard to African states' obligations in relation to social economic rights include decisions of the Commission. The landmark decision in this regard is

in *Social Economic Rights Action Center (SERAC) and Another v Nigeria* where the Commission stated.<sup>58</sup>

'It would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights- both civil and political rights and social and economic rights-generate at least four levels of duties for state that undertakes to adhere to rights regime; namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts.

The above holding entails that African states have obligations both in relation to civil and political rights as well as socio-economic rights. Although the wording of Article 1 of the ACHPR does not directly include language relating to 'maximum available resources' or 'progressive realization of the rights', the Commission itself emphasizes in several of its decisions that the fulfilment of obligations concerning economic and social rights is dependent upon the availability of resources.<sup>59</sup>

Going by the above discussion, it follows that in both the CRC and the ACRWC, the states obligation may be defined in different terms depending on the nature of the right under consideration. However, it is difficult to delineate as to which rights are civil and political and which are socio-economic due to the nature of the formulation of these rights. Thus, the use of the phrase 'to take appropriate measures with a view to achieving the full realization of the right', in various specific rights may be resorted to in aid to define the nature of states' obligation with respect to those rights. It is also instructive to always bear in mind the CRC Committee recommendations with regard to states obligations in relation to children rights that may, in appropriate circumstances, be deemed to be social and economic rights, which recommendation is couched in the following terms:<sup>60</sup>

"Even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ..."

The Committee emphasizes that under the Convention, socio-economic rights as well as civil and political rights must be regarded as justiciable.<sup>61</sup>

---

<sup>58</sup> (2001) AHRLR 60 (ACHPR 2001) para 43-44.

<sup>59</sup> K Olaniyan *Spoliation and international human rights* cited in Rishmawi, n 37 above, 14.

<sup>60</sup> Convention against Discrimination in Education (adopted by the General Conference of the United Nations Educational, Scientific and cultural organisation in Paris on 14 December 1960).

<sup>61</sup> General Comment 5, 39 above, para 6.

With regard to procedures to vindicate rights and remedies, states are urged to ensure that there are effective, child-sensitive procedures available to children and their representatives. These include the provision of access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, states are required to ensure availability of appropriate compensation and other appropriate measures to promote physical and psychological recovery, rehabilitation and reintegration.<sup>62</sup>

With respect to monitoring, the CRC and the ACRWC have inbuilt mechanisms aimed at monitoring states parties compliance with the obligations therein. The CRC under article 43 establishes the CRC Committee as a supervising body and its equivalent in the ACRWC context is the ACRWC Committee established under article 32.

States parties to the CRC have to submit an initial report to the CRC Committee indicating measures taken, achievements as well as problems faced in the course of implementation of the CRC. The initial report is to be submitted within two years of the entry into force of the CRC for the state party concerned. The initial report is then followed by a periodic report which is submitted in the intervals of five years after the initial report.<sup>63</sup> Under the ACRWC the initial report, the contents of which are similar to those of the CRC's initial report, is submitted within two years of the entry into force of the ACRWC for the state party concerned, followed by a periodic report after every three years.<sup>64</sup> Normally these Committees inspect reports submitted and engage the submitting states in a constructive dialogue with a view to fostering implementation of the provision of a particular Convention in the state concerned. At the end the Committee gives its concluding observation. In its next report the state will have to report on, among others, the actions it has taken with regard to concluding observations rendered after examination of its previous reports. The major aim of this reporting obligation is to bring about changes in national institutions, national plans and national legal systems.<sup>65</sup>

The ACRWC also envisages the communications procedure under article 44 which entitles individuals, groups or non-governmental organizations recognized by the Organization of the African Unity, member state or UN to submit a communication alleging violation of any rights contained therein. The ACRWC Committee is also empowered under article 45 to adopt

---

<sup>62</sup> General Comment 5, n 39 above, para V.

<sup>63</sup> Article 44 CRC.

<sup>64</sup> Article 43 ACRWC.

<sup>65</sup> SH Hamad, n 11 above, quoting H Badran, former chairperson of the CRC Committee.

appropriate measures to investigate on the implementation of the provisions of the ACRWC. These mechanisms are not available under the CRC.

As per the CRC recommendations, states parties may also establish independent institutions such as national human rights institutions or departments within the government structure to independently monitor the implementation of the provisions of the ACRC.<sup>66</sup> Going by the Commission's jurisprudence alluded to hereinabove, the case might be the same with the ACRWC when the ACRWC Committee develops its jurisprudence.

### **2.3 Conclusion**

The CRC and ACRWC contain comprehensive sets of universally recognised norms, asserting the complementarity and interdependence of human rights. They set a new vision of the child, embodying consensus that emerged in favour of the empowerment, as well as protection of children. However, adoption and ratification by states of the CRC and ACRWC will have little meaning and the instruments will always remain mere declarations of noble intentions unless, governments, families, communities, and institutions attach high value to all forms of measures required to implement children rights. The discussions in this chapter have revealed various measures, legal and desirable, protective and curative, if at all the rights are to be realised.

It must be noted here that there are always considerable stumbling blocks and shortcomings in the way of the state struggling to translate its commitment to children's rights into reality. To what extent this has been a reality in Tanzania is discussed in the next chapter.

---

<sup>66</sup> General Comment No. 2 (2002) "The role of independent national human rights institutions in the protection and promotion of the rights of the child."

## CHAPTER THREE

### THE TANZANIAN SITUATION

#### 3. Introduction

Tanzania is party to many international human rights instruments on children's rights. Of particular importance in this regard are the CRC and ACRWC, which she ratified in 1991 and 2003 respectively. Accordingly, Tanzania undertook to implement the provisions of these instruments within her domestic jurisdiction. This chapter attempts to explore the extent to which Tanzania has implemented the various human rights instruments on children's rights particularly with regard to CRC and ACRWC. It begins by examining Tanzania's obligations under international law and concludes by examining the weaknesses of its implementation mechanisms.

#### 3.1 Tanzania's obligation under international human rights law on children

Apart from the CRC, its two additional Protocols<sup>67</sup> and the ACRWC, Tanzania has also ratified other international human rights instruments that guarantee children's rights. These include instruments that contain a catalogue of human rights which apply to 'everyone' and therefore implicitly apply to all children.<sup>68</sup> These instruments comprise of the Universal Declaration of Human Rights (UDHR) of 1948, the ICCPR, the CESC, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, ILO Convention on the Elimination of the worst Forms of Child Labour (No. 182) and the ACHPR.

In this study, particular emphasis is given to the CRC and ACRWC. However, note is also taken of other instruments with specific provisions addressing children's rights. These provisions include article 24 of the ICCPR which adopts special measures designed to protect children's rights. In light of this provision there is a General Comment provided by the office of the High Commissioner for Human Rights to suggest that children also benefit from all of other civil rights enunciated in the ICCPR.<sup>69</sup> The CESC situates children's rights within the broad context of family rights. For instance, article 10 recognises that 'special measures of protection and assistance should be taken on behalf of all children and young persons

---

<sup>67</sup> Optional Protocol to the CRC on the involvement of children in armed conflict and Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.

<sup>68</sup> The instruments employ general phrases such as 'every one', 'every person', 'every human being' etc and there are no articles in those instruments stating that those phrases exclude persons below the age of eighteen. See also Art 2 of the ICCPR which states that 'the rights recognised in the ICCPR' apply to 'all individuals...without distinction of any kind.

<sup>69</sup> Office of the High Commissioner for Human Rights, Rights of the Child (Art. 24): CCPR General Comment 17 (4 July 1989) available at: <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument)>(Accessed on 9 September 2006)



without any discrimination for reasons of parentage or other conditions. It also stipulates that children should 'be protected from economic and social exploitation.'<sup>70</sup> Accordingly, the CESCR directs states to enact legislations prohibiting child labour.<sup>71</sup> In the CESCR the term 'child' or 'children' also appears in other articles addressing various children's rights.<sup>72</sup> These provisions in both the ICCPR and CESCR have the potential of making the two instruments serve as alternative instruments for recognition and enforcement of children's rights.<sup>73</sup>

Tanzania has ratified the above-named human rights instruments without any reservations, thus demonstrating the willingness to be bound by the instruments since ratification entails acceptance of the normative and universal standards of the instruments. Tanzania must thus, strive to fully translate the values enshrined in the instruments to the specific social, political, economic and cultural context of the country. In this regard the legislative, administrative, judicial and other national institutions in Tanzania are primarily responsible for the implementation of the CRC and ACRWC.

The international obligations to which the country has committed itself by ratifying the two instruments engender four levels of duties to the state. These include the duty to respect, protect, promote and fulfil those rights.<sup>74</sup> At the theoretical levels the obligations are categorised as positive and negative obligations as well as obligations of conduct.<sup>75</sup> In practical terms, the obligation to respect, a negative obligation, entails that the state should refrain from interfering in the enjoyment of all fundamental rights. The positive obligation involve the duty to protect which impose on the state, the responsibility to take measures to protect beneficiaries of the protected rights holders against political, economic and social interferences and to provide effective remedies in case of violation. Thirdly, the obligation to promote requires the state to adopt measures that will ensure that individuals are able to enjoy their rights and freedoms. Lastly, the obligation to fulfil requires the state to move its machinery towards the actual realisation of the rights. The third and fourth levels obligations together constitute the obligation of conduct.<sup>76</sup> These obligations are non-delegable and therefore the state cannot be relieved of its obligation by delegating its functions to other bodies.<sup>77</sup> It is in this regard that the state is obliged to prevent violation of the right by third

---

<sup>70</sup> CESCR art 10 (3).

<sup>71</sup> CESCR art 10(3).

<sup>72</sup> See CESCR articles 12(2)(a), 13(3), 10(1), and 10(2).

<sup>73</sup> LA Spits, n 12 above.

<sup>74</sup> SERAC v Nigeria, n 58 above, para 44-47.

<sup>75</sup> Scheinin, n 38 above, 30.

<sup>76</sup> Scheinin, n 38 above.

<sup>77</sup> UN Human Rights Committee in *Lindgren & Holm v Sweden* cited in Scheinin, n 38 above, 32.

parties and where it fails it may be liable on the basis of lack of due diligence to prevent or to respond to the violation.<sup>78</sup>

To fulfil the above duties, Tanzania has to take measures which are compatible with its international obligations. It must refrain from acts, conducts or taking steps which will defeat the objects and purposes of the instruments it has ratified.<sup>79</sup> It also has to give effect to the instrument's provisions in domestic laws.<sup>80</sup>

### **3.2 Implementation mechanisms of CRC and ACRWC in Tanzania**

Tanzania has adopted several measures in its endeavour to give effect to the provisions of the CRC and ACRWC. Firstly, at the policy level, the country has adopted the Child Development Policy of 1996 that, *inter alia*, gives direction as to how children's issues should be handled and given priority. There is also the Tanzania Development Vision 2025 and Poverty Reduction Strategy Programme which aims at improving, among other things, the standard of living of children, and lastly there is the Child Survival, Protection and Development Programme focusing on ensuring survival and development of the Tanzanian child.

Secondly, the government has in place several laws, both penal and civil, that safeguard children's rights in various circumstances. These include the Constitution of the United Republic of Tanzania of 1977 (the Constitution), Law of Marriage Act, 1971 (LMA), Employment Ordinance (Cap 366), Law of Contract Ordinance (Cap 433), Citizenship Act, 1995, Education Act, 1978, Adoption Ordinance (Cap 335), Affiliation Ordinance (Cap 278). Also in this category are the Children and Young Persons Ordinance (Cap 13); The Penal Code (Cap 16); The Probation of Offenders Ordinance (Cap 247); Children's Homes (Regulation) Act; 1968, the Land Act, 1999 and the Village Land Act, 1999. It has also amended certain laws in order to provide greater protection to children against sexual abuse and exploitation.<sup>81</sup>

The agency responsible for coordination and implementation of the CRC and ACRWC is the Ministry of Community Development, Gender and Children (MCDGC). The MGDC has, as part of its functions, the role of ensuring adoption and implementation of policies and

---

<sup>78</sup> A Eide 'Good governance, human rights, and the rights of minorities and indigenous people' in HO Sano & G Alfredson, n 38 above.

<sup>79</sup> Article 18 of the Vienna Convention on the Law of Treaties, 1969.

<sup>80</sup> J Dugard *International Law* (1994) 53.

<sup>81</sup> See the Preamble to the Sexual Offences Special Provisions Act (SOSPA) 1998. SOSPA amends several laws to provide better protection to children's rights in various instances.

programmes on children's rights. The same Ministry is also mandated to prepare and submit country reports on the implementation of the CRC and ACRWC.<sup>82</sup> To enhance its roles and functions the MCDGC has always encouraged the work of Non Governmental Organisations (NGOs) in promoting children's rights, and has always cooperated with them.<sup>83</sup> To further foster implementation of children's rights there has been established within the MCDGC the Department of Children Development to coordinate children matters.<sup>84</sup> The social welfare department in the Ministry of Youth Development Labour and Sports (MYLS) is responsible for children's social needs and for the rights of orphans and vulnerable children.<sup>85</sup>

Another institution charged with protection and promotion of human rights in Tanzania is the Commission for Human Rights and Good Governance (CHRG) which was established by a Constitutional amendment of 2000.<sup>86</sup> The CHRG is both a human rights institution and an ombudsman and thus has statutory authority to receive and investigate complaints relating to human rights violations and abuse of public power and to recommend corrective action.<sup>87</sup> The CHRG is also entrusted with the mandate to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues. The founding legislation has created a mechanism for public interest complaint with the CHRG so that not only the complainant in person, but any other person or an NGO or group of persons may lodge a complaint on behalf of the victim. Also, the founding legislation does not impose any fee on a complainant. Thus, the roles and procedures envisaged by the founding legislation makes the CHRG one of the potential institutions in promoting and protecting children's rights in the country. More importantly, the absence of filing fee and public interest litigation procedure envisaged by the founding legislation facilitates access to CHRG for the more vulnerable members of the society including children who may find it difficult to lodge complaints personally.<sup>88</sup> In terms of its composition, the CHRG has five Commissioners all appointed by the President but none with a specific portfolio.

There is as yet no precedent by the CHRG in relation to children's rights and the situation is understandable as the CHRG is still in its nascent stage.

---

<sup>82</sup> <<http://www.mcdgc.co.tz/children.html>> (accessed on 1 September 2006)

<sup>83</sup> NGO Report on Tanzania to the CRC Committee 15 November 2000 (NGO report 2000) (notes on file with the author)

<sup>84</sup> <[http://www.streetchildren.org.uk/reports/Tanzania\\_NNOC\\_NGO\\_REPORT.doc](http://www.streetchildren.org.uk/reports/Tanzania_NNOC_NGO_REPORT.doc)> (Accessed on 18 September 2006) (NGO Report 2005)

<sup>85</sup> NGO Report, n 84 above, 2005.

<sup>86</sup> Articles 129-131 of the Constitution as amended.

<sup>87</sup> Article 6(1) (f) and (g) of the Commission for Human Rights and Good Governance Act, 2001 (Act 7 of 2001).

<sup>88</sup> J Hatchard et al *Comparative Constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 223.

In its endeavour to comply with its reporting obligation, Tanzania has, so far, submitted to the CRC Committee two periodic reports. The first one on 20 October 1999 which was a revised version of the initial report submitted in 1994.<sup>89</sup> The second one was submitted on 15 May 2006. The two reports cite a number of steps that have been taken to implement the provisions of the CRC. Some of the major achievements include the enactment of specific legislation aimed at enhancing children's rights, making of policies and other programmes that have been put in place. As noted earlier, the ACRWC Committee is a newly established entity and is yet to exercise its supervisory powers under articles 42(iii) and 43 of the ACRWC.

### **3.3 Problems with existing national legislative and institutional framework**

Several factors hamper the implementation of the CRC and ACRWC in Tanzania. These include economic and social problems, the impact of the Structural Adjustment Programme, high external debt payments, increasing levels of unemployment and poverty, and the limited availability of human resources. The most inhibiting factors are discussed hereunder.

Tanzania is a least developed country ranking 162 out of 177 countries on the UNDP Human Development index. The current population is 38.3 million people and children make up more than 54 percent. Eighty percent of the population live in rural areas on subsistence agriculture, under harsh socio-economic conditions and devastating poverty.<sup>90</sup> This abject poverty has had adverse impacts on implementation of the children's rights instruments in terms of both financial and human resources required to support the implementation process.<sup>91</sup> As a result HIV/AIDS and other curable diseases like malaria and pneumonia continue to wipe out 450 children every day. Available statistics indicate that up to 8.3 percent of newborn babies in Tanzania are born HIV-infected and most of them die before their second birthday. Malaria is the leading killer of children under the age of five and it accounts for 15 per cent of child deaths in Tanzania every year. It is instructive to note here that 30 percent of all school age children in Tanzania are deficient in Vitamin A which is the leading cause of blindness and preventable childhood illnesses.<sup>92</sup>

There is high number of children who do not enjoy adequate standard of living and high school dropouts rates to the extent that half of Tanzania's 16 million children are not in

---

<sup>89</sup> CRC/C/8/Add.14/Rev.1 available at < <http://www1.umn.edu/humanrts/crc/tanzania2001.html>> (accessed on 13 September 2006)

<sup>90</sup> UNFPA Worldwide: Population, Health and Socio Economic Indicators/Policy developments available at: < <http://www.unfpa.org/profile/Tanzania.ctm>> (accessed on 2 September 2006).

<sup>91</sup> The Tanzanian Second periodic report to the CRC Committee available at <<http://www.ohchr.org>> (accessed on 13 September 2006)

<sup>92</sup> <[http://www.boonabaana.org/some\\_sad\\_statistics.htm](http://www.boonabaana.org/some_sad_statistics.htm)> (accessed on 20 September 2006)

school.<sup>93</sup> There is a high incidence of sexual abuse and exploitation, increasing child labour, abuse, ill treatment and neglect. This situation generally threatens children's rights to life, survival and development.

As a result of the economic reforms that have been going on for at least 20 years now<sup>94</sup> the Tanzanian government has been able to make improvements in the economy by tackling basic issues related to macro economic fundamentals and stability. The government has also created conducive environment for economic growth and a capacity to compete regionally and globally. This, however, has not had any significant impact in the delivery of reasonable social services including implementation of children's rights.<sup>95</sup>

It is true that, achieving macro economic stability, as the Tanzanian government is endeavouring, is an important aspect of reducing poverty in the country. However, the on-going government efforts at poverty reduction have been criticised as being too narrowly pursued and incapable of any substantial achievement with respect to the realisation of children's rights. This is because of its excessive reliance on the private sector as the 'engine for growth' and also inadequate articulation of the importance to national development of the provision of accessible and quality education and primary care for all. The process, mechanisms and actors involved do not facilitate real community participation and empowerment.<sup>96</sup>

At the institutional level, although there are departments in both the MCDGC and MYLS charged with children affairs as illustrated above, there is currently no department or institution specifically charged with the task of ensuring field implementation by mobilising and sensitising opinions, judiciary, police and other social welfare officers and the nation concerning the rights of the child and how they should be the foundation for any intervention in their welfare. As a result, public knowledge about the content and implications of applicable human rights treaties, especially the CRC and the ACRWC, is sparse.

As a consequence of lack of sufficient knowledge and training, police and the judiciary are often unable to enforce the law. Thus, in practice, non-enforcement of the law is routine with respect to violation of children rights, with prosecution so rare that there is little incentive for the reporting of such violations. The police may themselves be assailants, making them an

---

<sup>93</sup> As above.

<sup>94</sup> Economic reforms started in Tanzania in 1986.

<sup>95</sup> NGO Report, n 84 above, 2005.

<sup>96</sup> NGO Report, n 83 above, 2000.

object of fear by children.<sup>97</sup> Where domestic law protects children it is often incorrectly and inconsistently enforced. For example, in the case of *Republic v. Mohamed Abdullah*, 1999, the Magu District Court in Mwanza region misconceived the criminal liability of the 9 years old child and held him criminally liable and sentenced him to life imprisonment.<sup>98</sup>

Overall MCDGC's capacity to achieve change on the ground has always been compromised by limited resources and lack of political influence on major government policies making and practice in the interests of children.<sup>99</sup> The inefficiency at this level is further escalated by the lack of clear coordination modalities between MCDGC and other Ministries such as the MYLS and the Ministry of Education and Culture and other policy formulation bodies dealing with children affairs.<sup>100</sup> For example, under the current Local Government Reforms, employees of the MCDGC and the MLYS at the District level are accountable to the District Executive Director (DED) apart from their respective Ministries. The DED is under the Ministry in the President's Office responsible for Local Governments and Regional Administration. There is thus a lack of clarity about the roles and responsibilities and boundaries of key actors.<sup>101</sup>

Although the Tanzanian Constitution contains a justiciable Bill of Rights under its part III, there is lack of sufficient Constitutional protection of children's rights. The Bill of Rights recognises and guarantees basic rights and freedoms as well as basic human duties. However, there is no specific provision in the Bill of Rights that guarantees the rights of the child as a special and distinct category of rights.<sup>102</sup> Such a generalisation of protection accorded by the Constitution is oblivious of the fact that children are a vulnerable group that needs a special protection.

The establishment of the CHRG has not proffered any assistance on the situation either. This is because despite the mechanisms and roles envisaged by the founding legislation which enable the CHRG to play a role in the implementation of children's rights instruments, its efficiency is inhibited by various socio economic factors. For example, the majority of Tanzanians do not know about the existence, procedures and how the CHRG assists people whose rights have been violated. And because of limited funding from the central government, to date, there are neither zonal, regional offices nor sufficient manpower. The

---

<sup>97</sup> See the first Tanzanian report to the CRC Committee available at: <<http://www.ohchr.org>>.

<sup>98</sup> Cited in NGO Report 2005, n 84 above.

<sup>99</sup> NGO Report, n 83 above, 2000.

<sup>100</sup> NGO Report, n 84 above 2005.

<sup>101</sup> NGO Report, 2005, n 84 above.

<sup>102</sup> See *DPP v Daudi Pete* (1991) LRC (Const.) 553 cited in *RV Makaramba Child Rights in Tanzania* (1999)

CHRG therefore may not be able to reach the majority of Tanzanians who live in the rural areas. This makes the statement made more than thirty years ago by the then President of Tanzania, the late Julius Nyerere, with respect to access to the Permanent Commission of Enquiry which existed before the CHRG that: 'we must not forget that the Permanent Commission (of Enquiry) receives complaints only from the most literate, aware or energetic and courageous of our citizen' remain true today with regard to the CHRG.<sup>103</sup> The fact that there is no specific department or Commissioner charged with children's affairs might be a hindrance with regard to ensuring effective realisation of children's rights.

The other hindrance relates to domestic enforcement of the provisions of the CRC and ACRWC. Tanzania is a common law country and thus bears a dualist system. Ratified international treaties therefore are not self-executing in Tanzania. Treaties ratified have to be internalised to be applicable domestically. This may be through the government or the legislature drafting a new law or modifying existing laws to conform to the provisions of the instrument.<sup>104</sup> Technically therefore, the provisions of the CRC and ACRWC cannot be invoked directly before the Tanzanian courts of law simply because there is yet no specific instrument(s) to provide for their implementation in the country. The instruments however, may be used 'as an aid to the interpretation of the provisions on human rights in the Constitution'.<sup>105</sup>

In its endeavour to provide for children's rights, the government has been working to finish drafting one comprehensive national law on children.<sup>106</sup> However, the strength of those efforts and the actual progress made is questionable. There is to date no specific information as to the stage that has been reached in that process. Indeed, the whole process is unclear. For example, during the presentation of the country's first initial report to the CRC Committee on 20 October 1999 the delegation expressed government's commitment to incorporate the general principles of the CRC into all domestic legislation.<sup>107</sup> However, during the presentation of the second periodic report on 19 May 2006 no development was reported in that regard. Instead, the delegation reported that the government was in the process of realising a law on the rights of the child. This situation clearly shows that there is neither

---

<sup>103</sup> J Nyerere *Freedom and development/Uhuru na maendeleo*, 1973 cited in Hatchard, n 88 above 222.

<sup>104</sup> Makaramba, n 102 above, 9.

<sup>105</sup> Per Nyalali CJ (as he then was) *Attorney General v Lesinoy Ndeinay* (1980) TLR n. 214 cited in Makaramba, n 102 above, 14.

<sup>106</sup> According to the NGO Report 2005, n 84 above, the process of enacting a single children's rights legislation started in 1994 when the Law Reform Commission (LRC) submitted its reports on the study of laws relating to children.

<sup>107</sup> <<http://www.umn.edu/humanrts/crc/tanzania2001.html>> (accessed on 22 August 2006).

committed nor sincere government focus on children's rights in its laws.<sup>108</sup> This has been a general trend in Tanzania with regard to international treaties just as it is the case with other African countries.<sup>109</sup> Tanzania therefore has an unsatisfactory record in ratifying treaties and it is worse when it comes to implementing the provisions of international treaties at the national level by enacting specific legislations.<sup>110</sup> Non-enactment of specific legislation on children's rights has resulted in several problems which are enumerated in the next paragraphs.

Though the laws cited above<sup>111</sup> protect and guarantee various children's rights, most of those laws and practice, do not provide the comprehensive protections envisaged by the CRC and ACRWC. This is borne out of the fact that Tanzania enacted most of its legislation that cover children prior to its ratification of the CRC and ACRWC and at the time when the advocacy of beliefs in the rights of the child were at a very early stage. For example, the main child governing legislation, the Children and Young Persons Ordinance was enacted in 1937 and the Affiliation Ordinance was adopted in 1949. Generally, apart from SOSPA which was enacted in 1998 the other pieces of legislation mentioned above were enacted before 1990. They are therefore detached from the current socio-economic realities and therefore are deficient in the protection they give to children. It is not the purpose of this study to deal with the deficiency in the legislations. However, shortcomings relevant to this study will be highlighted in due course.

As a result of the factors cited above discrimination and lack of sufficient protection of the best interests<sup>112</sup> of the child are common features in a number of legislations. For example, whereas under the LMA the father of a marital child has to provide maintenance for the child until he or she attains the age of 18, under the Affiliation Ordinance the putative father is discharged from making provision for maintenance when the non-marital child attains the age of 14 or 16.<sup>113</sup> Thus, unlike the marital child, the non-marital child is denied the right to secure maintenance before attaining the age of majority.

The law is also to the effect that upon death of the putative father, a non-marital child cannot claim maintenance from the estate of his or her deceased father and that child is excluded from inheriting the estate of the deceased. A marital child has the right to inherit his or her

---

<sup>108</sup> Comments by Lucy Smith, the Committee expert who served as country rapporteur to the report for Tanzania.

<sup>109</sup> C Heyns, n 13 above, 4.

<sup>110</sup> Makaramba, n 102 above, 10.

<sup>111</sup> See para 3.3 above.

<sup>112</sup> Section 125 (2) provides: 'In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant...'

<sup>113</sup> S 129(1) LMA and 6 of the Affiliation Ordinance.



deceased father's estate. Thus contrary to articles 2 (1) of the CRC and 3 of the ACRWC which prohibit discrimination 'irrespective of the child's or his or her parent's or legal guardian's ... birth or other status', the law discriminates against non-marital children on the grounds of their birth status because they are born out of marriage, or because of their parents' status, that is, their parents are not married.

The law also discriminates against female children. According to section 13 of the LMA, the age of marriage is 18 years and above. Girls, however, can be married at the age of 15 years with the consent of the father and where there is no father, the mother. Marriage for girls below fifteen years but not below 14 years can be permitted by court order. This is discriminatory towards girls and is a violation of the rights of the child recognised under articles 2 of the CRC and 21 of the ACRWC. For instance, such a provision exposes children to sexual activity and sexual abuses at an early age and imposes a burden on children to become parents at a tender age.

With regard to childcare, the Penal Code and the Affiliation Ordinance impose parental duties and corresponding sanctions against parents who fail or neglect to take care of their children.<sup>114</sup> Such parental duties are subject to a theory of punishment that punishes the parent or guardian without regard to the welfare of the child.<sup>115</sup> For example the law does not provide for an immediate assessment of inquiry through which the causes of neglect can be determined and a proper solution, taking into account the well being of the child, to be sought.<sup>116</sup>

Tanzania also still maintains the Township (Removal of Undesirable Persons) Ordinance, 1944<sup>117</sup> and certain provisions of the Criminal Procedure Act (CPA)<sup>118</sup> which were found by Nyalali's Commission of Inquiry to be 'repressive legislations'.<sup>119</sup> The impugned legislations are not informed by current principles of children's rights. They are thus, not socially relevant or appropriate, and actually contradicts currently recognised humanitarian principles by propagating practices such as 'the arrest of street children for loitering and vagrancy'.<sup>120</sup> It is apposite to mention here that, in arresting and detaining street children, laws, regulation and procedures are not adhered to. Children are usually arrested and detained for long periods of

---

<sup>114</sup> Section 169 of the Penal Code as amended by SOSPA.

<sup>115</sup> Law Reform Commission of Tanzania, Report of the Committee on the Law relating to children in Tanzania 49-59(1994) available at <<http://lrtc-tz.org/pdf/watoto.pdf>> (accessed on 21 August 2006).

<sup>116</sup> As above.

<sup>117</sup> Cap 104

<sup>118</sup> Section 14(h) and 28 of the CPA.

<sup>119</sup> The Presidential Commission on Single Party or Multiparty System in Tanzania, 1991, Volume One, Report and recommendations of the Commission on the Democratic System in Tanzania (The Nyalali Report).

<sup>120</sup> BT Mapunda 'Personal freedom and Police powers in Tanzania' in CM Peter & IH Juma (eds) *Fundamental rights and freedoms in Tanzania* (1998) 143 148.

time and are detained together with adults in direct contravention of the law.<sup>121</sup> Freedom House has reported on this issue by stating that... 'arrest and pre-trial detention laws are often ignored ... and the prison conditions are harsh and police abuses are common.'<sup>122</sup>

There is also almost total absence of legal representation for children in matters affecting them under the Tanzanian law as it currently stands. A number of NGOs have attempted in recent years to provide legal representation to children in courts. However, this has not had a significant impact because most of these institutions are mostly located in urban centres inaccessible to the majority of children who live in rural areas. The institutions themselves depend on donor funding which is not always forthcoming or sufficient and they are also few in numbers to cater for the vast geographical area of the country.

Currently Tanzania does not have a foster care system and efforts to establish an effective foster care programme have been inadequate as noted by the CRC Committee in its concluding observations on the Tanzanian first initial report. Lack of such foster care has resulted in children who have been deprived of family environment being left without any protection. Informal adoptions are also widely accepted and practiced in Tanzania as a result of lack of adequate administrative procedures regulating adoptions.<sup>123</sup>

Another main stumbling block to implementation of children's rights is culture, traditions and customs. The biggest gap in children and youth participation remain within the mindset of adults' social and cultural norms and legal systems which have failed to recognise the progressive abilities of children to participate in the shaping of the development issues affecting their livelihood. Children are denied their rights to expression, contribution of ideas and views from the household, community and up to the national level.

There are also problems relating to the definition of who is a 'child'. This has adverse implications in the realisation of children's rights. As it is not the intention of this study to deal with the definition issue, only a few problems relating to definition will be highlighted.

Under the general statutes, the child is defined as one below eighteen years of age. The LMA, 1971 sanctions marriage of a person who is fifteen years of age, and under the Employment Ordinance, (Cap. 366), a person of fifteen years of age may enter into a

---

<sup>121</sup> See section 5 of Cap 13 and section 32(1) of the CPA and Section 28 of SOSPA.

<sup>122</sup> Arusha Caucus for Children's Rights 'Police Round-ups of street children in Arusha are unjust, inhumane and unconstitutional' Position paper, 2005

<sup>123</sup> CRC Committee concluding observations available at <[http: www.ohchr.org](http://www.ohchr.org)>(accessed on 13 September 2006)

contract of employment. The interesting issue in this regard is that under the Law of Contract Ordinance, (Cap. 433), a person is competent to contract if he is of the age of majority and the Age of Majority Ordinance (Cap. 431) sets the age of majority at eighteen years.<sup>124</sup>

The major penal legislation-covering children in Tanzania is the Children and Young Persons Ordinance (Cap. 13). This statute categorises children in two distinct groups of young offenders. Accordingly, a 'child' is a person under twelve years and 'young person' a person between the ages of twelve and sixteen years.<sup>125</sup> In this regard, a study undertaken by the Tanzanian Law Reform Commission in Eastern and Southern African countries has revealed that Tanzanian statute sets the age of the child relatively lower than the other countries. It is significant that the age of twelve years fits squarely within the age of criminal responsibility as covered under the Penal Code.<sup>126</sup> It is also true that a child of twelve years is strictly speaking one of tender years as recognised under the Evidence Act, 1967 that defines the child of tender years as the one below the apparent age of fourteen years.<sup>127</sup> Cap.13 is penal-oriented in that, the consequences of being found guilty of an offence is punishment, which includes imprisonment. The definition of a child in this statute, thus tends to impose a penal liability on a person who if otherwise defined might be termed to be a child and therefore subjected to protection commensurate to the status of childhood such as parental care, schooling or alternative programs aimed at attending the child of tender years.<sup>128</sup>

Definitely, each statute mentioned or not mentioned here covers a wide range of social and public activities which have particular purposes peculiar to each scheme. As such, definitions of a child are wide ranging. It is therefore true that any attempt to strike a uniform definition for all circumstances and cases will prove unrealistic and unpractical. In unfortunate circumstances such an attempt might jeopardise the protection desired. However, regardless of the varied circumstances, the definitions should always be geared towards offering children the maximum enjoyment of rights accorded by the CRC and ACRCW.<sup>129</sup>

---

<sup>124</sup> Also the Age of Majority (Citizenship Laws) Act, 1970, Cap. 452(now Citizenship Act, 1995) and Cap. 108 set the age of majority at eighteen years.

<sup>125</sup> Section 2 of Cap 13.

<sup>126</sup> Section 15 of Cap 16 as amended.

<sup>127</sup> Section 27.

<sup>128</sup> According to section 7 (1) and 22 (2) of Cap 13 'No young person shall be sentenced to imprisonment unless the court considers that none of the others methods in which the case may be dealt with ...are suitable'.

<sup>129</sup> B Maripe 'The recognition and enforcements of children rights in domestic law: An assessment of the child protection laws in Botswana in light of prevailing international trends' (2002) 9*The International Journal of Children Rights* 339 341.

### 3.4 Conclusion

It is now sixteen years since Tanzania ratified CRC and three years since it ratified the ACRWC. The pace of complying with its international obligations under these instruments is still wanting as demonstrated by the above discourse. Indeed a close look at the system obtaining in Tanzania will reveal that the law sanctions violations of children's rights in a number of circumstances. Other inhibiting factors have also been pointed out and efforts that have been made so far are indicated. Means to overcome the hindrances are varied and very much dependent on particular circumstances. However, certain principles are uniform and underlie the process. The main principle is that implementation of human rights instruments is a two stage process. First is the legal implementation which involves moving proposals into the national assembly and the lobbying for their adoption. The second stage is the task of field implementation. This might need an institution that could be involved in lobbying, act as a pressure group and coordinating implementation.<sup>130</sup> As the above discourse has demonstrated, Tanzania has not satisfied at the very least, the first stage. The second stage is therefore unlikely to produce any feasible effects. It must therefore, in order to discharge its obligations under the CRC and ACRWC, adopt strategies aimed at solving the current challenges to the enjoyment of children's rights in the country. To do so successfully, it is prudent that it draws lessons from other jurisdictions, for example South Africa and Ghana that have made considerable efforts and progress to comply with their obligations under both the CRC and ACRWC. It is on this note that the next Chapter discusses the laws and practices in those two countries.

---

<sup>130</sup> J Parry-Williams 'Legal reforms and children's rights in Uganda-some critical issues (1993) 1 *The International Journal of Children's Rights* 49.

## CHAPTER FOUR

### COMPARATIVE ANALYSIS OF THE LAWS AND INSTITUTIONS CONCERNING CHILDREN IN GHANA AND SOUTH AFRICA

#### 4. Introduction

The preceding chapters have shown that mere signing and ratifying of international human rights instruments cannot on their own ensure enjoyment of the rights contained in those instruments. There should be sincere efforts by the state and the society to guarantee enjoyment of the rights espoused by the instruments. To ensure this, the legal framework and infrastructures geared towards children's rights have to be developed and maintained. In doing this it is important to note that there is no single model that can totally and completely eliminate children's agonies at once. The whole process has to be understood as complex and very much dependent on specific circumstances obtaining in a given country.

It is on this note that efforts by South Africa and Ghana in ensuring enjoyment of children's rights will be visited in this chapter. As the two countries have made significant efforts in this regard, their experiences will enrich this study as they may help to point out measures adopted, their achievements and drawbacks in ensuring realisation of children's rights.

#### 4.1 The legislative and institutional framework in Ghana and South Africa

Ghana, a country located in the Western Coast of Sub-Saharan Africa, was the first country to ratify the CRC.<sup>131</sup> Ghana also signed the ACRWC in 1997 and ratified the same on 10 June 2005.<sup>132</sup> Apart from being the first country to ratify the CRC, Ghana is also among the first countries to establish a national commission for children<sup>133</sup> in an effort to raise children issues to the forefront of development policy and activity.<sup>134</sup> Ghanaian Constitution, 1992 (Ghana Constitution) also enshrines fundamental freedoms of, among others, children and article 28 mandates the parliament to enact laws in the best interest of the children.<sup>135</sup>

South Africa ratified the CRC on 16 June 1995 and the ACRC on 7 January 2000.<sup>136</sup> The Constitution of the Republic of South Africa, 1996<sup>137</sup> (RSA Constitution) includes specific

---

<sup>131</sup> Ghana signed the CRC on 29 January 1990 and ratified the same on 5 February 1990.

<sup>132</sup> Compendium of key human rights documents of the African Union (2005) 263.

<sup>133</sup> Ghana National Commission on Children (GNCC) was established in 1979.

<sup>134</sup> See UN Convention on the Rights of the Child: Impact study (Ghana's Report) (1998) 12.

<sup>135</sup> See Chapter V of Ghana Constitution.

<sup>136</sup> S Burman 'The best interest of the South African Child' (2003) 1 *International Journal of Law Policy and the Family* 28.

<sup>137</sup> Act 108 of 1996.

rights of children resembling those articulated in the CRC.<sup>138</sup> South Africa may therefore be among very few countries to include specific rights for children in their constitutions'.<sup>139</sup> South Africa has also, in the past five years, moved rapidly to address gross inadequacies with respect to human rights in general and most specifically children rights.<sup>140</sup>

These unique features in the Ghanaian history with regard to children's rights and the fact that policy and legislation in South Africa has moved from a position of virtual non existence to active constitutionalism in such a short time<sup>141</sup>, make it necessary to investigate the laws and practices in the two countries so as to understand the level of development they have reached through their efforts as well as learn from the challenges faced in the process of promoting children's rights.

#### **4.1.1 South African legislative and institutional framework on children's rights**

The Republic of South Africa is a fairly young democracy and a developing<sup>142</sup> country that has just come out of apartheid regime and policy. The apartheid regime was discriminatory and oppressive. Indeed, under apartheid, abuse and violation of human rights was the order of the day. With regard to children's rights under apartheid regime, children, particularly black children, were the main victims of human rights violations.<sup>143</sup> Laws such as the Group Areas Act<sup>144</sup> and 'influx control' practices forced parents to abandon their children in order to find work, leaving many children to seek survival on the streets. These children were then detained indefinitely for petty offences, and often in the same facilities with adult offenders.<sup>145</sup> The government also denied black children educational opportunities. Their labour was exploited by farmers and they were also constant victims of police and military brutality.<sup>146</sup> It was this level of neglect, exploitation and abuse suffered by children under apartheid, among other things, that provided a powerful motivation for situating children's rights within South Africa's transformative agenda immediately after its first democratic elections in 1994.<sup>147</sup> The new South African government therefore, embarked on programs and mechanisms that would redress the plight of South African children.

---

<sup>138</sup> Article 28 of the RSA Constitution.

<sup>139</sup> Spits, n 12 above.

<sup>140</sup> DA Louw & ME Klink 'A South African perspective on children's rights: General Principles' (2000) 19 *Medicine and Law* 49.

<sup>141</sup> As above.

<sup>142</sup> South Africa has the largest economy in the Sub-Saharan African region.

<sup>143</sup> TL Mosikatsane 'Children's rights and family autonomy in the South African context: A comment on children's rights under the Final Constitution (1998) 3 *Michigan Journal of Race and Law* 341.

<sup>144</sup> Act 42 of 1950.

<sup>145</sup> BB Woodhouse 'Recognizing Children's Rights: Lessons from South Africa' (1999) 26 *Spring Human Rights* 15 17.

<sup>146</sup> Mosikatsane, n 143 above.

<sup>147</sup> Woodhouse, n 145 above 17.

The government's initial efforts were evident upon inclusion, into the Interim Constitution, of article 30 which singled out children for special protection.<sup>148</sup> The Interim Constitution remained in force until 8 May 1996 when the RSA Constitution was adopted. The RSA Constitution contains article 28 which grants specifically defined rights to children in addition to the rights given to all the people.<sup>149</sup> Article 28 draws upon several comparative and international law sources, principally the CRC and ACRWC and enumerates various children's rights. Most importantly, article 28, entrenches into the RSA Constitution the standard of the 'best interests of the child' as the measure for all legal decisions on children.<sup>150</sup>

By granting children specifically defined rights in addition to those enjoyed by 'every one', section 28 recognises children as independent bearers whose rights are explicit and justiciable.<sup>151</sup> This recognition proceeds from appreciation of the fact that children's right cannot be protected unless children are treated as independent legal subjects<sup>152</sup>

The effect of such a recognition resulting in the constitutionalisation of children's rights under article 28 of the RSA Constitution is to provide both political justification for establishing social programmes and institutions for the protection and enforcement of children's rights while at the same time enabling children to make claims against the state 'using law as a sword' and also use it as a 'shield to protect themselves from erosion of social benefits by the state.'<sup>153</sup> It also provides children with institutional means to influence the decisions affecting their lives thereby achieving the mandate of article 12 of the CRC and 7 of the ACRWC which seek to ensure that children's views are given due weight in all matters affecting them. It also seeks to emulate the approach by both the CRC and ACRWC by emphasising the best interest of the child. This has already manifested itself in practice whereby in a number of cases the South African courts have explicitly stated that 'the interests of the child will trump the rights of the parent.'<sup>154</sup> The South African experience also indicates that by means of case law the courts have integrated international standards into the already existing system.<sup>155</sup>

---

<sup>148</sup> Republic Act 200 of 1993.

<sup>149</sup> Burman 'n 136 above.

<sup>150</sup> As above.

<sup>151</sup> Initial Reports of the state parties due in 1997, Addendum, South Africa, UN Convention on the rights of the child (U.N. Doc.CRC/C/51/Add.2)(SA Report) 15.

<sup>152</sup> Mosikatsane, n 143 above, 348-350.

<sup>153</sup> Mosikatsane, n 143 above.

<sup>154</sup> See for example, B v S (1995) 3 SA Law Reports 571A.

<sup>155</sup> K Johansson 'Children in trouble with the law: Child justice in Sweden and South Africa' (2003) 17 *International Journal of Law, policy and Family* 308.

South Africa's international obligations are spelt out with greater clarity in the RSA Constitution. This will assist in the realisation of the CRC, the ACRWC and other international human rights instruments, whether binding or persuasive in their authority.<sup>156</sup>

Another important point to note here is the status that CRC and ACRWC enjoys in South African domestic courts. As a matter of fact, South Africa is a dualist state that adheres to the common law tradition. This means that international treaties only become domestically enforceable upon incorporation into domestic laws. However, the RSA Constitution requires courts to consider international law in their deliberations. The first of these provisions is article 39(1) (b), which provides that a court, tribunal or forum 'must consider' international law when interpreting the chapter of the RSA Constitution that constitutes the Bill of Rights. Further, article 233 requires courts to afford preference to an interpretation of statutory law that is 'consistent with international law' whenever such an interpretation would be reasonable. Similarly, article 39 (2) provides another ground for considering international law in any child related legal dispute by providing that when interpreting any legislation, or developing the common law or customary law, every court must 'promote the spirit, purport and objects of the Bill of Rights.' These may include principles common to international law such as equality and human dignity.<sup>157</sup>

Therefore, independent of the interpretation of the relevant provisions in the Bill of Rights, international law principles may assume jurisprudential relevance in relation to the interpretation of other common law rules and statutory law, including any legislation pertaining to children's law.<sup>158</sup>

Another important feature notable in the RSA Constitution relates to the formulation of socio-economic rights. Under the RSA Constitution, socio-economic rights are formulated as 'rights'. This is different from the formulation in other African jurisdictions where socio-economic rights are formulated as policy directives.<sup>159</sup> Interestingly in this respect, the formulation of socio-economic rights under article 28 where children are involved differs from that found under articles 26 and 27 which cover 'everyone'. Whereas under articles 26 and 27 entitlement to the rights is subject to 'available resources' and 'progressive realisation', such an internal limitation does not pertain to children rights under article 28. To them, these

---

<sup>156</sup> RSA Constitution articles 231-233.

<sup>157</sup> J Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137 139.

<sup>158</sup> Sloth-Nielsen, n 157 above 139.

<sup>159</sup> Klink & Louw, 140 above.



rights asks more than just having service 'available' if a person can pay or if a person qualifies for free access.<sup>160</sup>

The South African legislative framework also comprises of several legislations that cater for children's rights. These include; the Child Care Act<sup>161</sup>, which makes it a criminal offence if a person who has to maintain a child does not provide the child with clothes, housing and medical care; the Basic Conditions of Employment Act<sup>162</sup>, which makes it illegal to employ a child under 15; the Domestic Violence Act<sup>163</sup>, which defines different forms of domestic violence and explains how a child can get a Protection Order against the abuser; and the Films and Publications Act<sup>164</sup>, which protects children from exploitation in child pornography.

There are also institutions that promote and protect children's rights. These include the National Steering Committee for a national Programme for Children (NPASC). The NPASC was established in 1995 and it is charged with the roles of coordinating the implementation programmes for the protection and care of children.<sup>165</sup> Its major activities include bringing together interested parties, develop inter-sectoral goals, to evaluate progress, plan activities and oversee provincial reports on children's rights. This institution has succeeded in most of its roles due to cooperation and assistance from the departments of Correctional Services, Safety and Security, Inter Ministerial Committee on Young People at Risk (IMCYPR), the South African Human Rights Commission, and other departments.<sup>166</sup>

The IMCYPR is mandated to develop standards pertaining to children at risk, such as homeless, street children, children in conflicts with the law, children placed away from home, children at risk, drug abuse or sexual exploitation.

In terms of legal representation of children the Legal Aid Amendment Act of 1996 provides that children are entitled to legal representation in all civil matters, at states expense, 'if substantial injustice would otherwise result'.<sup>167</sup> It is not, however, clear in this section as to what constitute 'substantial injustice' and who will allege and prove such injustice on behalf of the child.

---

<sup>160</sup> As above  
<sup>161</sup> Act 74 of 1983.  
<sup>162</sup> Act 75 of 1997.  
<sup>163</sup> Act 116 of 1998.  
<sup>164</sup> Act 65 of 1996.  
<sup>165</sup> SA Report, n 151 above, 43.  
<sup>166</sup> SA report, n 151 above, 26.  
<sup>167</sup> Section 28(1) (l).

There is also the Family Advocate. This institution assists children in matters of divorce that may affect their rights. It has powers and mandate to monitor, evaluate, and mediate in divorce action or action to vary orders on custody, access or guardianship in terms of the Mediation in Certain Matters Divorce Act of 1987.

Despite all the above efforts, there are still substantial numbers of South African children who do not enjoy the protection that the CRC and ACRWC demand. Several reasons account for this. First, the continued recognition of African customary law as a parallel system to the civil law undermines the protection of children in South Africa.<sup>168</sup> This system fails in many respects to conform to the principles and provisions of the CRC and ACRWC as customary law generally focuses on community rather than an individual unlike the CRC and ACRWC that recognise children as independent legal subjects. Customary law also does not incorporate legal rules that apply according to chronological age; rather it differentiates legal status according to, among others, gender, initiation and marriage which differentiation might lead to discrimination in the enjoyment of rights.

Second, the legacy of apartheid is another obstacle in South Africa's journey to ensuring realisation of children's rights. According to Spitz, apartheid has left South Africa with a culture of violence particularly at local community level to the extent that political violence has been replaced by an increase in crime in which many children, suffering the effects of poverty and unemployment have become involved.<sup>169</sup> Children also continue to be part in the 'cross fire violence' both as victims of appalling abuse and as actors.<sup>170</sup>

#### **4.1.2 Ghanaian legislative and institutional framework on children's rights**

Ghana was the first African country to attain her independence on 6 March 1957. Its current population is estimated at 18 million<sup>171</sup> of which children constitute a big part.<sup>172</sup> About 65 percent of the population lives in the rural areas in extreme poverty.<sup>173</sup> The population is divided into numerous ethnic and language groupings and about 45 percent of the Ghanaian population is traditionalist in the sense that they practice traditional religions and other cultural practices.<sup>174</sup>

---

<sup>168</sup> Burman, n 136 above.

<sup>169</sup> Spitz, n 12 above.

<sup>170</sup> SA report 477-483.

<sup>171</sup> <http://www.maclester.edu/geography/courses/geog261/eskidmore/genfacts.htm>

<sup>172</sup> CRC 41<sup>st</sup> session: Committee examines report of Ghana (13 January 2006) available at <<http://www.hrea.org/lists/child-rights/markup/msg00383.html>> (accessed on 26 September 2006)

<sup>173</sup> UN CRC Impact study: Ghana's report (1998) 5.

<sup>174</sup> Ghana's report, n 134 above, 5.

At independence, Ghana had a fairly stable economy. However, as a result of political instability, inappropriate development policy, famine, and unfavourable external terms of trade in late 1970's and early 1980's the economy recessed resulting to economic privation to both the government and citizens. Economic hardships coupled with traditional practices inimical to children's rights have always hampered realisation of children's rights in Ghana. For example in the education sector there are no sufficient infrastructure such as classrooms, teachers, and other teaching aids. Access to medical care is impeded by sparse distribution of health facilities, lack of qualified personnel, equipment and supplies. HIV/AIDS continues to affect children who are orphaned and without any means of subsistence as a result of which the number of street children is shooting up continuously. Traditional practices such as early betrothals, barter marriage, ritual and religious sacrifices and 'trokosi'<sup>175</sup> system continue to threaten survival and development of children in Ghana.<sup>176</sup>

The above impediments notwithstanding, Ghana has made significant progress in various areas of child development.<sup>177</sup> Its early ratification of the CRC indicates its sincere commitment to address children's rights. Practical manifestation of this commitment is evidenced by the establishment of the GNCC in 1979, and various awareness-raising campaigns undertaken even before ratification of the CRC and ACRWC.<sup>178</sup> Other important developments include efforts to harmonise<sup>179</sup> national legislation with the CRC and ACRWC by enacting specific provisions relating to children's rights in the 1992 Constitution<sup>180</sup>, the establishment of the Commission on Human Rights and Administrative Justice in 1992<sup>181</sup> (CHRAJ) which is also involved in the promotion and protection of children's rights.<sup>182</sup>

The procedure of the CHRAJ is governed by the Commission on Human Rights and Administrative Justice Act and a number of rules contained in the Commission's constitutional instrument.<sup>183</sup> These instruments provide that jurisdiction of the CHRAJ may be invoked through submission of either written or verbal complaints.<sup>184</sup> Act 456 further allows

---

<sup>175</sup> 'Trokosi' is a system whereby virgin girls are taken to the shrines to serve and appease the Gods for wrong doing committed by members of their family. The girls belong to the shrine for life and are forced to become the concubines of the fetish priests, their workers and also perform ceremonial duties.

<sup>176</sup> Ghana's report, n 134 above, 6.

<sup>177</sup> Concluding observation of the CRC Committee, Ghana, U.N.Doc.CRC/C/15/Add.73 (1997)

<sup>178</sup> For a detailed discussion on the 'pre ratification activities' see Ghana's report, n 134 above 12.

<sup>179</sup> During examination of Ghana's 2006 report to the CRC Committee it was remarked that efforts to 'harmonise' domestic legislation with the CRC was commendable, however, there were no commensurate efforts for the 'application' of the provisions of the CRC.

<sup>180</sup> Article 28 of Ghana Constitution, 1992.

<sup>181</sup> Established by article 216 of Ghana Constitution.

<sup>182</sup> Article 218 of the Ghana Constitution mandates CHRAJ to investigate complaints alleging violation of human rights and abuse of public power.

<sup>183</sup> Act 456 of 1993 and Constitutional Instrument number 17 (C 117) respectively.

<sup>184</sup> Section 2-16 and 18 of Act 456 and C 117 generally.

'any individual' (emphasis added) to file such a complaint.<sup>185</sup> This presupposes that the complaint need not necessarily be filed by a victim of violation. This informal procedure of lodging complaints before the Commission and the decentralisation of its operations to the regions, districts and possibly to lower levels as provided for under section 10 of Act 456 and the procedure allowing 'any person' to file the complaint have the potential to address the human rights of vulnerable segments of the Ghanaian society including children.

Similarly, in 1998 the police administration established a 'women and juvenile unit' to handle cases involving domestic violence, child abuse and juvenile offences.<sup>186</sup> In the same year, parliament passed a number of legislations aimed at protecting children's rights. These included the Criminal Code Amendment Act, a comprehensive legislation that proscribes the practice of 'trokos', making abandonment and abduction of children under 12 years a criminal offence, as well as declaring a child of 12 years incapable of committing a crime.<sup>187</sup> In the same year, the Children's Act<sup>188</sup> was enacted for purposes of reforming and consolidating the law relating to children, provide for the rights, maintenance and adoption of children as well as to regulate child labour and matters related to children's rights and affairs.<sup>189</sup> In 2003 the Juvenile Justice Act<sup>190</sup> was passed 'to provide for the juvenile justice system, to protect the rights of juveniles, ensure an appropriate response to juvenile offenders and provide for young offenders'.<sup>191</sup>

The above efforts culminated in the establishment of a formal child protection system which comprised various institutions, including family tribunal courts<sup>192</sup>, the Ministry of Women and Children's Affairs, Child Panel<sup>193</sup>, Department of Social Welfare (DSW), foster care system, and specialised probation officers and social workers. This system is governed by the Constitution and the other children's rights legislations referred to above. The system is organised in such a way that, the DSW receives a report of child abuse or endangerment and if it determines that the child is not in immediate danger; the matter is referred to a Child Panel. However, if the investigation by the DSW shows that the child has been abused or is in immediate need of care and protection, the Children's Act authorises the removal of the

---

<sup>185</sup> Section 12(5).

<sup>186</sup> N Yakubu 'Gender dimensions of Truth Commissions' in Cross dynamics of society in Transitional: Report of a workshop on 'cross dynamics of a society in transition' 22-24 October 2004(unpublished)

<sup>187</sup> Section 4, 5& 7 respectively of the Criminal Code (Amendment) Act, 1998.

<sup>188</sup> Act 560 of 1998.

<sup>189</sup> The Preamble to Children's Act.

<sup>190</sup> Act 650 of 2003.

<sup>191</sup> Preamble to the Juvenile Justice Act.

<sup>192</sup> Established under section 34 of the Children's Act to adjudicate matters concerning parentage, custody and maintenance of children.

<sup>193</sup> Established under section 27 of the Children's Act, to deal with adjudication of both civil and criminal matters involving children.

child to a place of safety. This child must then be brought before a Family Tribunal within seven days. The Family Tribunal can then make a 'care order' to determine the placement of the child or a 'supervision order' setting out the terms under which a child may remain in the custody of his parent(s), guardian(s), or relative(s).<sup>194</sup>

The Children's Act allows the child to express his/her opinion and participate in decision making in the Child Panel. It also grants him/her the right to legal representation before the Family Tribunal.<sup>195</sup> According to section 38, such representation is provided only at the request of 'the child, the child's parents, relatives, or persons interested in the matter'. The costs for representation are to be borne by the parties. As a result, children are usually represented by probation officers of the DSW.<sup>196</sup>

## **4.2 Challenges and opportunities to Tanzania**

It has been argued in chapter one of this study that measures to be adopted to ensure enjoyment of the rights under the CRC and ACRWC have to be compatible with socio-economic and cultural conditions obtaining in a particular state or society. Ghana and South Africa have each adopted legislative, institutional and policy measures to ensure compliance with their obligations under the CRC and ACRWC. The incorporation of children's rights in the constitution is a common feature in the two countries. In Ghana children's rights are also specifically provided for and protected by other specific and general legislations just as it is the case in South Africa.

With regard to institutions, Ghana has established the NCC to specifically deal with issues of children's rights. There is also the CHRAJ and Ministries vested with specific mandates on children's rights.<sup>197</sup> In South Africa, institutions mandated to deal with children's are as listed above.

Tanzania also has a Constitution that contains a justiciable Bill of Rights. The main difference between this Bill of Rights and those in the Ghanaian Constitution and the RSA Constitutions is that the Tanzanian does not have specific provisions on children's rights. Similarly, apart from articles 22 and 24 which provide for the rights to work and to own property respectively, the other socio-economic rights are provided for under the chapter on the directive policies of

---

<sup>194</sup> Section 19 of the Children's Act.

<sup>195</sup> Sections 30 & 38 of the Children's Act.

<sup>196</sup> <http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/ghana/frontpage.htm>.

<sup>197</sup> These include the Ministry of Employment and social welfare, the Ministry of health, Ministry of education. For details on their roles see Ghana's report, 25.

the government and therefore not justiciable.<sup>198</sup> The Constitution only provides that the parliament has powers to ratify the international treaties to which Tanzania is a party.<sup>199</sup> The challenge here is in determining which model will best suit Tanzania. Is it the South African model that contains explicit justiciable socio-economic rights and clear stipulations on the states obligations with regard to its international obligations or the Ghanaian model that also contains children's rights and other justiciable<sup>200</sup> socio-economic rights both under the Bill of Rights<sup>201</sup> and as Directive Principles of State Policy?<sup>202</sup> It is imperative to bear in mind the fact that the Ghanaian Constitutional proclamations have been said 'to be rather too loud that they drown the dearth of their realisation.'<sup>203</sup>

Another challenge may be posed by the fact that currently Tanzania does not have a specific children's rights legislation. The issue will be whether to adopt one comprehensive children's rights legislation or to incorporate the existing norms in the already existing scattered pieces of legislation.

Tanzania has the HRGC and other institutions that deal with children's rights. The shortcomings that inhibit the HRGC from effectively addressing children's rights have been highlighted in chapter three of this study. Where the economic challenges are sorted out, would the fact that there is neither a specific department nor a particular Commissioner mandated to deal with children's issues specifically pose another challenge? If this question is answered affirmatively, another issue will be whether the creation of a specific portfolio will suffice or there will still be a need to establish an independent children rights institution.

As with the other institutions mandated to deal with children's issues in Tanzania, the main challenge has been shown to be lack of coordination to a large extent. In this regard, this may not pose a great challenge as where the legislative framework is settled then it will also provide a clear administrative framework to implement it.

---

<sup>198</sup> See AJ Chenge 'The government and fundamental rights and freedoms in Tanzania' in CM Peter and IH Juma (eds), n 120 above, 3 4.

<sup>199</sup> Article 63 (e) of the Constitution.

<sup>200</sup> Article 12 of the Ghanaian Constitution enjoin the executive, legislature, judiciary, all organs of government, natural and legal persons; to respect and uphold rights enshrined in the Constitution; and they are enforceable as such in the courts of law.

<sup>201</sup> See articles 22 to 30.

<sup>202</sup> It must be note that the existing line of authority in Ghana is to the effect that the Directive Principles of State Policy are justiciable. See *New Patriotic Party v Attorney General* (1993-94) 2 GLR 35. Directive principles of state policy are contained under articles 36-39 of the Ghanaian Constitution.

<sup>203</sup> B Kunbor 'Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons' (2001) *Law, Social Justice & Global Development (LGD)* 2.

As stated above, in implementing international human rights instruments there is no model 'one size fits all'. The three countries under consideration in this study have different socio-economic and political background. While Tanzania has been politically stable since its independence in 1961, the situation has been different in Ghana that so far stands second among the African countries that have had a large number of *coups*.<sup>204</sup> Political stability was ushered in Ghana in 1992 when the fourth Ghana Republic was instituted by a constitutional democracy. South Africa has also been politically stable since its democratic election in 1994. The other difference lies in the economies of the three states. South Africa stands out as the country with the biggest and stable economy in the African South of Sahara region. In terms of culture, the three states are inhabited by different ethnic groups with varied traditions and culture. The three countries, however, share the common law tradition and legal system. The cultural and economic differences pose challenges on specific structures that may function effectively in specific countries.

Despite all the above differences, it will always remain true that African children share similar problems. This is why the ACRWC Committee in its report commented:<sup>205</sup>

Africa's children are most disadvantaged in many ways: their life chances are limited; they are exposed to violence; they are used as child soldiers; they are vulnerable to malnutrition and diseases, in particular the HIV/AIDS pandemic; they are deprived of education; their rights are violated; they are abused and exploited.

These sentiments are echoed in the preamble to the ACRWC which notes with concern the unique socio-economic, cultural, traditional, developmental circumstances and other factors affecting the African child.

The measures adopted, therefore, whatever form they take, must be geared towards translating the legal norms in the CRC and ACRWC in the human rights lives of children.

### **4.3 Conclusion**

As has been mentioned elsewhere in this study, there is no doubt that the first step in implementing the CRC and ACRWC should be the adoption of a legislative framework with sufficient certainty as to the rights and mechanisms for implementation of such rights. Mechanisms simply entail an administrative framework that support implementation. South Africa and Ghana have shown significant developments in this step. The existence of specific

---

<sup>204</sup> A Thomson *An introduction to African Politics* (2004) 132. Ghana has experienced five coups.

<sup>205</sup> Report of the African committee of experts on the rights and welfare of the child (EX.CL/200 (VII) available at: < [http://www.chr.up.ac.za/hr\\_docs/themes/theme06.html](http://www.chr.up.ac.za/hr_docs/themes/theme06.html)> (accessed on 18 September 2006).

provisions in the constitutions of the two countries as well as other legislation that deal with children's rights form the basis for the institutions that deal with children's rights in the two countries. The mode of formulation of rights as has been done in the RSA Constitution with regard to socio-economic rights and clear stipulations as to the place of international treaties domestically are also important in ensuring compliance with international standards. At the theoretical level sincere political commitments, as evidenced by very fast developments in the domain of children's rights in the two countries, appear to be the secret behind their success, at least, in the first stage. Impact on the ground will be easily obtained where such infrastructure exist.



## CHAPTER FIVE

### FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 5.1 Findings

It has been demonstrated in this study that the CRC was borne out of the need to address children's problems around the globe and that, the ACRWC does not conflict the CRC but rather provides a normative standard that reflects African values and traditions. In terms of content, the two instruments contain similar rights and each instrument combines the three generations rights in one instrument. These two instruments therefore compliment each other. They also envisage mechanisms for their implementation. The measures envisaged are open ended hence the use of the term 'and other measures' in articles 4 and 1 of the CRC and the ACRWC respectively. The use of such a term in provisions dealing with implementation allows state parties flexibility to adopt measures suitable in their specific circumstances.

The three countries, Tanzania, Ghana and South Africa, whose legal and institutional framework on children's rights have informed this study have shown various positive and negative experiences in their attempts to ensure realisation of children's rights. The Tanzanian experience indicates that unless measures adopted are coordinated and modelled on the spirit of the CRC and ACRWC, the realisation of children's rights will remain an empty promise. South African and Ghanaian experiences are rich in that they provide useful jurisprudence on the role of the legislative framework in the realisation of children's rights. They also show that where the legislative framework is settled and certain, it will provide an administrative structure that would support its implementation.

The impact on the ground is facilitated where there is such coordination between the legislative framework and the implementation mechanism. To attain this coordination there is the need for sincere political commitment and concerted efforts which have not been proved to be present in Tanzania.

#### 5.2 Conclusion

The importance of effective implementation of children's rights need not be overemphasised. The near universal ratification of the CRC is a clear indication of the need for children's rights protection as exploitation, abuse and neglect of children in any form is detrimental to development. Such practices affect children's ability to learn as well as their evolving capacities as parents, citizens, and productive members of society. Therefore, to build a

strong and responsible future generation, children's rights must be effectively implemented at all levels, community, national and international.

### **5.3 Recommendations**

The Problems around the implementation of children rights in Tanzania have been pointed out in chapter three of this study. They range from inadequate legislative framework, lack of appropriate implementation mechanisms to existing traditions and customs that do not conform to the spirit of the CRC and ACRWC. All these need to be dealt with if the Tanzanian children's rights are to be guaranteed. It is important, therefore, that the legal framework is brought into conformity with the spirit and purpose of the CRC and ACRWC by doing the following:

- ❖ Tanzania should adopt the South African model that incorporates specifically defined children's rights into the Constitution. If this is done, all the other legislative instruments will have to conform to the Constitution otherwise they will be invalid to the extent of their inconsistencies as per article 35 of the Constitution.
- ❖ Alongside incorporating specific rights in the Constitution there must also be reference to the place of international human rights and other treaties in the Tanzanian legal system. This will enable all the activities relating to the implementation of human rights norms, human rights education, advising the government or investigating violations to be taken with reference to, and in accordance with internationally recognised human rights standards.
- ❖ Tanzania should also adopt a comprehensive legislation on children's rights. This legislation must conform to the provisions of the CRC and ACRWC. The provisions of such a document must also be tailored in such terms that will clearly indicate that they take precedence over any legislation that may conflict with them.
- ❖ Outdated pieces of legislation such as the Township (Removal of Undesirable Persons) Ordinance should be repealed.
- ❖ In addition to the above, the problematic statutory provisions identified under chapter three of this study must be amended to reflect the protection required under the CRC and ACRWC. In this regard, the definition of a child should as far as possible adhere to the internationally accepted age criterion, age of marriage should be raised so that it matches with the rights and benefits conferred to persons of the age of majority. The distinction

between legitimate and illegitimate children should also be abolished in as far as affiliation, inheritance and succession is concerned.

- ❖ There should also be a coordinated institutional structure that can often draw attention to unacceptable and inconsistent laws and international laws on children's rights. The infrastructure must be one which provides for monitoring, protective and accountability device for children. This role may be discharged by the CHRG especially taking into consideration the fact that the economic situation does not support the establishment of an independent children institution in Tanzania. What is required is therefore the strengthening of the CHRG to enable it to independently and effectively monitor, protect and promote children's rights. To discharge this responsibility, a special focus on children's rights need to be emphasised in both the structure and activities of the CHRG. Accordingly, an identifiable Commissioner specifically responsible for children's rights as well as a specific section responsible for children's rights has to be created in the general institutional structure of the CHRG.
  
- ❖ It is also important to note that the problems concerning the enforcement of children's rights are not confined to state institutions only but extends to communities as well. It is trite knowledge that culture and lack of knowledge of the CRC and ACRWC act as major obstacles to enforcement of children rights. This is because the communities in which children live do not always observe the relevant legislative prescriptions for the protection of children rights. The result is that although the legal system may make extensive provision for the rights of the child and institutions may exist to promote and protect children's rights, in reality all these efforts may prove futile if the community as a whole does not become part of the process.
  
- ❖ Similarly, adults should be educated about the principles and provisions of the CRC and ACRWC. In the three countries referred to in this study the experience show that little attention has been given to the education of adults, and in the absence of education about the CRC and ACRWC it is likely that the myth about children's rights and notions of children as parental property will persist.

**WORD COUNT: 17997**

## BIBLIOGRAPHY

### Books

Bentzon, AW; Hellum, A & Stewart, J (1998) *Pursuing grounded theory in law: South-North experiences in developing women's law* Oslo: Tano Aschehoug

Detrick, S (1999) *A commentary on the United Nations Convention on the Rights of the Child* The Hague: Martin Nijhoff Publishers

Doek, J; van Loon, H & Vlaardingerbroek (eds) (1996) *Children on the move. How to implement their right to family life* The Hague/Boston/London: Martinus Nijhoff publishers

Dugard ,J (1994) *International Law* Cape Town: Juta

Flekkoy, MG (1991) *A voice for children: Speaking out as their ombudsman* London: UNICEF/Jessica Kingsley publishers

Franklin, B (ed) (1986) *The rights of the children* Durban: Butterworths

Hatchard, J; Ndulo, M and Slinn, N (2004) *Comparative Constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective*

Heyns, C & Viljoen, F (2002) *The Impacts of the United Nations human rights treaties on the domestic level* The Hague/London/New York: Kluwer Law International

Heyns, C (ed) (2004) *Human rights law in Africa* Leiden: Martinus Nijhoff

Hodgkin, R & Newel, P (1996) *Effective government structures for Children* London: Gulbenkian Foundation

Makaramba, RV (1999) *Child Rights in Tanzania* Dar es Salaam: Friedrich Ebert Stiftung

Michael, H (1997) *The Policy Process in the Mobilisation in Low Income Countries* Florence: Innocenti Publications

Reif, LC (2004) *Good governance and international human rights system* Leiden/Boston: Martinus Nijhof publishers

Thomson, A (2004) *An introduction to African Politics* 2<sup>nd</sup> edition London and New York: Routledge

Umzurike, UO (1997) *The African Charter on Human and Peoples Rights* The Hague: Martin Nijhof Publishers

Van Bueren, G (1995) *The International Law on the rights of the child* Dordrecht: Martinus Nijhoff

### Chapters in books

BT Mapunda, BT 'Personal freedom and Police powers in Tanzania' in Peter, CM & Juma, HI (eds) (1998) *Fundamental rights and freedoms in Tanzania* (1998) Dar es Salaam: Mkuki na Nyota publishers

Chenge, AJ 'The government and fundamental rights and freedoms in Tanzania' in Peter, CM and Juma, IH (eds) (1998) *Fundamental rights and freedoms in Tanzania* Dar es Salaam: Mkuki na Nyota publishers

Eide, A 'Good governance, human rights, and the rights of minorities and indigenous people' in Sano,HO & Alfredson, G (eds) (2002) *Human rights and good governance: Building bridges* The Hague/London/New York: Martinus Nijhoff publishers

Fottrell, D 'One step forward or two steps sideways? Assessing the first decade of the children's Convention on the rights of the Child' in Fottrell, D (ed) (2000) *Revisiting Children's Rights 10 years of the UN Convention on the Rights of the Child* The Hague-London-Boston: Kluwer Law International

Ncube, W (1998) 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International human rights norms and domestic law, tradition and culture' in W Ncube (ed) *Law, Culture, Tradition and Children's rights in Eastern and Southern Africa* Brookfield, Vt.: Ashgate/Dartmouth

Rishmawi, M 'Article 4: The nature of state parties obligations' in Alen, A; Lannote, JV; Verhellen, E; Ang, F; Berghmans, M; Verheyde, M; (eds) (2006) 16 *A commentary on the United Nations Convention on the Rights of the Child* Leiden: Martinus Nijhoff Publishers

Scheinin, M 'State responsibility, good governance and indivisible human rights' in Sano,HO & Alfredson, G (eds) (2002) *Human rights and good governance: Building bridges* The Hague/London/New York: Martinus Nijhoff publishers

### **Articles**

Burman, S 'The best interest of the South African Child' (2003) 1 *International Journal of Law Policy and the Family* 28

Cohen, CP 'The developing jurisprudence of the rights of the child' (1993) 6 *St Thomas Law Review* 1

Doek, JE 'What does the Children Convention require?' (2006) 20 *Emory International Law Review* 199

Hamad, SH 'The CRC: Words on Paper' or a reality for children? A case study of Jordan (1999) 7 No 3 *International Journal of Children's Rights* 215

Johansson, K 'Children in trouble with the law: Child justice in Sweden and South Africa' (2003) 17 *International Journal of Law, policy and Family* 308

Kunbor, B 'Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons' (2001) *Law, Social Justice & Global Development (LGD)* 2. Also available at: < <http://elj.warwick.ac.uk/global/issue/2001-2/kunbor.html>>. (accessed on 18 September 2006)

Lloyd, A 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *The International Journal of Children's Rights* 179

Louw, DA & Klink, ME 'A South African perspective on children's rights: General Principles' (2000) 19 *Medicine and Law* 49

Maripe, B 'The recognition and enforcements of children rights in domestic law: An assessment of the child protection laws in Botswana in light of prevailing international trends' (2002) 9*The International Journal of Children Rights* 339 341

Mosikatsane, TL 'Children's rights and family autonomy in the South African context: A comment on children's rights under the Final Constitution (1998)3 *Michigan Journal of race and Law* 341

Nyaundi, PM 'Circumcision and the rights of the Kenyan boy child' (2005) 5 *African Human Rights Law Journal* 171

Parry-Williams, J 'Legal reforms and children's rights in Uganda-some critical issues (1993) 1 *The International Journal of Children's Rights* 49

Sloth-Nielsen, J 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137 139

Spits, LA 'Implementing the United Convention on the Rights of the Child: Children's rights under the 1996 South African Constitution' (2005) *Vanderbilt Journal of Transnational Law* 853

van der Vyver, JD 'Municipal legal obligations of states parties to the Convention on the Rights of the Child: The South African Model' (2006) 20 *Emory International Law Review* 9.

Von Struensee, SO 'Violence, exploitation and children: Highlights of the United Nations Children's Convention and International response to children's human rights' (1995) 18 *Suffolk Transnational Law Review* 589

Williams, J 'Effective government structures for children? The UK'S four children's commissioners (2005) 17 *Child and Family Law Quarterly* 37

Woodhouse, BB 'Recognizing Children's Rights: Lessons from South Africa' (1999) 26 *Spring Human Rights* 15 17. Also available at: <http://lic.law.ufl.edu/~saltzman/woodhse.pdf>

### **International treaties**

African Charter on Human and Peoples Rights (ACHPR)

African Charter on the Rights and Welfare of the Child (ACRWC)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Convention on the Rights of the Child (CRC)

First Optional Protocol to the CRC; on the Involvement of Children in Armed Conflict

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and cultural rights (ICESCR)

Second Optional Protocol to the CRC; on the sale of children Child Prostitution and Child Pornography

## **International humanitarian Law**

The Protocol I to the Geneva Conventions; Relating to the Protection of Victims of International Armed Conflicts

## **Labour instruments**

ILO Convention (No.138) Minimum age for Admission to Employment

## **UN Declarations**

Convention against Discrimination in Education (adopted by the General Conference of the United Nations Educational, Scientific and cultural organisation in Paris on 14 December 1960.

Declaration of the Rights of the Child, GA Res.1386 U.N. GAOR, 14TH SESS.Supp.No.16

Geneva Declaration of the Rights of the Child, League of Nations O.J Spec.Supp.23 (1924)

## **Domestic legislations**

### **Tanzania**

The Adoption Ordinance (Chapter 335 of the Laws of Tanganyika)

The Affiliation Ordinance (Chapter 278 of the Laws of Tanganyika)

The Age of Majority (Citizenship Laws) Act, 1970 (Act 24 of 1970)

The Children and Young Persons Ordinance (Chapter 13 of the Laws of Tanganyika)

The Children's Homes (Regulation) Act; 1968 (Act 4 of 1968)

The Citizenship Act, 1995 (Act 6 of 1995)

The Citizenship Ordinance (Chapter 452 of the Laws of Tanganyika)

The Commission for Human Rights and Good Governance Act, 2001 (Act 7 of 2001)

The Constitution of the United Republic of Tanzania, 1977

The Criminal Procedure Act, 1985 (Act 9 of 1985)

The Employment Ordinance (Chapter 366 of the Laws of Tanganyika)

The Evidence Act (Act 6 of 1967)

The Land Act, 1999 (Act 4 of 1999)

The Law of Contract Ordinance (Chapter 433 of the Laws of Tanganyika)

The Law of Marriage Act (LMA), 1971 (Act 5 of 1971)

The National Education Act, 1978 (Act 25 of 1978)

The Penal Code (Chapter 16 of the Laws of Tanganyika)

The Probation of Offenders Ordinance (Chapter 247 of the Laws of Tanganyika)

The Registration of Births and Deaths Ordinance (Chapter 108 of the Laws of Tanganyika)

The Sexual Offences Special Provisions Act, 1998 (Act 4 of 1998)

The Village Land Act, 1999 (Act 5 of 1999)

Township (Removal of Undesirable Persons) Ordinance, 1944(Chapter 16 of the Laws of Tanganyika)

### **Ghana**

The Children's Act, 1998 (Act 560 of 1998)

The Commission on Human Rights and Administrative Justice Act, 1993 (Act 456)

The Constitutional Instrument Number 17 (C I17)

The Criminal Code (Amendment) Act, 1998 (Act 554 of 1998)

The Constitution of the Republic of Ghana, 1992

The Juvenile Justice Act, 2003 (Act 650)

### **South Africa**

The Basic Conditions of Employment Act, 1997 (Act 75 of 1997)

The Child Care, 1983 (Act 74 of 1983)

The Constitution of the Republic of South Africa (Act 108 of 1996)

The Domestic Violence Act, 1998 (116 of 1998)

The Films and Publications Act, 1996 (Act 65 of 1996)

The Group Areas Act (Act 42 of 1950)

### **International case law**

*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)

### **Domestic case law**

#### **Tanzania**

*DPP v Daudi Pete* (1991) LRC (Const.) 553

*Attorney General v Lesinoy Ndeinay* (1980) TLR n 214

#### **South Africa**

*B v S* (1995) 3 SA Law Reports 571A.

#### **Ghana**

*New Patriotic Party v Attorney General* (1993-94) 2 GLR 35

### **General comments**



Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (U.N. Doc. CRC/GC/2003/5)

General Comment No. 2 (2002) "The role of independent national human rights institutions in the protection and promotion of the rights of the child"

Office of the High Commissioner for Human Rights, Rights of the Child (Art. 24): CCPR General Comment 17 (4 July 1989)

### **Internet sources**

<http://www.ohchr.org>

<http://lrtc-tz.org/pdf/watoto.pdf>

<http://www.africa-union.org/child/home.htm>

[http://www.boonabaana.org/some\\_sad\\_statistics.htm](http://www.boonabaana.org/some_sad_statistics.htm)

[http://www.chr.up.ac.za/hr\\_docs/themes/theme06.html](http://www.chr.up.ac.za/hr_docs/themes/theme06.html)

<http://www.hrea.org/lists/child-rights/markup/msg00383.html>

<http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/ghana/frontpage.htm>

<http://www.macalester.edu/geography/courses/geog261/eskidmore/genfacts.htm>

<http://www.mcdgc.co.tz/children.html>

[http://www.streetchildren.org.uk/reports/Tanzania\\_NNOC\\_NGO\\_REPORT.doc](http://www.streetchildren.org.uk/reports/Tanzania_NNOC_NGO_REPORT.doc)

<http://www.umn.edu/humanrts/crc/tanzania2001.html>

<http://www.unfpa.org/profile/Tanzania.ctm>

<http://www.unhchr.ch/html/menu6/2/fs10.htm>

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument)

<http://www1.umn.edu/humanrts/crc/tanzania2001.html>

### **Unpublished materials**

Concluding observation of the CRC Committee, Ghana, U.N.Doc.CRC/C/15/Add.73 (1997)

General guidelines regarding the form and contents of periodic reports to be submitted by state parties under article 44(1)(b) of the CRC

Initial Reports of the state parties due in 1997, Addendum, South Africa, UN Convention on the rights of the child (U.N. Doc.CRC/C/51/Add.2)(South Africa's Report) 15

Law Reform Commission of Tanzania, Report of the Committee on the Law relating to children in Tanzania (1994)

Makaramba, RV 'The efficacy of human rights protection mechanism', A paper presented in the Annual Human Rights Conference 10-11 December 200 Karimjee Hall Dar Es salaam Tanzania

Yakubu, N 'Gender dimensions of Truth Commissions' in Cross dynamics of society in Transitional: Report of a workshop on 'cross dynamics of a society in transition' 22-24 October 2004

NGO Report on Tanzania to the CRC Committee 15 November 2000

Report of the African committee of experts on the rights and welfare of the child (EX.CL/200 (VII))

Tanzania Development Vision 2025

Tanzanian Child Development Policy

Tanzanian Second periodic report to the CRC Committee

The Committee on the Rights of the Child Concluding observations (U.N. Doc.CRC/C/15/Add.156 (2001))

The Poverty reduction strategy Programme

The Presidential Commission on Single Party or Multiparty System in Tanzania, 1991, Volume One, Report and recommendations of the Commission on the Democratic System in Tanzania

UN Convention on the Rights of the Child: Impact study (Ghana's Report) (1998)

UNFPA Worldwide: Population, Health and Socio Economic Indicators/Policy developments