

**BALANCING PARENTAL RESPONSIBILITY AND STATE OBLIGATION IN FULFILLING  
THE SOCIO-ECONOMIC RIGHTS OF CHILDREN UNDER THE AFRICAN CHARTER ON  
THE RIGHTS AND WELFARE OF THE CHILD**

**Submitted in partial fulfilment of the requirements for the degree LLM (Human  
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## DEDICATION

*In loving memory of my beloved father, Mr Daniel Zamani Ankut, who left too soon to share the joy of this achievement... and for Hilda and Harrison, my niece and nephew, it is to you, and to the countless numbers of African children that this work is dedicated.*

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## LIST OF ABBREVIATIONS

<b>CAT</b>	Convention Against Torture
<b>CRC</b>	Convention on the Rights of the Child
<b>CERD</b>	Convention for the Elimination of all Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>UN</b>	United Nations
<b>OAU</b>	Organisation of African Unity

## INTRODUCTION

### 1.1 Background to the study

All children the world over have physical needs which must at first be supplied by someone else if they are to survive at all. At a basic level, these needs include nutrition, health, education, clothing and shelter. In classical human rights terms, such needs are referred to as socio-economic rights. More recently, they have come to be referred to as security rights whose objective is the attainment of the child's basic needs for subsistence and rounded development.<sup>1</sup>

In many respects, African children are more likely to be victims of socio-economic rights violations than children in other continents.<sup>2</sup> The major obstacle to the enjoyment of these rights is the generalised lack of resources in the region.<sup>3</sup> For example, children often cannot go to school because their parents are too poor to afford the school fees and hire them out to wealthy families either as herd boys or domestic servants in order to supplement the family income.<sup>4</sup>

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<sup>1</sup> The Committee on the Rights of the Child has identified four pillars on which the Convention on the Rights of the Child is based. These are the best interest of the child (article 3), non-discrimination (article 2), survival and development (article 6 (2) and the right to participate (article 12 (1)). Security rights come under the child's right to survival and development. These include health and health related rights, education, food, housing freedom from exploitation and family protection and care rights.

<sup>2</sup> F Viljoen, 'The African Charter on the Rights and Welfare of the Child' (2000) C J Davel (ed) *Introduction to Child Law in South Africa*, 214.

<sup>3</sup> B Rwezaura, 'Law, Culture and Children's Rights in Eastern and Southern Africa, Contemporary Challenges and Present-day Dilemmas' (1998) W Ncube (ed.) *Law Culture and Children's Rights in Eastern and Southern Africa*, 289.

<sup>4</sup> Rwezaura above, citing a study conducted in Lesotho by P Letuka where parents who cannot afford to pay school fees for their children prefer to send them out to work and contribute to the economic needs of the family. This practice results in exposing the child to various forms of exploitation as well as the denial of other basic rights.

Other causes of violations include HIV/AIDS, warfare, famine and harmful cultural practices. Famine increases rates of infant mortality and children, especially girls, sometimes suffer health hazards as a result of cultural practices such as female genital mutilation and forced early marriages which are prevalent practices in the continent.<sup>5</sup> Children born with HIV or those who are AIDS orphans face immediate and grave obstacles to their humanity as well as the consequences of living in households without adult caregivers.<sup>6</sup>

The need to respond to the socio-cultural and economic realities of the African child formed in part, the foundational basis for the adoption of the African Charter on the Rights and Welfare of the Child (Children's Charter).<sup>7</sup> This contribution endeavours to discuss the concepts of parental responsibility and states obligation in fulfilling the socio-economic rights of children under the Children's Charter.

## 1.2 Problem statement

Family poverty is a prime indicator of the larger national problems of underdevelopment and economic deprivation that has afflicted sub-Saharan Africa for many generations. It's more general effects are demonstrated by the high rates of infant and child mortality, low calorie consumption, stillbirths and low life expectancy for the whole region.<sup>8</sup> Children, due to their needs for physical

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<sup>5</sup> Viljoen (n 2 above) 215. See W Ncube, 'The African Cultural Fingerprint? The changing concept of childhood' in Ncube (n 3 above) where incidences of female genital mutilation in Kenya are highlighted. See also the discussions of J Kabeberi- Macharia on 'Reconstructing the image of the girl-child' in Ncube (n 3 above) 20 & 52 respectively.

<sup>6</sup> J. Sloth- Nielsen, 'Too little? Too late? The implications of the Grootboom responses to child- headed households' (2003) 7 *Law, Democracy & Development* 114.

<sup>7</sup> The African Charter on the Rights and Welfare of the Child was adopted at the 26<sup>th</sup> Session of the OAU Assembly of Heads of States and Governments, OAU Doc/CAB/LEG/24.9/49 (1990).

<sup>8</sup> Rwezaura (n 3 above) 293, based on a global survey by the United Nations Human Development Index (1996) covering 174 countries.



and mental development are more likely to suffer higher negative impacts of poverty than adults. This is because they require particular care with regards to health, physical, mental and social development.<sup>9</sup>

The Children's Charter imposes on parents or other persons responsible for the child, the primary responsibility of the upbringing and development of the child.<sup>10</sup> The duty of parents is to ensure, at all times, that the best interest of the child is of basic concern to them. Additionally, such parents are to secure, within their abilities and financial capacities, conditions of living necessary to the child's development.<sup>11</sup> States Parties are obliged, among other things, to assist parents and others responsible for the child in cases of need, to provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.<sup>12</sup>

The prevailing realities of 'severely depressed' African economies make it difficult for children to enjoy the socio-economic rights guaranteed under the Children's Charter.<sup>13</sup> This study takes the view that the responsibility of parents and the obligations of the state towards children's socio-economic must be mutually supportive. It therefore, proposes the need for balancing parental responsibility and state obligations in the struggle to ensure that the socio-economic rights of children across the continent are met, albeit, under difficult economic circumstances.

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<sup>9</sup> See generally, the Preamble to the Children's Charter.

<sup>10</sup> Article 20(1) Children's Charter.

<sup>11</sup> Article 20 (1) (a) & (b) Children's Charter.

<sup>12</sup> Article 20 (2) Children's Charter.

<sup>13</sup> A Lloyd, 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) *African Human Rights Law Journal* 2 No 1, 32.

### **1.3 Aims of the study**

This essay seeks to define parental responsibility within the African context and the extent of States Parties obligations in fulfilling the socio-economic needs of children under the Children's Charter. The aim is to establish a balance between parental responsibility and States obligation in ensuring that socio-economic rights of children are ultimately fulfilled.

### **1.4 Significance of study**

International law sets universal standards of protection for children. However, the world community is so diverse economically, socially and culturally that it cannot understand, interpret and apply these standards in the same way.<sup>14</sup> Africa, thus, found it necessary to take the protection of children's rights to a supra-national level through the adoption of the Children's Charter.<sup>15</sup> In so doing, Africa has taken the lead in setting standards for the protection of children's rights in a regional context.

The socio-economic obligations imposed on parents or others responsible for the care of the child, as well as those imposed on the state, require concrete conceptual interpretations. These interpretations will help provide the springboard for sustained discussions on the fulfilment of the rights within the domestic arena of States Parties to the Children's Charter. The interpretations given in this study will attach due weight to fundamental international standards, whose contents and scope are defined by peremptory norms of international values.

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<sup>14</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 Ncube (n 3 above) 1.

<sup>15</sup> Lloyd (n13 above) 13.

## 1.5 Methodology

The method employed in undertaking this research is by way of literature review. There will, therefore, be reliance on relevant primary and secondary sources relating to economic, social and cultural rights in general and children's rights in particular. These include international and regional treaties, books, articles and case law.

## 1.6 Literature review

Though child rights have been the subject of international discourse for several decades,<sup>16</sup> the African Charter on the Rights and Welfare of the Child is a pioneer instrument for regional protection of child rights.<sup>17</sup> It is an instrument, which, like the category of people it seeks to protect, is still in its 'infancy'. Understandably, the literature available on it is scant.

Viljoen<sup>18</sup> has contextualized the motivations for the adoption of the Children's Charter by arguing amongst other things, that the Convention on the Rights of the Child, which was adopted a year earlier than the Children's Charter, was a product of numerous political compromises as a result of which issues pertinent to Africa were not addressed. Such unaddressed issues included the situation of children living under apartheid, prevailing practices such as female genital mutilation, socio-economic conditions like illiteracy and low levels of sanitary conditions- all of which pose threats to the survival of children.

The African conception of community responsibilities and duties for children was also neglected. Specifically, the ability of the community to engage in meaningful

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<sup>16</sup> The Universal Declaration on Human Rights (1948) The International Covenant for Civil and Political Rights (1966), The International Covenant on Economic, Social and Cultural Rights (1966) and the UN Convention on the Rights of the Child (1989).

<sup>17</sup> Lloyd (n 13 above) 14.

<sup>18</sup> Viljoen (n 2 above) 218.

participation in the planning and management of basic programmes for children was not taken into account. Other issues such as the use of child soldiers and the role of the family were not articulated in as strong and enforceable terms as deserving of issues of such magnitude in Africa. He also gives an overview of the normative and procedural framework for protecting child rights under the Children's Charter.

Lloyd<sup>19</sup> in a similar vein, gave a theoretical analysis and drew attention to the socio-economic realities of African countries, which are capable of imposing limitations on the enjoyment of the rights provided in the Children's Charter. Chirwa<sup>20</sup> provided an interesting perspective of what he considers the merits and demerits of the Children's Charter by highlighting its inherent weaknesses especially with respect to its enforcement mechanisms.

Gose<sup>21</sup> presented an illuminating assessment of the legal value of the substantive provisions of the Children's Charter by means of a direct comparison to the Convention on the Rights of the Child. Olowu<sup>22</sup> also undertook a critical discuss of the normative and substantive frame work of the Children's Charter while upholding its potency as a powerful tool for enhancing the lives of millions of African children.

This contribution seeks to define in concrete terms, the issue of parental responsibility and states obligations in providing for the socio- economic needs of

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<sup>19</sup> Lloyd (n 13 above) 11-32.

<sup>20</sup> D Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) *Kluwer Law International Journal of Children's Rights* 157-177.

<sup>21</sup> M Gose, (2002) *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child' A Publication of the Children's Rights Project Community Law Centre, University of the Western Cape.*

<sup>22</sup> D Olowu, 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) *Kluwer Law International Journal of Children's Rights* 127- 135.

the child under the Children's Charter within the prevailing socio-economic and cultural conditions of the African state.

### **1.7 Limitations of proposed study**

This study is based on the African regional mechanisms for the protection of children's rights. Direct inspiration will be drawn from international mechanisms for protecting socio-economic rights in general and the rights of the child in particular. Guidance will also be sought from relevant case law where attempts have been made to give effect to the socio-economic rights of children.

### **1.8 Summary of chapters**

The study is divided into five chapters. Chapter 1 has highlighted the structure of the entire discourse. Chapter 2 deals with the general perspectives of the socio – economic rights of children within the broad context of international human rights law. An overview of the normative and procedural framework of the Convention on the Rights of the Child is given. The chapter also examines the normative and procedural framework available for the protection of the child at the African regional level, the starting point of which is the African Charter on Human and Peoples Rights and eventually narrowed down to the African Charter on the Rights and Welfare of the Child.

Chapter 3 addresses the concept of parental responsibility. In particular, Africa's notion of parental responsibility is critically analyzed as a factor that makes a crucial difference to the interpretations of the underlying assumptions in the Children's Charter that the socio-economic rights of children could be met through the African communal and extended family network.

Chapter 4 deals with states obligations in respect of the socio-economic rights of children. The South African jurisprudence on the rights of the child is also

discussed in this chapter. The chapter also highlights the interplay between parental responsibility and state obligations in fulfilling the socio-economic rights of children.

Chapter 5 consists of conclusions of the essay.

## GENERAL PERSPECTIVES ON THE SOCIO-ECONOMIC RIGHTS OF CHILDREN

### 2.1 Introduction

According to Van Bueren,<sup>23</sup> the growth in the development of International law on the rights of the child has paralleled to some degree the development of the general body of international law. The development of both bodies of laws can be divided into three stages. The first stage was the recognition that all individuals, including children, were objects of international law requiring legal protection. The second stage, which is still evolving, is the granting of substantive rights to individuals including children. And the third stage, which is also still developing, is the acknowledgement that in order to ensure that individuals are able to enjoy and exercise their rights, they must be acknowledged to possess the necessary procedural capacity to exercise and claim these rights and freedoms.<sup>24</sup>

Although in principle, children were entitled to enjoy the full range of rights under international law, the practical realisation of these rights became problematic with the development of the second and third stages of the general body of international law.<sup>25</sup> This was particularly so in respect of the child's freedom of expression and the question of possessing sufficient procedural capacity to act on his or her own behalf.<sup>26</sup>

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<sup>23</sup> Van Bueren, G (1995) *The International Law on the Rights of the Child* 1.

<sup>24</sup> Van Bueren (n 23 above).

<sup>25</sup> Van Bueren (n 23 above).

<sup>26</sup> Van Bueren (n 23 above).

The need to respond to these questions led to the adoption of the Convention on the Rights of the Child (CRC), which addresses the special needs of the child including his or her economic and social rights.<sup>27</sup>

### **2.1.1 Defining the socio-economic rights of children within the broad context of international human rights law**

Social and economic rights constitute interrelated components of a more comprehensive package that is axiomatically linked with civil and political rights.<sup>28</sup> At the core of social rights is the right to an adequate standard of living,<sup>29</sup> the enjoyment of which requires, at the very minimum, that everyone shall enjoy necessary subsistence rights- adequate food, nutrition rights, clothing, housing and the necessary conditions of care. Closely related to these rights, is the right of families to assistance.<sup>30</sup> In order to enjoy these social rights, there is also the need to enjoy certain economic rights such as the rights to property,<sup>31</sup> the right to work<sup>32</sup> and the rights to social security.<sup>33</sup>

Children, as much as adults are covered by human rights treaties which safeguard socio-economic rights.<sup>34</sup> In some instances these treaties have made either implicit or express provisions in relation to children. For example, the

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<sup>27</sup> T Hammarberg, 'Children' in Eide A et al (eds.) (1995) *Economic, Social and Cultural Rights: A Textbook* 293. The CRC was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of November 20 1989 and came into force on 2 September 1990.

<sup>28</sup> A Eide, 'Economic, Social and Cultural Rights as Human Rights' in Eide (n 27 above) 31.

<sup>29</sup> Article 25 UDHR, article 11 ICESCR.

<sup>30</sup> Eide (n 28 above), see articles 10 ICESCR and 27 CRC.

<sup>31</sup> Article 17 UDHR.

<sup>32</sup> Articles 23 UDHR and 6 ICESCR.

<sup>33</sup> Articles 22 & 25 UDHR, and 9 ICESCR.

<sup>34</sup> Hammarberg (n 27 above) 290.



International Covenant on Economic, Social and Cultural Rights (ICESCR) in recognising the right of everyone to education specifically prescribes for free and compulsory primary education.<sup>35</sup> Similarly, the right to health is available for everyone, but governments are enjoined to take steps to reduce infant mortality and to provide for the healthy development of the child.<sup>36</sup> The practical realisation of these rights by children however, remained illusory. This resulted in concrete efforts by the international community to strengthen the frontiers of protection available to children.

### **2.1.2 The Convention on the Rights of the Child: normative and procedural framework for fulfilling socio-economic rights**

The most comprehensive international instrument dealing with the rights of children at the international level is the CRC. The approach to rights in the CRC is holistic and makes it less obvious as to which provisions are to be classified specifically as economic, social and cultural rights.<sup>37</sup> The Committee on the Rights of the Child has grouped together certain rights under the heading of 'Basic Health and Welfare' which are of relevance in this context.<sup>38</sup> The most notable of these provisions are the rights to health care,<sup>39</sup> social security<sup>40</sup> and education.<sup>41</sup> Other articles of interest in this connection are some of those

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<sup>35</sup> Article 13 ICESCR.

<sup>36</sup> Article 12 ICESCR.

<sup>37</sup> J Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: some implications for South Africa' (1995) 11 *South African Journal of Human Rights* 415.

<sup>38</sup> Sloth-Nielsen (n 37 above).

<sup>39</sup> Article 24 CRC.

<sup>40</sup> Article 26 CRC.

<sup>41</sup> Article 28 CRC.

described as ‘special protection measures’ which relate to vulnerable groups of children or children in situations of risk.<sup>42</sup>

Under the CRC, parents or legal guardians have the primary responsibility for the upbringing and development of the child. This obligation is to be carried out with due regard to the best interest of the child.<sup>43</sup> States Parties are to render appropriate assistance to parents in the performance of their child rearing responsibilities where necessary. States Parties are also to undertake all appropriate, legislative, administrative and other measures to ensure the implementation of the rights recognised in the CRC. And with regard to socio economic rights, States Parties are to undertake such measures to the maximum extent of their available resources and where needed, within the framework of international co-operation.<sup>44</sup>

The CRC establishes the UN Committee on the Rights of the Child (the Committee) as the monitoring body with the mandate to examine the progress made by States Parties in fulfilling their obligations under the convention.<sup>45</sup> Through its General Comments, the Committee has been able to highlight issues it considers pertinent to the realisation of the rights under the convention.

The General Comments so far issued include General Comment No 1 on the Aims of Education under article 29 (1),<sup>46</sup> General Comment No 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion

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<sup>42</sup> Article 27 CRC.

<sup>43</sup> Article 18 CRC.

<sup>44</sup> Article 4 CRC.

<sup>45</sup> Article 43 CRC.

<sup>46</sup> General Comment No 1, The Aims of Education 17/04/2001, CRC/GC/ 2001/1 sourced at <<http://www.unhcr.ch/tbs/doc.nsf>> accessed on 11 October 2003.

of the Rights of the Child;<sup>47</sup> General Comment No 3 on HIV/AIDS and the Rights of the Child;<sup>48</sup> General Comment 4 on Adolescent Health and Development in the context of the Convention on the rights of the Child;<sup>49</sup> and more recently, General Comment No 5 on General measures of implementation for the Convention on the Rights of the Child.<sup>50</sup>

The Committee has also exercised its mandate to receive and examine state reports.<sup>51</sup> In its periodic examination of States Parties report under the CRC, the Committee pays particular attention to what it has termed “general measures of implementation.” It also issues concluding observations following the consideration of reports submitted by States Parties. In its concluding observations issued following examination of reports, the Committee provides specific recommendations relating to general measures. It expects the State Party to describe action taken in response to these recommendations in its subsequent periodic report.<sup>52</sup>

State Parties are expected to be honest and to indicate clearly in their reports any difficulties they have encountered in seeking to implement the Convention. This is intended to foster the notion of collaboration and mutual trust that ought to

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<sup>47</sup> General Comment No 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child 15/11/2002 CRC/GC/2002/2 sourced at <<http://www.unhcr.ch/tbs/doc.nsf>> accessed on 11 October 2003.

<sup>48</sup> General Comment No 3, HIV/AIDS and the Rights of the Child CRC/GC/2003 sourced at <http://www.unhcr.ch/html/menu2/6/crc/doc/comment/hiv/pdf>> accessed 11 October 2003.

<sup>49</sup> General Comment No 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child CRC/GC/2003 sourced at <http://www.unhcr.ch/html/menu2/crc/doc/comments/adohealth.doc>> accessed on 11 October 2003.

<sup>50</sup> General Comment No 5, General measures of implementation for the Convention on the Rights of the Child CRC/GC/2003/5 sourced at <http://www.unhcr.ch/tbs/docs/nsf> accessed 18 October 2003.

<sup>51</sup> Article 44 CRC.

<sup>52</sup> Para 2 of General Comment No 5 (n 50 above).

underline the relationship between the States Parties and the Committee. The Committee recognizes that certain States Parties lack the necessary means or expertise to prepare their national reports. In order to remedy the situation, it has been suggested that assistance could be sought either from non-governmental organisations or may be obtained from bilateral assistance.<sup>53</sup>

Though the adequacy of state reporting as a mechanism for protecting rights has been the subject of much controversy under international law,<sup>54</sup> the fact still remains that the reporting system has evolved over the years into an important framework which is useful in bringing about compliance with treaty obligations while at the same time affording states the benefit of external scrutiny.<sup>55</sup> This is particularly relevant in relation to economic social and cultural rights where a complaint procedure may be useless if the right complained against is not justiciable, or is recognized through gradual implementation or does not depend on the state or other public authorities alone but also on the conduct by various private actors.<sup>56</sup>

Unfortunately, the CRC, unlike some other UN human rights treaties<sup>57</sup> failed to empower the committee with individual complaints mechanisms- an omission which profoundly weakens its enforcement capacity. Despite this notable weakness, the committee has been instrumental in monitoring compliance with the CRC.

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<sup>53</sup> Para 2 General Comment No 5 (n 50 above).

<sup>54</sup> P Alston, 'Purposes of Reporting' *United Nations Manual on Human Rights Reporting* (1991), (New York) 13.

<sup>55</sup> M. Evans et al, 'The reporting mechanism of the African Charter', Evans & Murray (2000) (eds.) *The African Charter on Human and Peoples' Rights, the System in Practice, 1986-2000*, 38.

<sup>56</sup> R Rosas et al, 'Implementation mechanisms and remedies' in Eide (n 27 above) 367.

<sup>57</sup> For example the complaints mechanisms introduced by the Optional Protocol to International Covenant on Civil and Political Rights (ICCPR), article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD), article 21 of the Convention Against Torture (CAT) and article 55 of the African Charter on Human and Peoples Rights.

## **2.2 Africa's response to children's socio- economic rights**

### **2.2.1 The African Charter on Human and Peoples Rights and the Socio-economic rights of children**

The African Charter on Human and Peoples Rights (The African Charter)<sup>58</sup> is Africa's 'parent' human rights treaty.<sup>59</sup> It entitles everyone to enjoy all the rights and freedoms recognised therein without distinction as to race, ethnic group, colour, sex language, religion, political or any other opinion, national and social origin, fortune or birth or other status.<sup>60</sup> The African Charter also provides for the traditional economic social and cultural rights such as the right to work under equitable and satisfactory conditions<sup>61</sup> and to equal pay for equal work.<sup>62</sup> It also protects the right to work and guarantees that every individual shall have the right to enjoy the best attainable state of physical and mental health.<sup>63</sup> The right to education is also guaranteed under the African Charter.<sup>64</sup>

The Charter does not contain express guarantees on the rights to social security, food and adequate standards of living or housing, or a prohibition against forced labour. Odinkalu has argued however, that the rights to social security, housing and food are not outside the scope of interpretative possibilities open to the

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<sup>58</sup> The African Charter on Human and People's Rights was adopted in 1981 by the Organisation of the African Unity, OAU Doc.CAB/LEG/67/3.Rev and entered into force in 1987.

<sup>59</sup> Viljoen (n 2 above) 216.

<sup>60</sup> Article 2 African Charter.

<sup>61</sup> Article 15 African Charter.

<sup>62</sup> Article 15 African Charter.

<sup>63</sup> Article 16 (1) African Charter.

<sup>64</sup> Article 17(1) African Charter.

instrument which could be well covered through a combined reading of articles 5, 15-17 of the African Charter.<sup>65</sup>

The recent decision of the African Commission on Human and Peoples Rights, (the enforcement body of the African Charter)<sup>66</sup> in *Social and Economic Rights Action Centre and another v Nigeria* (SERAC case)<sup>67</sup> has presented an example of the positive reflection of the economic, social and cultural rights contents of the African Charter through its interpretative scope.<sup>68</sup>

This case was based on a complaint against the government of Nigeria. The allegation was that the government of Nigeria was involved in oil exploitation through a consortium with Shell Petroleum Development Company. The activities of the consortium were alleged to have resulted in environmental pollution, provoking repeated demonstrations from victims of the pollution. To quell these demonstrations, the government had deployed members of the security and armed forces whose activities led to loss of lives, displacements from homes and destruction of food and food sources.<sup>69</sup>

The African Commission found a violation of the right to property,<sup>70</sup> the right to a generally satisfactory environment,<sup>71</sup> the right to health<sup>72</sup> and family rights.<sup>73</sup> In

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<sup>65</sup> C.A Odinkalu, 'Implementing economic, social and cultural rights' in Evans and Murray (n 55 above) 192.

<sup>66</sup> Article 30 African Charter.

<sup>67</sup> Communication 155/96.

<sup>68</sup> J Oloka-Onyago, 'Reinforcing Marginalised Rights in the Age of Globalisation: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa' (2003) *American University International Law Review*, 852-911.

<sup>69</sup> Para 60 and 64 (n 67 above).

<sup>70</sup> Article 14 African Charter.

<sup>71</sup> Article 24 African Charter.

<sup>72</sup> Article 16 African Charter.

addition, the African Commission found that the right to shelter and food had been violated. Though these rights are not provided for in the African Charter, the Commission found that they were implicit.

A plain language interpretation of the African Charter supports the conclusion that children are also protected, both as individuals and as members of the society.<sup>74</sup> Moreover, specific protection to children is obvious in three main respects. Firstly, the right to education under article 17(1) is of greater relevance to children than to any other sector of the population. Secondly, the family in article 18 is proclaimed as the natural unit and basis of the society and states are enjoined to assist the family and protect its physical health and morals. The care of children within the context of the family is seen as a virtue in the African historical tradition.<sup>75</sup> Thirdly, States Parties to the African Charter are obliged to ensure the protection of the rights of the child as stipulated in international declarations and conventions.<sup>76</sup>

Despite these safeguards and guarantees with respect to children under the African Charter, Africa still found it necessary to take the protection of children's rights further through the adoption of the Children's Charter.<sup>77</sup>

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<sup>73</sup> Article 18(1) African Charter.

<sup>74</sup> Viljoen (n 2 above) 216.

<sup>75</sup> The care of children within the context of the traditional African family will form the basis of discussion in chapter 3 of this contribution.

<sup>76</sup> Viljoen (n 2 above) 217.

<sup>77</sup> Lloyd (n13 above) 13.

## 2.2.2 African Charter on the Rights and Welfare of the Child

Shortly after the adoption of the CRC by the UN, the OAU Assembly of Heads of States adopted the African Charter on the Rights and Welfare of the Child.<sup>78</sup> It has been argued that the benefit of the adoption of the Children's Charter is to ensure that the cultural heritage, historical background and values of the African civilisation can inspire and characterise reflections on the concept of the rights and welfare of the child.<sup>79</sup> It was further reasoned that, although in principle, everyone is entitled to the enjoyment of all the rights in the African Charter, the situation of African children remained critical due to the unique factors of their socio economic, cultural and traditional development circumstances.<sup>80</sup> The African Leadership therefore thought it necessary to put in place special measures and safeguards for the care and protection of the child.

Indeed in a number of respects, the Children's Charter sets a higher level of protection than its UN equivalent. Notable amongst these is in the area of participation of children in hostilities,<sup>81</sup> child marriages,<sup>82</sup> child refugees<sup>83</sup> and the

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<sup>78</sup> The CRC was adopted by the UN in 1989 while the African Charter on the Rights and Welfare of the Child was adopted one year later, in 1990. OAU Doc/CAB/LEG/24.9/49.

<sup>79</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 International Journal of Children's Rights* 179.

<sup>80</sup> Para 3 of Preamble to the Children's Charter.

<sup>81</sup> Under the Children's Charter no person under the age of 18 is allowed to take part in hostilities (article 22(2)). The CRC allows children between 15 and 18 to be used in direct hostilities (article 38 (2)).

<sup>82</sup> Child marriages are not allowed under the Children's Charter (article 21(2) read with article 2). The same does not apply to the CRC in terms of which majority may be attained below the age of 18 (article 1).

<sup>83</sup> The scope of protection of child refugees is broader under the Children's Charter which allows for internally displaced children to qualify for refugee protection (article 23 (4) the causes of internal dislocation are not restricted but may take any form, including the breakdown of economic social order.



best interest of the child principle.<sup>84</sup> Each of these aspects resonates with the precarious position in which children find themselves in Africa.<sup>85</sup> The basic principle of the best interest of the child requires all rights to apply to children without exception and imposes an obligation on the state to ensure the child's survival and development.<sup>86</sup>

Of great relevance in this context is the protection accorded to socio-economic rights under the Children's Charter. Though, the Children's Charter, like the CRC, is holistic and does not lend itself to the traditional bifurcation of the so-called three generations of human rights.<sup>87</sup> The recognition of the rights to education, to leisure, recreation and cultural activities, health and health services, and freedom from economic exploitation amounts to a guarantee of socio-economic rights.

Unfortunately, the right to social security and social assistance that is contained in article 26 of the CRC has found no express recognition under the Children's Charter. The exclusion of such a right is somewhat disturbing, because the right to social security would have been of utmost importance in the context of Africa where most families are grappling with basic survival needs and require, to a large extent, state support.<sup>88</sup>

In interpreting the Children's Charter however, one must be mindful of the fact that it is not opposed to the CRC, rather the two are complementary and both

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<sup>84</sup> Under the Children's Charter, the best interest of the child is 'the primary consideration' (article 4 (1) not merely 'a primary consideration' as provided for in the CRC (article 3(1)).

<sup>85</sup> F Viljoen, 'Africa's contribution to international human rights' (2001) 1 *African Human Rights Law Journal* 22.

<sup>86</sup> Note Lloyd (n 13 above) 19.

<sup>87</sup> S.C Abagkwa, 'Reclaiming humanity: economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, 180. This is in furtherance of the 1993 Vienna Declaration and Consensus of Opinion which recognised the futility of entrenching civil and political rights without the corresponding economic, social and cultural rights. Vienna Declaration and Programme of Action June 25 1993 UN Doc A/CONF. 157/24 (1993).

<sup>88</sup> Gose (n 21 above) 120.

provide the framework for which children and their welfare are increasingly being discussed in Africa.

### **2.3 The mechanisms for the enforcement of the socio-economic rights of children under the Children's Charter**

The affirmation of rights must be accompanied with a clear, unambiguous mode of enforcement.<sup>89</sup> It is in this regard that the Children's Charter entrusts the functions of promotion and protection of its provisions to the Committee of Experts on the Rights and Welfare of the Child (The African Committee).<sup>90</sup> The Children's Charter as a starting point, allows the African Committee to draw inspiration from international law of human rights and other instruments adopted by the United Nations and African countries in the field of human rights.<sup>91</sup>

Chirwa has articulated the view that the African Committee has wider powers than the CRC Committee.<sup>92</sup> This is because it not only has power to examine state reports;<sup>93</sup> it also has power to receive individual and inter-states communications,<sup>94</sup> and also to conduct investigations.<sup>95</sup>

The state reporting procedure under the Children's Charter is a replica of the reporting mechanism under the CRC. Under the Children's Charter, States Parties are initially required to submit reports to the African Committee within the

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<sup>89</sup> See the introductory paragraph of General Comment No 5 of the CRC Committee (n 50 above).

<sup>90</sup> Article 32 Children's Charter.

<sup>91</sup> Article 46 Children's Charter.

<sup>92</sup> Chirwa (n 20 above) 169.

<sup>93</sup> Article 43 Children's Charter.

<sup>94</sup> Article 44 Children's Charter.

<sup>95</sup> Article 45 Children's Charter.

first two years of ratification and thereafter once in every three years.<sup>96</sup> It is envisaged that it would be rather cumbersome for States Parties to fulfill their reporting obligations to both the African Committee and the CRC Committee at the same time. In an attempt to circumvent this problem, the African Committee has in its guidelines for initial states reporting, requested States Parties to re-submit to it, reports already submitted to the CRC Committee with an addendum on specific provisions of the Children's Charter which are either not in the CRC or where the Children's Charter sets a higher standard of protection than the CRC.<sup>97</sup>

Complaints mechanisms allow individuals to lodge complaints directly to the African Committee in cases of individual violations. The procedure for individual complaints under the Children's Charter is simple- communication submitted to the Committee must contain the name and address of the author and will be treated in confidence.<sup>98</sup>

The confidentiality requirement for the complaints procedure under the Children's Charter has, however, come under attack. This is because confidentiality has, in the past, been used by African States as a disguise for facilitating an amicable solution to control human rights monitoring mechanisms. This principle has been cited as one of the factors that accounted for the inefficiency of the African Commission in the early years of its existence.<sup>99</sup> Publicity mobilises shame and has a deterrent effect in preventing future human rights violations. Thirdly, confidentiality will make it difficult for the Committee's work to be monitored.

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<sup>96</sup> R Rosas & M Scheinin, 'Implementation Mechanisms and Remedies' in Eide (n 27 above) 357.

<sup>97</sup> Article 24-26 of the Guidelines for Initial Reports of States Parties prepared by the African Committee on Experts on the Rights and Welfare of the Child, Cmttee/ACRWC/ 2 II Rev. 2 (on file with author).

<sup>98</sup> Article 44 (2) Children's Charter.

<sup>99</sup> Chirwa (n 20 above) 170.

It must be noted, though, that the complaint procedure, like the state reporting procedure, is not specifically designed for the protection of socio-economic rights as such. It is however of great relevance to the protection of socio-economic rights because it presents a forum in which individuals can claim directly for violations suffered in respect of their socio-economic rights.

The availability of the individual complaints mechanisms under the Children's Charter, appears in this context, to cure the deficiency inherent in the CRC occasioned by the lack of it.

The special investigative mandate of the African Committee can be exercised under circumstances similar to the practice of appointing Special Rapporteurs under the UN and the African Commission system. Special Rapporteurs are often appointed to explore the human rights situation either in a particular country or pertaining to a particular theme. It has become a well-established feature of the UN human rights machineries and ranks amongst its most innovative achievement.<sup>100</sup> The African Committee can exercise its investigative mandate by adopting this approach in respect of specific socio economic rights of children since it has an explicit treaty based competence to examine the situation on a country-by-country basis through the Children's Charter reporting procedure.

In this regard, HIV/AIDS<sup>101</sup> could rank as a specific theme for investigation because it is one of the largest problems confronting Africa today. The CRC Committee has articulated an urgent need for States Parties to respond to the problem of HIV/AIDS in specific relation to children.<sup>102</sup> Though HIV/AIDS has not

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<sup>100</sup> M Evans and R Murray, 'The Special Rapporteurs in the African System' in Evans & Murray (n 55 above) 304.

<sup>101</sup> Article 14 of the Children's Charter.

<sup>102</sup> See generally General Comment No 3, HIV/AIDS and the Rights of the Child in (48) above where the CRC committee articulates the urgent needs for States Parties to respond to the problem of AIDS in specific relation to children.

been addressed directly by the Children Charter, it can be well covered under the scope of the right to health and health services.<sup>103</sup>

## **2.4 Conclusion**

The adoption of the Children's Charter as a regional instrument for child rights protection is a welcome development. But it must be borne in mind that it is , like other international treaties, premised on the willingness of states to actively promote children's rights nationally. The monitoring and enforcement mechanisms of state reporting and individual complaints built into the CRC and the Children's Charter can serve a more crucial role in the struggle to fulfil the socio-economic rights of African children. African states can take advantage of the reporting opportunity to make known their difficulties and make genuine claims for assistance from the richer nations of the world within the framework of bilateral or multilateral agreements.<sup>104</sup>

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<sup>104</sup> Rwezaura (n 3 above) 304. See also article 4 CRC.

## PARENTAL RESPONSIBILITY IN FULFILLING THE SOCIO-ECONOMIC RIGHTS OF CHILDREN

### 3.1 Introduction

Traditional conceptions of parenthood under common law were based on the assumption that parents, particularly fathers, were in absolute control of their children's lives and that children had no rights or remedies against them.<sup>105</sup> This conception sustained the view that parents had "rights and duties" over their children. Hence, international law tended to safeguard the privacy of the family and attempted to regulate the quality of relationships within the family by linking the concepts of privacy and family life.<sup>106</sup> This resulted in a policy of minimum intervention which left the child vulnerable to abuse or neglect by family members.<sup>107</sup>

Recent times, however, witnessed the recognition of the child as an active subject of rights with an emphasis on the exercise of such rights by the child.<sup>108</sup> Parental responsibility then emerged and gradually evolved into an acceptable

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<sup>105</sup> Hogget B, (1993) *Parents and Children* (fourth edition) 6. See also J A Robinson 'An introduction to international law on the rights of the child relating to the Parent-Child relationship' in (2002) 13 (2) *Stellenboch Law Review* , 309 - 321.

<sup>106</sup> Article 17 ICESCR.

<sup>107</sup> Van Bueren (n 27 above) 73, See Leora Bilksy 'Child-Parent-State: The Absence of Community in the Courts Approach to Education', G Douglas and L Sebba (eds) *Children's Rights and Traditional Values*, 134 where the challenge of reconciling the doctrine of family privacy with the basic aspiration of a liberal state to enhance the autonomy of its individual members is highlighted. See also J A Robinson (n 102 above) 309.

<sup>108</sup> UNICEF Regional Office of South Asia and Save the Children Sweden (2000) ' *Children's Rights : Turning principles into practice* ' , 79.

concept of law in the 1986 decision of Lord Scarman in *Gillick v West Norfolk and Wisbeach Area Health Authority*<sup>109</sup> where it was succinctly stated that:

“The principle of the law ...is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.”

The reasoning of Lord Scarman was reflecting the philosophy outlined by Blackstone in eighteenth century England where it was stated that:

“The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation...laid down on them not only by nature herself , but by their own proper act in bringing them into the world:...and thus children will have a perfect right of receiving maintenance from their parents...”<sup>110</sup>

Parents are recognised as the primary source of protection, nurturing and care for the child. The CRC confirmed this role by entrusting the responsibility for the primary upbringing and development of the child on their parents, obligating parents to ensure that at all times, the best interests of the child is of basic concern to them.<sup>111</sup> Similarly, the Children’s Charter spells out the duties of parents and others responsible for the child, according them the primary responsibility for the development and upbringing of the child.<sup>112</sup>

The concept “parental responsibility” covers the duties to take care of the child’s person and welfare. This includes a responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for the child’s upbringing.

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<sup>109</sup> (1986) A.C 112 at 184.

<sup>110</sup> Hogget (n 105 above) citing from Blackstone (1765) *Commentaries on Laws of England*.

<sup>111</sup> Article 18 (1) CRC.

<sup>112</sup> Article 20 Children Charter.

The social practices by which responsibility for the sustenance of children is allocated may vary from society to society and is reflected in different social and cultural patterns across the world.<sup>113</sup> According to Eekelaar,<sup>114</sup> the duties of parenthood are embedded in the conjunction of two sources. One is a *a priori* duty to promote flourishing, which exists independently of the actual organisation of any society. It is a moral duty that binds any one, and is not specifically directed towards parents (although it will frequently primarily fall on them for no other reason than their physical proximity to children). The other is derivative from the society itself, because social practices determine the application of the duty within its structures.

Article 5 of the CRC refers for instance, not only to parents, but also to legal guardians or other persons legally responsible for the child.<sup>115</sup> The Children's Charter avoids any reference to 'legal guardians' and uses the expression "other persons responsible for the child."<sup>116</sup> Parental responsibility therefore, assumes a special meaning in the African context where the care of children is assumed to lie with the extended family or with the community than with legal guardians.

### **3.2 Africa's notion of parental responsibility**

Children in traditional African societies do not belong exclusively to their parents. They have obligations to the wider society, which likewise bears responsibility for their proper socialisation.<sup>117</sup> The concept of 'parent' is wider than the man and women who are biological parents, and the idea of 'family' assumes an extended

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<sup>113</sup> Hogget (n 105 above) 78.

<sup>114</sup> J Eekelaar, 'Are Parents Morally Obligated to Care for their Children?' (1993) J Eekelaar and P Sarcevic (eds.) *Parenthood in Modern Society*, 60.

<sup>115</sup> See generally articles 5 and 27 CRC.

<sup>116</sup> Article 20 (1) Children's Charter.

<sup>117</sup> A B C Ocholla-Ayayo, 'The African family, between tradition and modernity' (1997) Adepoju A (ed.) *Family, Population and Development in Africa*, 60.



group of kin. It is in this context that it is often said that the child in an African community is the child of everyone, conveying the notion that traditional solidarity requires that a variety of persons exercise different and varying functions over children and that children are important and valuable members of any community over whom all must, and ought, to take responsibility.<sup>118</sup> A child may not be seen to be suffering just because the natural parents may be unable to take responsibility for him or her.<sup>119</sup>

Thus, within the context of the extended family, various persons who may not be the natural parents of a particular child discharge, in relation to that particular child, some parental functions within the general rubric of the concept that a child belongs to everyone. In this way, the definition of parenthood may be obscured by the fact that a number of persons perform or discharge parental responsibilities which, in the narrow nuclear families of the west may be performed by natural parents.<sup>120</sup> This position raises difficulties in the sense that it may not be possible to impose real legal duties of a socio-economic nature on people who care only *de facto* for a child.<sup>121</sup>

A child's claim against the family for food and shelter was of little account in traditional African society because it was taken for granted that all members of the family will be adequately maintained. Families were generally sufficient and their wants were few and so members whether young or old could confidently expect a lifetime of sustenance and protection.<sup>122</sup>

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<sup>118</sup> A Armstrong et al, 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African Perspective' (1995) Women and Law in Southern Africa working paper No 11, 10.

<sup>119</sup> Armstrong (n 118 above).

<sup>120</sup> Armstrong (n 118 above)

<sup>121</sup> Gose (n 21 above) 35.

<sup>122</sup> Bennett T. W ' Human Rights and African Customary Law under the South African Constitution' (1995) Human Rights and Constitutional Law Series of the Community Law Centre of the University of the Western Cape, 96.

Children do not appear to have had any precise legal rights because customary law had no set procedure enabling them to sue their guardians, nor did third parties have standing to intervene on a child's behalf. Bennett has argued that the absence of special mechanisms to protect children suggests that neglect or abuse were not social problems at that time.<sup>123</sup>

Within the family, children received shelter, all their education, all their spiritual training.<sup>124</sup> They worked and produced food for their subsistence needs within the family. The totality of their upbringing took place within the environment of the family and therein, they played multiple roles and acquired the capacity to play their social roles. In this sense, the food consumed within the family was as much often the product of their labour as it was that of their parents.

Accordingly, the idea of a totally dependent child who is fed, clothed, educated and generally brought up at the expense of his or her parents is alien to traditional African society.<sup>125</sup> The child's position in the traditional socio-economic set up was central to the survival and perpetuation of a system of inter-generational dependency which ensured that the discharge of parental obligations towards children during their tender years created a reciprocal obligation on the children to support their parents at all times.<sup>126</sup>

But society is dynamic. With changing social and economic conditions, the practice of the community or extended family responsibility for the welfare of the child has changed. Extended families have become increasingly separated geographically due to the overriding influence of urbanisation. As a result, parents send their children to stay with relatives either to gain economic advantages or to strengthen family ties. Rights and expectations have become

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<sup>123</sup> Bennett (n 123 above).

<sup>124</sup> Ncube (n 3 above) 21.

<sup>125</sup> Ncube (n 3 above) 21.

<sup>126</sup> Armstrong (n 118 above) 12.

more individualised and social interaction with family members less immediate, so the role of the biological parents' increases while the role of the other extended family members decreases.<sup>127</sup>

Widespread poverty, warfare, famine and HIV/AIDS have further weakened the African kinship care system that would ordinarily be expected to assist in fulfilling the responsibility of parents towards the provision of the socio-economic needs of their children. Sloth- Nielsen has noted in relation to South African HIV/AIDS orphaned child- headed families that :

[I]t has been recognised that the African kinship care system that once would have absorbed children without parents into communal life can no longer be relied upon to fulfil that function. Communities are themselves being decimated by the scourge of the epidemic, with only the elderly and the very young remaining. Also the stigma attached to AIDS sufferers has affected attitudes towards their offspring and it has been reported that children whose caregivers have died of AIDS are themselves increasingly ostracised and shunned.<sup>128</sup>

Consequently, the combined impact of urbanisation, globalisation, poverty and HIV/AIDS have resulted in the near crumbling of the once thriving African kinship network which, in the face of untold hardship, is being called upon to fulfil the socio-economic needs of children in the society.

### **3.3 Parental responsibility for the socio-economic rights of children under the Children's Charter**

Under article 20 of the Children's Charter, parents or others responsible for the care of the child are to ensure the provision of conditions of living necessary for

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<sup>127</sup> Armstrong (n 118 above) 11.

<sup>128</sup> Sloth-Nielsen (n 7 above) 116.

the development of the child. This refers to the collection of tasks, activities and choices that are part and parcel of looking after and bringing up the child. Conditions of living necessary for the development of the child would include adequate education, shelter, food, clothing, and medical aid for the child. Article 20 (1) states that:

[P]arents or other persons responsible for the care of the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interest of the child are their basic concern at all times
- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

The CRC Committee,<sup>129</sup> has, with specific reference to education, insisted that education should be given a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates.

The education to which every child has a right is one designed to provide the child with life skill, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal of education is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which

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<sup>129</sup> General Comment No 1 on the Aims of Education (n 46 above).

enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.<sup>130</sup>

Adequate shelter will, in this context, mean much more than a mere claim that the child should have a roof over his or her head. It embraces within its purview the right to live somewhere in security, peace and dignity based on the premise that the human being has an “inherent dignity” which determines the circumstances under which he should live, irrespective of income or access to economic resources.<sup>131</sup>

The right to food arises from the claim to food in order to prevent hunger and is intended to take care of malnutrition and under-nutrition which may result from a low calorie, or low protein intake.<sup>132</sup> The responsibility of parents to provide food for the child covers both the qualitative and quantitative aspects of food necessary for the sound and rounded development of the child. The child’s right to health translates into a responsibility on the part of the parents to ensure that the child enjoys adequate medical assistance.

Parents are expected to secure these rights within their abilities and financial capacities.<sup>133</sup> In formulating this provision, the drafters were mindful that socio-economic rights of children can not be applied with uniformity across all households. It also recognizes that though parents are been called upon to fulfill the needs of their children in accordance with standards defined under international law, this may, in some cases prove very difficult due to extreme conditions of poverty. It is therefore, highly unlikely, that inability to fulfill the

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<sup>130</sup> General Comment No 1 on the Aims of Education (n 46 above).

<sup>131</sup> General Comment No 4 on the right to adequate housing, Report of the Committee on Economic, Social and Cultural Rights, UN doc E/1992/23, pp114-120. See also S. Leckie ‘The human right to adequate housing’ in Eide ( n 27 above) 107.

<sup>132</sup> See General Comment No 12: The right to adequate food, Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/1999/5.

<sup>133</sup> Article 20 (1) (b) Children’s Charter.

socio-economic rights of children on account of the poverty of their parents will amount to a violation of the child's rights under the Children's Charter. This because some of the most notable changes in the functions of the African family are those influenced by the shift from traditional modes of economic production and economic relations to modern economic relations based on the cash economy which most African families still grapple to adjust to.<sup>134</sup>

On the other hand African states have not been able to, due to their weak economies, provide alternative social security to avert the serious economic risks faced by families. It is against this background that international human rights law provides a basis for imposing obligations on the state to assist families in fulfilling their child rearing functions.<sup>135</sup>

### 3.4 Conclusion

It seems therefore, that though parental responsibility as a concept is not fully defined, the duty owed towards children for their sustenance and upkeep lies on all who are capable of affecting them by their action or inaction. Consequently, the promotion of children's rights depends on the promotion of respect for the family and the community itself. A strong family setting with opportunities for fulfilling the child's basic needs contributes to a strong society.<sup>136</sup> The empowerment of both the family and the community thus becomes a *sine qua non* for their meaningful participation in the care and development of the child.

What is needed to enable the community to participate in the traditional support care of children as contemplated under the Children's Charter is community

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<sup>134</sup> C Himonga, 'State Intervention in African Family Relations in Post Colonial Africa' (1997) 22<sup>nd</sup> Hans Wolff Memorial Lecture, African Studies Program, Indiana University ( An unpublished paper on file with author) 8.

<sup>135</sup> Himonga (n 134 above) 8.

<sup>136</sup> General Comment No 1 on Aims of Education (n 46 above).

empowerment and development. Community development must, as a matter of necessity be assigned high priority by States Parties. Child care legislation enacted domestically should clearly delineate the role of communities in child care support with a corresponding duty on the state to empower the community to perform its role in the upbringing and development of the child. Though one concedes that it is not possible to go back to the 'hallowed' traditional African society, a lot of merits still exists in this system of care.

## **STATES OBLIGATION IN RESPECT OF THE SOCIO-ECONOMIC RIGHTS OF CHILDREN**

### **4.1 Introduction**

The interpretations of the socio-economic obligations imposed by the Children's Charter on States Parties in this chapter are discussed against the background on the currently existing family structure given in chapter 3. The ideological and conceptual formulations of socio-economic rights at the international also inspire and characterise the interpretations of states obligation. Needless to add that the Children's Charter seems comfortable with this approach since it allows for inspiration to be drawn from international law of human rights and other instruments adopted by the United Nations and African countries in the field of human rights in interpreting the Children's Charter.<sup>137</sup>

#### **4.1.1 The nature of states obligations under the Children's Charter**

Article 1 of the Children's Charter spells out the nature of states obligations in respect of the rights contained in the Charter. It provides that States Parties shall recognise the rights, freedoms and duties enshrined in the Charter and obliges them to undertake all the necessary steps, in accordance with their constitutional processes and with the provisions of the Charter to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.

More specifically, and in relation to socio-economic rights, article 20 (2) provides that States shall, in accordance with their means and national conditions, take

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<sup>137</sup> Article 32 Children's Charter.



appropriate measures to assist parents and others responsible for the child in cases of need by providing material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.<sup>138</sup>

Gose has argued that, in providing that the 'primary responsibility' for the upbringing of the child lies with parents, earlier under article 20 (1) the Children's Charter makes it clear that it is principally not the task of the State to take care of the child. Read in this way, the Charter's provisions could be understood as a safeguard for the state.<sup>139</sup> It is doubtful that the drafters of this provision intended it to be given the interpretation proffered by Gose. A more positive interpretation would suggest that articles 20(2) and article 20(1) are mutually supportive. Article 20 (2) reads thus:

[S]tates Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures:

(a) to assist parents or others responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.

(b) to assist parents and others responsible for the care of the child in the performance of child rearing and ensure the development of care institutions for providing care for children; and

(c) To ensure that children of working parents are provided with care services and facilities

By imposing on States the obligations to assist parents and other persons responsible for the care of the child in cases of need, the Children's Charter reinforces the obligations of States Parties under article 1. It also represents a positive reflection of the reality of poverty that confronts many African families, which often render families incapable of fulfilling their obligations towards their

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<sup>138</sup> Article 20 (2) (a) Children's Charter

<sup>139</sup> Gose (n 21 above) 36.

children. Secondly Article 20 (2) cannot be interpreted without reference to article 18 which enjoins states to support the family as the basic unit of society.

The obligations of the state under the Children's Charter are articulated in terms of a high standard by using phrases like 'shall take' and 'to ensure'.<sup>140</sup> This standard means that states *must* play an active role by taking all appropriate legislative and other measures to care for and protect the child's survival and development.<sup>141</sup>

The language of the Children's Charter in terms of States obligations is very similar to the language of the CRC. Several articles in the CRC refer to state obligations with regards to socio economic rights. Article 3 refers to all appropriate measures to be taken by states parties, article 26 deals with the child rights to social security, article 27 to the child's adequate standard of living and article 18 refers to states obligations to render appropriate assistance to parents and legal guardians in the performance of child rearing responsibility.

#### **4.1.2 Legislative and appropriate measures**

Realising the ultimate effectiveness of the socio- economic rights in the Children's Charter is contingent on the measures taken by states. States Parties have been called upon to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.<sup>142</sup> This immediately imposes the obligation to refrain from acts which will defeat the aims and purpose of the Children's Charter.<sup>143</sup> States Parties are then required to review

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<sup>140</sup> UNICEF Regional Office of South Asia and Save the Children Sweden (2000) ' *Children's Rights: Turning principles into practice*', 85.

<sup>141</sup> Note (n 139 above) 85.

<sup>142</sup> Note Article 1 Children's Charter.

<sup>143</sup> Vienna Convention on the Law of Treaties, 1969.

their legislation in order to ensure that domestic law is consistent with its provisions and to take immediate steps towards the full realisation of the rights in the covenant through all appropriate measures consistent with the rights in the covenant.<sup>144</sup>

The ICESCR Committee has described legislation as highly necessary, and in some cases even indispensable for the realisation of certain rights. For example it may be difficult to combat discrimination effectively in the absence of sound legislative foundation for the necessary measures in fields such as health and the protection of children and mothers.<sup>145</sup>

The CRC Committee has taken the view that the general measures of implementing children's human rights should engage all sectors of society and ensure that domestic legislation is fully compatible with the CRC.<sup>146</sup> It has also urged for the direct application of the principles and provisions of the CRC which should be appropriately enforced as fundamental. It has in addition, identified a wide range of measures that are needed for effective implementation.<sup>147</sup> The general measures of implementation identified by the committee apart from legislation are; establishment of coordinating and monitoring bodies-governmental and independent comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies services and programmes.

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<sup>144</sup> General Comment No 3 of the Committee on Economic, Social and Cultural Rights, 'The Nature of States Obligations' UN DOC E/1991/23. See Para 2,3,7 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN doc. E/CN.4/1987/17, (1987) 9 *Human Rights Quarterly*, 122-135.

<sup>145</sup> Note Para 3 of General Comment No 3 (n 143 above).

<sup>146</sup> Para 5 General Comment No 5.(n 45 above), This paragraph complements General Comment No 3 of the UN Committee on Economic, Social and Cultural Rights on the Nature of States Parties Obligations.

<sup>147</sup> General Comment No 5 (n 145 above).

The Committee is mindful that the adoption of legislative measures is by no means exhaustive of the obligations of States Parties, rather the phrase ‘appropriate means’ is given a fuller meaning. Under the ICESCR, the Committee on Economic, Social and Cultural rights allows states to determine by themselves what other means are appropriate for the realisation of the rights in accordance to their special circumstances and in relation to each specific right. The ultimate determination on whether or not such measures are appropriate will be left to the Committee to decide.

The provision of judicial remedies in accordance with national legal systems is also considered as appropriate. So also are administrative, financial, educational and social measures.<sup>148</sup>

#### **4.1.3 Resource availability and the concept of ‘minimum core’ obligations**

The Children’s Charter has been positively noted for advancing socio-economic rights beyond the traditional confines of progressive realisation, giving rise to the interpretation that children’s rights are capable of immediate enforcement due to children’s vulnerability and special status.<sup>149</sup> According to Olowu:

[T]he Charter advanced the status of socio-economic rights beyond the traditional confines of the rights which are considered only attainable by “progressive realization”. For instance, the guarantee of the rights to education (article XI); to leisure, recreation and cultural activities (article XIII); health and health services (article XIV); and freedom from economic exploitation (article XV) all amount to a bolder expression of their equivalents in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966<sup>150</sup>

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<sup>148</sup> Para 7 of General Comment No 3 (n 143 above).

<sup>149</sup> Olowu (n 22 above) 130.

<sup>150</sup> Olowu (n 22 above) 130.

Although article 1, which deals with general States obligations under the Children's Charter contains no limitation clause, in reaching the conclusion that socio-economic rights under the Children's Charter transcend the boundaries of progressive realisation, Olowu failed to avert his mind to article 20 (2) (a) which makes it very obvious that States Parties are in actual fact, expected to provide for the socio- economic needs of children *in accordance with their means and national conditions*. This could be interpreted to mean that the enjoyment of these rights is subject to the qualifier of resource availability and progressive realisation. And in this sense, the difference between the CRC and the Children's Charter in their approaches to socio-economic rights of children appears to be more semantic than real.

The argument for immediate implementation of children's rights, on account of their vulnerability has encountered difficulty under judicial scrutiny on grounds of availability of resources. For example in constructing section 28<sup>151</sup> of the South African Constitution,<sup>152</sup> the Constitutional Court held in the case of *Government of Republic of South Africa & Others V Grootboom and others*, while rejecting the minimum core argument, that the realisation of socio economic rights, including the rights of children are subject to available resources and to progressive realisation. South Africa had expressed its support for children's rights when it ratified the CRC in 1995. Thereafter, children's rights were given express recognition under section 28 of the constitution.

In the Grootboom case, the applicants who numbered 900, out of whom 510 were children, had been evicted by a court order from a piece of land on which they had squatted and built temporary shelters. In desperation, they moved on to

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<sup>151</sup> Section 28 provides in part as follows: every child has the right.... b) to family care or parental care, or to appropriate alternative care when removed from the family environment; c) to basic nutrition, shelter, basic health care services and social services; d) to be protected from maltreatment, neglect, abuse or degradation;...

<sup>152</sup> Constitution of the Republic of South Africa Act 108 of 1996 (hereafter, the Constitution).

a sports field and erected temporary shelters and thereafter brought an application against the municipal authorities in the High Court.<sup>153</sup> The application sought to enforce against the respondents the right to housing;<sup>154</sup> which, it was argued included basic shelter. The second relief sought is what they called the children's "unqualified right to shelter" under section 28(1) (c). The claim to the first relief sought was dismissed. The High Court was convinced that the government had in place a reasonable plan for the achievement of the right to housing which was subject to the 'available resources' and to 'progressive realisation' as stipulated. On the issue of children's rights, the High Court came to the conclusion that the respondent were under duty to provide the children with shelter which was an unqualified duty. That such shelter would also be used by the parents or persons under whose supervision such children were. Davis J stated that:

"The primary obligation to maintain a child falls upon the parents. Such an obligation clearly includes the provision of shelter. In the event that the parents are unable to provide shelter for their children, section 28(1) (c) imposes an obligation on the state to do so".<sup>155</sup>

Dissatisfied with the judgement of the High Court, the government went on appeal to the Constitutional Court. The Constitutional Court was adamant that section 28(1)(c) did not create socio-economic rights for children independent of other sections that guaranteed such rights to everyone including children, and that they are subject to "available resources" and to "progressive realisation" and that section 28(1)(c) should be read together with 28(1)(b) which gives the children the right to family care or parental care, or to appropriate alternative care

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<sup>153</sup> *Grootboom v Oostenberg Municipal Council & others*, 2000 (3) BCLR 277 (C).

<sup>154</sup> Section 26, 1996 Constitution.

<sup>155</sup> Davis J (n 152 above) 288 para B.

when removed from the family environment. The state would only incur obligations under section 28(1) (c) when the children are removed from the care of their parents. The effect of the Court's finding was that the rights in sections 26<sup>156</sup> and 28 were not absolute. Read together with sections 26 and 27<sup>157</sup> they were subject to "available resources" and "progressive realisation."

The Constitutional Court was of the opinion that the decision of the High Court with respect to children, produced anomalous results because people who have children would have a direct and enforceable right to housing while others who have none or whose children are adult are not entitled to housing, "no matter how old, disabled, or otherwise deserving they be".<sup>158</sup> And that moreover, there was an obvious danger that children could become stepping stones to housing for their parents instead of being valued for whom they are.<sup>159</sup>

Indirectly the Court was saying that persons without children would be discriminated upon unfairly. This reasoning failed to take into account the fact that when assessing competing priorities, children have as a matter of law, to be weighed more heavily in the balance, because of the principle that a child's interests are paramount in every matter concerning children.<sup>160</sup> This is also because of the special interest and vulnerability of the children.

It is true that under both the CRC and the South African Constitution, parents possess the primary obligation to meet the socio-economic needs of their

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<sup>156</sup> Section 26 of the Constitution guarantees the right to housing.

<sup>157</sup> Section 27 of the Constitution guarantees the rights to healthcare, food, water and social security.

<sup>158</sup> Justice Yacoob, (n 152 above).

<sup>159</sup> Justice Yacoob (n 152 above).

<sup>160</sup> G Van Bueren 'Alleviating poverty through the Constitutional Court' 1999 (15) *South African Journal of Human Rights* 59.

children and the obligation only falls on the state when children are removed from the family environment. But the argument stretches further than this. The CRC makes it clear that parental obligation is to be discharged “within their ability and financial capacities”<sup>161</sup> and imposes on the state the obligation to “take appropriate measures to assist parents ... to implement this right” and in case of need to “provide material assistance and support programmes particularly with regard to nutrition, clothing and housing.”<sup>162</sup>

The provision of article 27 of the CRC, seem almost to have been reproduced under article 28 of the South African Constitution. These two provisions, are almost on all fours with the Children’s Charter article 20 (2) provision.

Clearly article 20 (2) envisages situations like in the Grootboom case where children are vulnerable because of the desperate conditions of their families. It is unfortunate that whereas the court appreciated the vulnerability of such children, in the Grootboom case, it did not take a holistic approach to the duty to maintain these children.

In addition to parental responsibility, there is state obligation to fulfil the socio-economic needs of children. Separating these two obligations will, inevitably, lead to unhappy results. The two must be viewed holistically if a complete picture is to be canvassed and adequate attention given to socio-economic needs of the child.<sup>163</sup>

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<sup>161</sup> Article 27(2) CRC.

<sup>162</sup> Article 27(3) CRC.

<sup>163</sup> B Clark ‘The duty of the state to support children in need’ 117 *South African Law Journal* 345.



## 4.2 The interplay between parents and the state in fulfilling the socio economic rights of children

The state has the responsibility to protect the child even within the family if the parents are deemed to have failed in their child rearing responsibilities, in cases of abuse , neglect of the child or where such parents are simply too poor to provide for the needs of the child.<sup>164</sup> The logical consequence of this interpretation is that, states may, when necessary, have to intervene in the family to provide for the child's wellbeing. The tenets of the family privacy accordingly need to be balanced with the states obligation to ensure that the best interest of the child is protected. These scenario was well illustrated in the South African case of *Minister of Health and others v Treatment Action Campaign and others* (TAC case).<sup>165</sup>

The case arose out of a government policy of providing nevirapine, a drug which at the time was believed to reduce the risk of transmitting HIV/AIDS from mother to child during child birth. The drug was to be provided in restricted health centres that had been designated as research sites. This policy was challenged as unreasonable and violating the right of access to health care services under section 27(1) and the rights of newborn children to basic health care under section 28(1)(c). While rejecting for the second time the core minimum argument the court re-visited the issue of state's obligation under section 28(1)(b) and 28(1)(c).

It was held that while the primary obligation to provide basic care services no doubt rests on those parents that can afford, this does not mean that the State

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<sup>164</sup> Clark (n 162 above).

<sup>165</sup> 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)

incurs no obligation in relation to those children that are being looked after by their parents.<sup>166</sup> The court said that:

[T]he State is obliged to ensure that children are accorded the protection contemplated by section 28 when the implementation of the right to parental care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are to the most part, indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are on the main dependent on the State to make health services available to them.<sup>167</sup>

This reasoning differed from the earlier reasoning in *Grootboom* in a number of respects. First it acknowledged the fact that the State bears an obligation towards children even when they are in the custody of their parents especially where such parents are disadvantaged and cannot meet the socio-economic needs of their children. Secondly the reasoning identified classes of people including children that may be considered vulnerable due to a number of factors including history. By doing so, the court appreciated the fact that some children live in families that are too poor to provide them with the basic necessities of life which can not be determined in terms of sections 26 and 27.<sup>168</sup>

In the context of rapid socio-economic changes that have occurred in the African state, a strong case is been made for States intervention in providing support for the African family in order to fulfil the socio-economic needs of the child.

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<sup>166</sup> Note (164 above) para 75.

<sup>167</sup> Note (164 above) para 79.

<sup>168</sup> S Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty” at 15 (unpublished paper on file with author).

Similarly, the obligations of the state create corresponding duties for the parents. For example, the Children's Charter requires the state to make primary education compulsory and available free for all children.<sup>169</sup> In order to implement this provision, the state has to impose a corresponding obligation on parents to encourage their children to study and to see that they attend school. States should also be involved in cases of placement in alternative family environments and, including foster care and adoption.

### **4.3 Conclusion**

The Children's Charter has successfully located the discussion for the realisation of children's socio-economic rights within the broad spectrum of the socio-economic and cultural realities of the African state. It recognises that modern governments are active participants, not passive spectators, in the events that fundamentally impact the ability of children to lead meaningful and dignified lives.<sup>170</sup>

It is thus recommended that states should undertake the development of comprehensive strategies for family and child support in order to support the resource base of the family to safeguard the rounded well being of children. This will make governance meaningful in assisting the majority of African families who find themselves in situations where they cannot appreciate the value of life let alone enable their children enjoy it.

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<sup>169</sup> Article 11 (3) (a) Children's Charter, See also article 28 CRC.

<sup>170</sup> Agbakwa (n 87 above) 181.

## **CONCLUSIONS**

It is a settled fact that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, and traditional and development circumstances. The Children's Charter has been shown, in this study, to affirm and strengthen global standards of protection for children in a regional context.

An attempt has been made to show that the mechanisms for monitoring and enforcing children's rights at the international level can be exploited by African states to make genuine claims for assistance from the richer nations of the world within the framework of bilateral or multilateral co-operation.

From the perspective of Africa's notions of parental responsibility in fulfilling the socio-economic rights of children, community empowerment has been advocated as a way of revitalising the African social security system and enabling community participation in child care responsibilities in the sense contemplated under Children's Charter. Comprehensive family support strategies developed by governments have also been called for, as necessary for strengthening the resource base of the family for proper child care.

A strong case has also been made for balancing parental responsibilities with states obligations in fulfilling the socio-economic needs of children. It has been demonstrated that separating these two obligations will, inevitably, lead to deprivation and marginalisation of children born of indigent parents. Parental responsibility and States obligations must be viewed holistically if a complete picture is to be canvassed and adequate attention given to the socio-economic rights of the African child.

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