

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

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Abstract

Child rights are particularly sensitive due to the power relations within societies. As early as 1924, a number of countries collaborated to produce the Declaration of the Rights of the Child. In 1945, the Charter of the United Nations appeared, followed three years later by the Universal Declaration of Human Rights (UDHR). Although the latter is concerned primarily with everyone's rights, Article 25(2) refers to children as well and provides that all children must receive special care and assistance. The article focuses on the most important children's rights instruments both at regional and international level; respectively the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC) and the United Nations Convention on the Rights of the Child of 1989 (CRC). Particularly, these conventions are binding on all the states which sign and ratify them. Although the CRC classifies children's rights into four main categories, this article focuses on life and survival rights in selected African countries that have committed themselves to implement and enforce basic rights for children, namely South Africa, Kenya and the Democratic Republic of the Congo. The article is an evaluative and comparative analysis of the selected countries, based on international law and domestic legislation, as standards of actual delivery of child rights. The authors aim to produce a model guideline for effective realisation and observance of the specified children's rights in the countries under investigation.

INTRODUCTION

The concept of children's rights carries a strong international dimension.¹ As early as 1924, a number of countries collaborated to produce the

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¹ Sonia Burman, Carmel Matthias, Julia Sloth-Nielsen and Noel Zaal, 'Beyond the Rights of the Child' in Sonia Burman (ed), *The Fate of the Child Legal Decisions on Children in the New South Africa* (Juta 2003) 1.

Declaration of the Rights of the Child.² Despite its title, a critical analysis of this declaration highlights the fact that children were mainly conceived as objects requiring adult protection.³ From the more general human rights movement, the idea of children's rights emerged.⁴ After the Second World War, the nations of the world decided to create general international standards for the rights of all people throughout the world.⁵ This was the beginning of the international human rights movement. Subsequently, the United Nations⁶ was created and the concept of universal human rights began to develop.⁷

In 1945, the Charter of the United Nations appeared and the Universal Declaration of Human Rights (UDHR) followed three years later. Although the latter is concerned primarily with the rights of adults, Article 25(2) refers to children as well, and provides that all children must receive special care and assistance regardless of whether they were born in or out of wedlock. From the above, it must be recognised that the concept of children's rights emerged from the broader concept of fundamental human rights for all people.⁸ In 1959, the UN General Assembly adopted the Declaration of the Rights of the Child (UNDRC).⁹ The Declaration introduced the principle of the best interest of the child to guide decisions that had the potential of ultimately affecting children. In 1979, a Declaration on the Rights and Welfare of the African Child was concluded.¹⁰ In addition to the above instruments, the most recent and elaborate instrument that created a substantial body of important fundamental rights for children was the United Nations Convention on the Rights of the Child of 1989 (CRC).¹¹ The tendency of the African Union (AU) to introduce instruments mimicking UN conventions resulted in the African Charter on the Rights and Welfare

² The Geneva Declaration of the Rights of the Child was adopted on 26 September 1924. This Declaration contains only five Articles. See Sonia Human, 'The Theory of Children's Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (Juta 2009) 249. See also Lawrence Schafer, *Child Law in South Africa – Domestic and International Perspectives* (LexisNexis 2011) 71. Also see John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 SAJ Human Rights 100.

³ Human (n 2) 249.

⁴ Schafer (n 2) 71.

⁵ John Mubangizi, 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context' (2004) African Human Rights LJ 93.

⁶ The United Nations officially came into existence on 24 October 1945. <<http://www.un.org/cyberschoolbus/unintro/unintro.asp>> accessed 16 September 2014.

⁷ Article 1 of the Charter of the United Nations.

⁸ Schafer (n 2).

⁹ The Declaration of the Rights of the Child was unanimously adopted on 20 November 1959 by all seventy-eight member states of the UN General Assembly in Resolution 1386 (XIV).

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

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

of the Child of 1990 (ACRWC) being concluded in Monrovia, Liberia.¹² Although both the CRC and ACRWC encompass the same children's rights, it can be argued that the ACRWC contains an additional element missing from the CRC, which is 'the responsibility of the child'.¹³ This feature is a unique conception portraying the influence of African countries.

As a result, this article focuses on the most important children's rights instruments, namely the CRC at international level and the ACRWC at regional level. This article specifically compares three selected African countries and their delivery of child rights. It should be noted that the CRC and the ACRWC are binding on all the states which sign and ratify them.¹⁴ However, it is important to note that the effectiveness of the implementation of the children's rights instrument depends on the available mechanisms and resource capacities within a given participating state. The three selected countries that have committed themselves to implementing and enforcing basic rights for children¹⁵ are South Africa, Kenya and the Democratic Republic of the Congo (DRC). The rationale behind the selection of these three countries for a comparative examination is that poverty constitutes a challenge standing in the way for a speedier, more efficient and better realisation of children's survival rights in these countries. The second reason is that Kenya, the DRC and South Africa are all developing African countries with varying socio-economic standards.¹⁶

The DRC's inclusion is largely influenced by the widespread poverty that exists in the country.¹⁷ In addition, poor law enforcement of legal provisions, coupled with an intractable internal conflict situation, has impeded the realisation of children's rights in the DRC.¹⁸ Kenya is included largely because of the high level of poverty¹⁹ that affects the country's capacity to deal with the triple threats against children: child abuse, child exploitation and child trafficking.²⁰ The addition of South Africa is based on factors

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

¹³ Article 31 of the ACWRC.

¹⁴ See Art 4 of the CRC and Art 1 of the ACWRC.

¹⁵ Catharina Davel, 'The African Charter on the Rights and Welfare of the Child, Family Law and the CRC on 28 September Children's Rights' (2002) *De Jure* 281.

¹⁶ As discussed below.

¹⁷ Carl Conradie and Shelly Whitman, 'Our Work in the Democratic Republic of the Congo: 2009–2012' The Romeo Dallaire Child Soldiers Initiative (2013) <<http://www.childsoldiers.org/publications/>> accessed 3 February 2015. See also UNDP, 'Human Development Report 2011' <<http://hdr.undp.org/en/data>> accessed 20 November 2014.

¹⁸ *ibid.*

¹⁹ African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) 'Towards Elimination of Child Trafficking in order to Address Child Abuse and Exploitation and Neglect' Programmes Fact Sheet (2013) <http://www.anppcan.org/files/File/08_ChildTrafficking.pdf> accessed 8 September 2014.

²⁰ *ibid.*

such as poverty, child abuse, the lack of access to education, and drug and substance abuse, all of which are arguably exacerbated by family fragmentation induced by urbanisation and forms of social ills that obstruct the welfare of a large segment of the child population.²¹

The main question this article seeks to understand is the extent to which children's survival rights are being fulfilled in the three countries, and what can be done to ensure the effective implementation of children's rights.

CONCEPTUAL BACKGROUND

The CRC is the first major international instrument exclusively dedicated to the implementation and protection of children's rights. In the discussions that follow, the proper orientation towards what child rights are, is fundamental. The CRC classifies children's rights into four main categories, namely life and survival rights, protection rights, development rights, and participation rights.²² Scholars such as Freeman, Eekelaar, Wald and Hafen have also endeavoured to provide a practical framework for children's rights by classifying them into certain categories,²³ but the researchers opted to delineate child rights purely within the CRC typology. However, this article is delimited to the first right, namely 'life and survival rights'. The comparison of life and survival rights between the three selected countries has been pursued.

It can be inferred from the approach adopted by scholars such as Eekelaar and Hafen²⁴ that theories of children's rights²⁵ bring together two significant ideas.²⁶ The first is that every individual is entitled to fundamental rights.²⁷ The second is that children should be holders of their own rights and not be considered the property of their parents.²⁸ By combining these two ideas, it can be concluded that children are entitled to fundamental rights and furthermore that any qualification of their rights has to be embedded in human rights principles.²⁹ It is worth reiterating that human rights principles are entrenched in the CRC and the ACRWC. Life and survival rights relate to the right to life, nutrition, shelter and adequate access to medical amenities whilst development rights relate to the right to education, play, leisure, cultural activities and access to information, and

²¹ Schafer (n 2) 53.

²² Anne Kiprotich and Ong'ondo Charles, 'An Assessment of the Level of Awareness about Children's Rights among Children in Eldoret Municipality, Kenya' (2013) *J of Emerging Trends in Educational Research and Policy Studies* 279.

²³ Human (n 2) 253.

²⁴ Bruce Hafen, 'Children Liberation and New Egalitarianism: Some Reservations about Abandoning Youth to their "Rights"' (1976) *Brigham Young University LR* 605.

²⁵ Human (n 2) 261.

²⁶ *ibid.*

²⁷ Human (n 2) 261.

²⁸ *ibid.*

²⁹ *ibid.*

freedom of thought, conscience and religion. The emphasis on survival rights has a bias towards the human rights perspective because international organisations and agencies tend to understand child survival rights within a biomedical framework to include mortality (death and death-related causes) and morbidity (disease patterns) affecting children under the age of five.³⁰ Beneficiaries of rights in the CRC as well as the ACRWC include all persons under the age of eighteen.³¹

The authors argue that contemplating survival rights from a medical perspective alone is not sufficient to give effect to the realisation of these rights. Factors such as malnutrition, access to clean water and sanitation and other social services should be taken into consideration.³² Additionally, child survival is linked to child development.³³ Children have the right to survive under conditions that enable them to develop to their full potential.³⁴ As a result, a wide variety of rights in the CRC and ACRWC is related to the issue of survival.³⁵ A further motivation for focusing on survival rights of the child is that factors such as poverty and malnutrition affect the lives of many children in South Africa, Kenya and the DRC. Establishing the extent to which these countries realise children's survival rights will be in line with the Millennium Development Goals (MDGs)³⁶ and the United Nations (UN) Sustainable Development Goals (SDGs) set out in the 2030 Agenda for Sustainable Development.³⁷

Through the ratification of both international and regional instruments (the CRC and ACRWC), South Africa, Kenya and the DRC³⁸ committed themselves to the implementation of children's rights. Notably, a firm commitment requires state parties to take all the appropriate legislative, administrative and other measures to effect the implementation of rights contained in these Conventions.³⁹ However, after many years, realising this commitment with regard to children's rights still presents a challenge for

³⁰ WHO, UNICEF, UNDP and the World Bank.

³¹ Article 6(2) of the CRC and Art 2 of the ACRWC.

³² Mark McClellan and Charmaine Smith, *Child Survival Project* (Children's Institute 2006) 2.

³³ *ibid.*

³⁴ Article 6 of the CRC.

³⁵ Articles 6, 18, 24, 27, 39 of the CRC. These include the right to life, parental responsibilities, health and health services, social security, standard of living, rehabilitative care. Art 14 of the ACRWC.

³⁶ The focus has now shifted on sustainable development goals.

³⁷ In 2015, the UN states parties adopted a new global development agenda named 'Transforming Our World: The 2030 Agenda for Sustainable Development'. This 2030 global agenda establishes seventeen Sustainable Development Goals to be met by 2030.

³⁸ As mentioned above, the DRC signed but did not yet ratify the ACRWC.

³⁹ UNICEF, 'General Comments of the Committee on the Rights of the Child: A Compendium for Child Rights Advocates, Scholars and Policy Makers' (January 2014) <<http://www.unicef.org>> accessed 5 February 2014; see also Pais Santos, 'Monitoring Children's Rights: A View From Within' in Eugene Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 139.

each of these countries.⁴⁰ Currently, the DRC is recovering from a protracted armed conflict. In light of this, there is a need for appropriate preventive measures towards avoiding atrocities and violations committed against children.⁴¹ Kenya is faring better in the process of implementing children's rights.⁴² A significant development in that country is the passing of a new Constitution in 2010 with a progressive Bill of Rights.⁴³ Nevertheless, poverty still stands out as a major cause of children's rights violations in Kenya and needs to be eradicated.⁴⁴

Although South Africa is more progressive in the implementation and observance of children's statutes, giving effect to survival rights, it still needs appropriate intervention programmes and strategies that address the needs and rights of children, especially those who are vulnerable.⁴⁵

THE LEGAL POSITION IN THE THREE COUNTRIES UNDER DISCOURSE

South Africa, Kenya and the DRC ratified the CRC. As state parties, these countries are compelled to take all legislative and other measures to ensure the fulfilment of the rights enshrined in the CRC.⁴⁶ To this end, the legal position in the jurisdictions have been interpreted and compared, focusing on the promulgation, effectiveness and enforcement of the domestic laws, thereby isolating factors that militate against the realisation of children's survival rights.

In respect to justiciability and law enforcement, some cases on children's survival rights have served before courts in South Africa⁴⁷ and Kenya.⁴⁸ In the DRC, most of the cases brought to the International Criminal Court (ICC) concerned sexual offences against children and the prohibited use of children as soldiers.⁴⁹ This contrast arises as a result of the armed conflict that affected the country. Below is the discussion of relevant judgments of each country under discourse.

⁴⁰ UNICEF (n 39) 38.

⁴¹ André Mangu, 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' (2003) African Human Rights LJ 235.

⁴² Godfrey Odongo, 'Caught Between Progress, Stagnation and Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' (2012) African Human Rights LJ 112.

⁴³ Kenya's new Constitution came into force in 27 August 2010 and introduced a Bill of Rights (article 4).

⁴⁴ ANPPCAN (n 19).

⁴⁵ Ann Skelton and Morgan Courtenay, 'The Impact of Children's Rights on Criminal Justice' (2012) SA Criminal Justice 180.

⁴⁶ Article 4 of the CRC.

⁴⁷ *Government of the Republic of South Africa and Others v Grootboom & Others* 2001 (1) SA 46; *Treatment Action Campaign v Minister of Health* 2000 BCLR (4) 356 (T).

⁴⁸ *Florence Amunga Omukanda & Another v Attorney General & 2 Others* [2016] eKLL.

⁴⁹ *The Prosecutor v Germain Katanga and Mathieu Ngudjalo Chui*; *Prosecutor v Thomas Lubanga Dyilo*; *Prosecutor v Jean Pierre Bemba Gombo* <<http://www.icc-cpi.imy/menys/icc/situations+and+cases>> accessed 2 December 2017.

PROMULGATION OF LAWS IN THE SELECTED STATES

All three countries have put domestic laws in place to ensure that children's survival rights are realised.⁵⁰ The South African Constitution of 1996, being the supreme law, has an entrenched Bill of Rights regulating children's rights in section 28.⁵¹ The rights to basic nutrition, health and social services are guaranteed.⁵² Furthermore, the South African Children's Act 38 of 2005 indicates that parents have the responsibility to care for and maintain the child.⁵³ The South African Social Assistance Amendment Act also provides for the assistance of a child applicant.⁵⁴

Similar to South Africa, the 2010 Kenyan Constitution embodies constitutional supremacy with an entrenched Bill of Rights.⁵⁵ Article 53 of the 2010 Constitution guarantees children's rights to food, sanitation, water, health and social security.⁵⁶ Furthermore, the Kenyan Children's Act 2001 stresses that the government and family need to ensure the survival and development of the child.⁵⁷

Unlike the Kenyan and South African constitutions, the 2006 DRC Constitution only mentions that everyone is obliged to respect the Constitution and comply with the laws of the Republic.⁵⁸ The DRC has no clear provision emphasising the supremacy of the Constitution. On the contrary, the Congolese Constitution leaves room for constitutional review subject to certain conditions.⁵⁹ Unlike the DRC, South Africa and Kenya also provide that children have a right to family care.⁶⁰ As a result, the public authorities have the duty to protect children against any form of maltreatment.⁶¹ Similar to Kenya and South Africa, the DRC has a child protection law, which adequately details the classes of protection available to a child. The classification ranges from social, juridical to criminal protection.⁶² Therefore, this exposé provides adequate evidence that the DRC, Kenya and South Africa have taken measures to incorporate the CRC requirements into their domestic laws. In addition, the current CRC

⁵⁰ For example, s 28 of the 1996 Constitution of South Africa; the Social Assistance Act 13 of 2004; art 53 of 2010 Kenyan Constitution; art 47 of the Congolese Child Protection Law 09/001 of 2009.

⁵¹ Section 2 of the 1996 Constitution is the supremacy clause; the Bill of Rights is contained in chapter 2.

⁵² Section 27 of the 1996 Constitution.

⁵³ Section 18 of the 1996 Constitution.

⁵⁴ Article 2 of the Social Assistance Act 13 of 2004.

⁵⁵ Article 4 of the 2010 Constitution.

⁵⁶ Articles 43–46.

⁵⁷ Section 4 of the Kenyan Children's Act 2001.

⁵⁸ Article 62 of the 2006 Congolese Constitution, see also art 168.

⁵⁹ Title VIII, art 218 of the 2006 Congolese Constitution.

⁶⁰ Section 41 of the 2006 Congolese Constitution.

⁶¹ *ibid.*

⁶² See Title II, Title III and Title IV of the 2009 Law on the Protection of the Child.

Committee's concluding observations of each country under discussion provides specific evidence that highlights the progress made.⁶³

INTERPRETIVE ANALYSIS OF THE SOUTH AFRICAN CONTEXT

Scholars such as Bennett, Bekker, Bonthuys, Nicholson and Songca emphasise that the 'best interest criterion' should be taken into consideration in every matter pertaining to a child.⁶⁴ These authors focus more on parental responsibilities and rights and the manner in which African cultures find expression in the Children's Act.⁶⁵ The best interest of the child is a criterion of both the CRC and the ACRWC informing children's rights.⁶⁶ Songca raises a pertinent point that previously in South Africa, there was no comprehensive legislation dealing with children.⁶⁷ That being said, the current position is that children's prerogatives, duties and responsibilities are incorporated in the Constitution and various statutes, including the Children's Act.⁶⁸ Sloth-Nielsen supports the view that the South African Constitution's entrenchment of a clause pertaining to children's rights is the most extensive constitutional protection for children anywhere, specifically since the socio-economic rights accorded to children are enumerated therein and are consequently justiciable.⁶⁹ The justiciability of children's rights has not only enriched jurisprudence but has also earned international recognition.⁷⁰

South Africa has made good progress in fulfilling the rights of children.⁷¹ For example, millions of children are benefiting from the child support

⁶³ See below section on 'PRACTICALITIES IN THE REALISATION OF CHILDREN'S SURVIVAL RIGHTS'.

⁶⁴ Rushiella Songca, 'Evaluation of the Children's Rights in South African Law: The Dawn of an Emerging Approach to Children's Rights; (2011) XLIV CILSA 340; Tom Bennett, 'The Best Interests of the Child in an African Context' (1999) *Obiter* 145. Jan Bekker, 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) *Obiter* 395; Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) 20 *Intl J of L, Policy and the Family* 23.

⁶⁵ *ibid.* Caroline Nicholson, '*LB v YD* 2009 5 SA 463 (T) / *YD v LB (A)* 2009 5 SA 479 (NGP) Disputed Paternity, Blood Tests; Court as Upper Guardian, Compel Blood Tests for DNA Testing; Best Interests of the Child' (2010) *De Jure* 410.

⁶⁶ Article 3 of the CRC. Art 4 of the ACRWC.

⁶⁷ Songca (n 64).

⁶⁸ *ibid.* The author mentions numerous statutes as recent legal provisions on the protection of the children's rights in South Africa, these include: the Children's Act 38 of 2005, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Child Justice Act 75 of 2008. See also Skelton and Courtenay (n 45) 181.

⁶⁹ Section 28 of the 1996 South African Constitution. See also Julia Sloth-Nielsen, *Children's Rights in Africa: A Legal Perspective* (Ashgate 2008) 3.

⁷⁰ Sloth-Nielsen (n 69) 4.

⁷¹ South Africa Government Information, 'Executive Summary' (2011) <<http://www.info.gov.za/aboutsa/index.htm>> accessed 21 January 2015.

grant⁷² through the extension of the age of eligibility and from an extensive outreach programme by the state.⁷³ The grant enables parents/guardians to acquire basic food for children. Through its progressive Constitution, South Africa has put in place a system of laws and programmes to ensure basic support for children.⁷⁴ The 1996 Constitution,⁷⁵ the Children's Act⁷⁶ and the Child Justice Act⁷⁷ provide a solid foundation for advancing child protection in South Africa. However, inequalities in access to the essentials of life still exist, affecting in very strong ways how children access the opportunities that the country should avail for the fulfilment of their rights.⁷⁸

Research has shown that several factors affect the welfare of the South African child.⁷⁹ These factors range from poverty, inequality, preventable diseases including HIV/AIDS, nutrition, non-citizenship, education and healthcare, to family fragmentation and abuse.⁸⁰ Approximately one-third of child deaths under the age of five occur during the newborn period, while diarrhoea, pneumonia and HIV infection remain the most prominent causes of death outside of the newborn period.⁸¹ The implementation of children's rights provisions and outright challenges are still to be addressed. In a study by Proudlock and others, which evaluated the progress South Africa has made in realising children's rights within twenty years of democracy,⁸² the authors emphasise that the fulfilment of children's rights requires a broad strategy involving the promulgation of relevant laws, the design and implementation of suitable programmes and policies, and provision of services. More so, the 2017 *South African Child Gauge* provides a further valuable document to ground this article given the fact that it elaborates on the SDGs to create an enabling environment in which South African children not only survive, but also develop and reach their full potential.⁸³

⁷² In 2018, the child support grant was set to increase from the baseline of R380 to R400 on 1 April and to R410 on 1 October. This is a 6.6 per cent annual increase. See 'Budget 2018: Social Grants Set to Increase' <<https://www.iol.co.za/news/politics/budget2018-social-grants-set-to-increase-13404875>> accessed 25 October 2018.

⁷³ *ibid.*

⁷⁴ Songca (n 64).

⁷⁵ The Constitution of the Republic of South Africa, 1996.

⁷⁶ Act 38 of 2005.

⁷⁷ Act 75 of 2008.

⁷⁸ South Africa Government Information (n 71).

⁷⁹ Schafer (n 2); see also David McQuoid-Mason, 'The Teddy Bear Clinic Constitutional Court Case: Sexual Conduct between Adolescent Consenting Children Aged Under 16 Years Decriminalised and a Moratorium on the Reporting Duties of Doctors and Others' (2014) 104 *South African Medical J* 275.

⁸⁰ Schafer (n 2).

⁸¹ Lesley Bamford, Neil McKerrow, Peter Barron and Yi Yi Aung, 'Child Mortality in South Africa: Fewer Deaths, but Better Data are Needed' (2018) *South African Medical J* 108 s 25.

⁸² Paula Proudlock, 'South African Progress in Realising Children's Rights: A Law Review' (Children's Institute 2014) 251; see also Lucy Jameson, Lizette Berry and Lori Lake, *South African Child Gauge* (Children's Institute 2017) 18.

⁸³ Jameson, Berry and Lake (n 82) 24.

The *South African Child Gauge* discusses recent policy and legislative development affecting children in South Africa.⁸⁴ Accordingly, the annual *South African Child Gauge* will be useful as it provides child-centred data to monitor progress and track progress made towards the realisation of children's socio-economic rights.⁸⁵ The value of this article is in comparing the progress in realising children's survival rights in the three African countries, and to consider the lessons learnt from one another as a contribution to their respective national systems.

South African Case Law

Children's rights in South Africa received a significant boost with the enactment of a supreme constitution with an entrenched justiciable Bill of Rights. In South African law, a child's constitutional enjoyment of rights begins at birth. Birth as a threshold for legal identity is entrenched in the Constitution because it provides for the child's right to a name and a nationality from the moment of his or her birth.⁸⁶ In South Africa, the right enshrined in section 28(1)(a) is a universal right.⁸⁷ As a result, the right is not circumscribed in any way whatsoever and is available to 'every child, including the child of foreign parents whether the parents are in South Africa temporarily or permanently, legally or illegally.'⁸⁸

The Treatment Action Campaign case⁸⁹

The background to the *Treatment Action Campaign (TAC)* case is found in the trial court process where the applicants, comprising a number of associations and members of civil society, brought a claim against the Minister of Health. Basically, the applicants argued that the Minister needed to immediately plan and implement an effective, comprehensive and progressive programme to make the antiretroviral drug (nevirapine) available to pregnant mothers already identified with HIV, and to their newborn babies. The critical concern for the applicants, however, was that the restricted availability of the drug to only two select test centres per province violated the right to health of HIV-positive pregnant women as well as their children—throughout the country—who were not exposed to those test centres.⁹⁰

⁸⁴ *ibid* 10.

⁸⁵ *ibid* 94.

⁸⁶ Section 28(1)(a) of the 1996 South African Constitution.

⁸⁷ Article 7 of the CRC.

⁸⁸ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

⁸⁹ *Treatment Action Campaign* (n 47).

⁹⁰ *ibid* para 5.

In view of the fact that the applicants based their claim on sections 27 and 28, which deal with rights such as access to healthcare services,⁹¹ sufficient food and water,⁹² and social security:⁹³

- 2.7(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁹⁴

The socio-economic provision on children states that

- 2.8(1) Every child has the right (c) to basic nutrition, shelter, basic health care services and social services.⁹⁵

The trial court held that the right to anti-retroviral treatment for pregnant mothers created a positive obligation on the government, which the Minister (for the state) could not avoid. In this way, the court's holding in *TAC* confirmed that 'basic health care service' is not an act of charity which government may extend or not extend as it wishes, but is an actionable right under the Constitution and the Bill of Rights.

***The Government of the Republic of South Africa v Grootboom case*⁹⁶**

The facts in the *Government of the Republic of South Africa v Grootboom* case provide a classic illustration of the kind of intolerable conditions envisaged by the criterion of reasonableness just quoted.⁹⁷ *Grootboom* also involved the socio-economic right to housing. The constitutional provision on housing states that

- 26(1) Everyone has the right to have access to adequate housing.⁹⁸
 (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.⁹⁹
 (3) No one may be evicted from their home, or have their home demolished, without an order of court after considering all the

⁹¹ Section 27(1)(a) of the 1996 South African Constitution.

⁹² Section 27(1)(b) of the 1996 South African Constitution.

⁹³ Section 27(1)(c) of the 1996 South African Constitution.

⁹⁴ Section 27(2) of the 1996 South African Constitution.

⁹⁵ Section 28(1)(c) of the 1996 South African Constitution.

⁹⁶ *Grootboom* (n 47).

⁹⁷ *ibid.*

⁹⁸ Section 26(1). Note also that this section sets out the parameters of the right and does not exclude children. See para 34 in the judgment per Jacob J.

⁹⁹ Section 26(2) of the 1996 South African Constitution.

relevant circumstances. No legislation may permit arbitrary evictions.¹⁰⁰

Stated briefly, facts from the *Grootboom* case were as follows: Grootboom and most of the other respondents lived in shacks situated in a water-logged informal settlement in Wallacedene in the Western Cape, where there was neither water nor sewage nor services for the removal of refuse.¹⁰¹ Most of the inhabitants in the informal settlement in Wallacedene were children. Only about five out of 100 shacks had electricity. About twenty-five out of 100 households received no income at all. The rest lived off an income of below R500 per month.¹⁰²

Many of the respondents had placed their names on the municipality's waiting list for subsidised low-cost housing. In the face of intolerable conditions at Wallacedene, and after an indefinite wait for housing allocations, the respondents moved onto privately owned land out of desperation. It was at this informal settlement that the landowner had them removed. Their removal was carried out in a most inhumane way in that it occurred at the beginning of the cold, windy and rainy Cape winter. Their homes were bulldozed, and their possessions destroyed in the process.¹⁰³ It is patently clear that the case history in *Grootboom* entailed an egregious violation of the rights guaranteed in section 26 of the Constitution, especially section 26(3), which prohibits evictions or demolitions, except by court order and only 'after considering all the relevant circumstances' of the evictees. Unfortunately, judging by the manner in which the evictions were carried out, the conscience raising and humanitarian empathy which the Constitution drafters envisaged in section 26(3) did not materialise in the case of *Grootboom*.

Nevertheless, the court held that the government has an obligation to act positively to ameliorate the conditions of people who find themselves in circumstances of homelessness. It must provide access to housing, healthcare, sufficient food and water, and social security to people who are unable to support themselves and their dependants.¹⁰⁴ However, the court stated that the government was not obliged to act beyond available resources to realise the right to access to adequate housing immediately.¹⁰⁵ The constitution only requires that the right to housing be realised

¹⁰⁰ Section 26(3) of the 1996 South African Constitution. Note also that this section affirms a negative right, which outlaws arbitrary evictions.

¹⁰¹ Thus several rights in the Bill of Rights could be said to have been effectively invaded: the right to human dignity, the right to equality, the right to a clean environment, and some of the socio-economic rights set out in ss 26 and 27.

¹⁰² *Grootboom* (n 47) para 7.

¹⁰³ *ibid* paras 8–10.

¹⁰⁴ *ibid* para 83, Jacoob J stressed that 'human beings are required to be treated as human beings'.

¹⁰⁵ *Grootboom* (n 47) para 94.

‘progressively’.¹⁰⁶ Notwithstanding, the court noted that there was ‘at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.’¹⁰⁷

Against this background, Mrs Grootboom and others based their second claim on section 28(1)(c) of the Bill of Rights, which provides that children have the right to shelter. The court held that section 28(1)(b) places an obligation on the state to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children. However, the court’s treatment of section 28(1)(c) was guarded and nuanced. The Constitutional Court rejected the holding of the *court a quo* that people who have children become entitled to jump the housing queue purely by virtue of being parents, guardians or caregivers of children.

Whilst human rights jurisprudence in South Africa does not recognise any hierarchy of values, the court stated the need for socio-economic rights to be read together in their social and historical context.¹⁰⁸ At this juncture, two comments beg articulating. First, it is a salutary interpretational practice that the court recognised that though the text of a provision in the Bill of Rights is the starting point, a proper interpretation of a rights provision may entail moving beyond the text itself to its context, whether the context is historical, political or economic.¹⁰⁹ Second, it bears noting that in the context of the section 26(1) provision guaranteeing ‘adequate access to housing,’ the court rejected the notion of ‘a minimum core obligation’ because of the numerous difficulties it raises. Mainly, the problem with specifying a minimum core obligation is that implementing the notion would progressively present discrepancy depending on the group with which one is dealing. What could be appropriate to one group might not be acceptable to another. An additional differential might be differences in socio-economic levels. A further differential might be location in terms of whether the minimum core was intended to alleviate the housing conditions of beneficiaries in an urban setting or in a rural environment.¹¹⁰

To come back to section 28(1)(c), *The Government of the Republic of South Africa v Grootboom* is authority that section 28(1)(c) must be read together with section 28(1)(b). On this order of reading, the court concluded that the obligation to provide shelter to their children is imposed primarily on the parents, as section 28(1)(c) does not of its own impose any primary obligation on the government to provide shelter on demand to parents and their children. It is only in the eventuality that children have become

¹⁰⁶ *ibid* para 95.

¹⁰⁷ *ibid* para 34.

¹⁰⁸ *ibid* para 25.

¹⁰⁹ Ann Skelton, ‘Children’ in Iain Currie and Johan De Waal (eds), *The Bill of Rights Handbook* (Juta 2013).

¹¹⁰ *Grootboom* (n 47) paras 31–37.

dislodged from their families that the state becomes charged with the responsibility to provide shelter to the children. As a result, the court in *The Government of the Republic of South Africa v Grootboom* (per Jacob J) set aside the order handed down in *Grootboom v Oostenberg Municipality* (per Davis J).

From the foregoing discourse, the purpose was to demonstrate, through select case law (through the *Treatment Action Campaign* case and the landmark judgment in *Grootboom*) that the rigour in the available human rights jurisprudence may be trusted to protect the survival rights of children who are unable to fend for or defend themselves in South Africa.¹¹¹

The purpose of this concluding case law is to reinforce earlier approving observations made by the authors in the *TAC* and *Grootboom* case analyses. What becomes clear from the above case law is that children's survival rights in South Africa are not only provided by the legislature but are also justiciable and enforceable by the courts of law. However, Erasmus correctly insists that courts need to consider the realities of South African society when laying down the principles that should be exercised to enforce the rights of children.¹¹² Rosa and Dutschke also argue that the courts need to properly define the scope and the content of children's socio-economic rights.¹¹³ As a result, when adjudicating any children's substantive right, a clear explanation of that right is needed. This calls on the legislators and policy makers to draw a comprehensive and inclusive protocol of, for example, children's socio-economic rights.

KENYA

Sloth-Nielsen observed that Kenya was the first African country to develop child law in the new millennium.¹¹⁴ South Africa even proposed adopting provisions similar to those of Kenya dealing with parental responsibilities and rights.¹¹⁵ However, the issue of parental responsibilities and rights falls

¹¹¹ George Annas, 'The Right to Health and the Nevirapine Case in South Africa' (2003) *The New England J of Medicine*.

¹¹² Deon Erasmus, 'There is Something You are Missing; What about the Children? Separating the Rights of Children from Those of Their Caregivers' (2010) 25 *SA Public Law* 124.

¹¹³ Solange Rosa and Mira Dutschke, 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) 22 *SAJ Human Rights* 225. Many other authors also emphasise the court's failure to engage sufficiently with the substantive scope and content of socio-economic rights; see for example, David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJ Human Rights* 1; Marius Pieterse, 'Coming to Terms with the Judicial Enforcement of Socio-economic Rights' (2004) 20 *SAJ Human Rights* 383.

¹¹⁴ Julia Sloth-Nielsen, Lorenzo Wakefield and Nkatha Murugi, 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' (2011) *J of African L* 203.

¹¹⁵ *ibid.* Kenya enacted the Children's Act in 2001, while South Africa passed its Children's Act in 2005.

outside the scope of this article. Suffice it to say, that this point is raised to emphasise the seriousness of children's rights implementation in Kenya.

Onyango and Lynch indicate that Kenya made efforts to improve legislation and the country's policy framework to protect children.¹¹⁶ However, the resources needed to make a real difference are inadequate and unpredictable.¹¹⁷ They conclude that the Kenyan government must be encouraged to control the process of children's rights implementation. This requires commitment to long-term planning on the part of both the government and its international partners.¹¹⁸ According to Odongo, the enactment of the Children's Act is not sufficient by itself to make Kenya compliant with international child-rights norms.¹¹⁹ In addition, there remains a need for a comprehensive audit of existing laws and policies.¹²⁰ Odongo states that an important development in Kenya was the passage of the 2010 Constitution.¹²¹ He recommends a review of all laws as well as administrative and practical measures in place to ensure that children's rights are realised.¹²² Odongo concludes that the success of children's rights implementation requires a political commitment from the government.¹²³

Notwithstanding, Onyango and Lynch insist that to fulfil the rights of the child is the responsibility of the government.¹²⁴ They point out that, in spite of the fact that resources for fulfilment of children's rights mostly depend on international donor-driven agendas and demands,¹²⁵ the scarcity of resources still remains a problem for Kenya.¹²⁶

On the other hand, Kiprotich and Charles focus on the assessment of the level of awareness about children's rights in Kenya.¹²⁷ They insist on the enhancement of access by children to programmes that address issues affecting them.¹²⁸ This view is significant because it gives an idea of the extent to which children's rights are being fulfilled in Kenya.

A further relevant point is that the Kenyan Constitution includes protection of rights of children in Article 4 of the Kenya Bill of Rights.¹²⁹

¹¹⁶ Philistia Onyango and Margaret Lynch, 'Implementing the Right to Child Protection: A Challenge for Developing Countries' (2006) 367 *Essay Focus* 693 <<http://www.thelancet.com>> accessed 12 December 2014.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ Odongo (n 42)141.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.* Laws such as the Sexual Offences Act, 2006; the Prohibition of Female Genital Mutilation Act, 2011.

¹²³ *ibid.*

¹²⁴ Onyango and Lynch (n 116).

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Kiprotich and Charles (n 22) 279.

¹²⁸ *ibid.*

¹²⁹ Kiprotich and Charles (n 22) 279.

Despite efforts made to implement children's rights, the challenge remains. The point to bear in mind is that poverty remains an aggravating factor in children's rights violations.¹³⁰

A Brief Analytical Look into Kenyan Case Law

Similar to South Africa, in respect of law enforcement and standing, article 21 of the 2010 Kenyan Constitution guarantees access to legal remedies and the holds government accountable for the infringement of socio-economic rights in Kenya. In light of the above, the Kenyan case of *Florence Amunga Omukanda & Another v Attorney General & 2 Others* provides a case in point.¹³¹ In this matter (*Omukanda* case) the applicant was attacked by unknown intruders while she and her daughters were asleep in her house, which was subsequently burnt down from the outside by the intruders. She was trapped in the fire and lost consciousness in the process and was in a coma for two months. She alleged that when she regained consciousness, she was informed by her friend that her two daughters had been burnt during the arson.¹³² In the resultant application, the mother argued that the state had failed to take positive action to protect her children as mentioned in articles 23 and 26 of the Kenyan Constitution. Respectively, article 23 is related to the authority of courts to uphold and enforce the Bill of Rights, and article 26 entails the right to life. The question in this case was whether the state, through the police, had violated the applicant's children's rights by failing to protect them during the violence.¹³³ However, the court found that the applicant had failed to prove that the state had violated her rights to property, life and equality. The court in this case failed to hand down a fair judgment in relation to children's rights infringements as the applicant had not given tangible evidence of birth certificates proving that she had children,¹³⁴ nor had she handed in academic records from the school.¹³⁵ Given these inconsistencies and deficiencies in her testimony, the court did not believe that the child victims were actually her children. As a result, the court dismissed her application.¹³⁶ Despite the unsuccessful case of the applicant, the Kenyan Constitution allows that in cases of a children's rights infringement, any person has the right to approach the court and claim that his or her children's rights have been infringed.¹³⁷ The court also states that 'where an allegation of violation of the constitutional rights and fundamental freedoms are alleged particularly against state actors, the state

¹³⁰ Odongo (n 42) 138.

¹³¹ [2016] Eklr para 87.

¹³² *Omukanda* (n 48) para 87.

¹³³ *ibid* para 75.

¹³⁴ *ibid* para 76.

¹³⁵ *ibid* para 77.

¹³⁶ *ibid* para 76.

¹³⁷ Article 23 of 2010 Constitution.

is enjoined to investigate the matter.’¹³⁸ In other words, the state has the duty to investigate human rights violations. However, in the *Omukanda* matter, it is evident that the law’s enforcement, although existing on paper, remains weak in reality. Basically, there are some flaws on the part of Kenya’s government, which authors deem as unlawful discrimination.¹³⁹ While mentioning discrimination on the part of the government handling some children’s rights issues, it is strategic to introduce the *Nubian case*.¹⁴⁰ This case is related to the children of Nubia,¹⁴¹ with Nubians originally hailing from Sudan.¹⁴² They were forcibly enrolled into the British colonial army brought to Kenya by the British rulers during colonial times.¹⁴³ Although Nubians had lived in Kenya for more than a century, they were not considered Kenyan citizens.¹⁴⁴ As a result, their children faced numerous restrictions such as the denial of Kenyan citizenship at birth, as well as the denial of access to education and healthcare.¹⁴⁵ By law, denying children such basic human rights amounted to the infringement of the right to survival and development,¹⁴⁶ right to a name, nationality¹⁴⁷ and healthcare.¹⁴⁸ Subsequently, the matter was brought to the attention of the African Committee of Experts on the Rights and the Welfare of the Child.¹⁴⁹ the African Committee recommended that the government of Kenya should take all the necessary legislative, administrative and other measures to ensure that children of Nubian descent receive nationality at birth.¹⁵⁰ What transpires from this discussion is that when realising children’s rights, a state needs to avoid discriminating against any child given the fact that non-discrimination is one of the principles in the CRC as well as the ACRWC.¹⁵¹ It should be noted that all rights apply to all children without exception. It is the state’s obligation to protect children from any form of discrimination

¹³⁸ *Omukanda* (n 48) para 86. The court referred to the judgment in the case of *Velasquez Rodriguez v Honduras* of 27 July 1985.

¹³⁹ Child Rights International Network (CRIN), ‘Kenya: How to Get Recognised – Nubian Children and the Struggle for Citizenship’ <https://www.crin.org/sites/default/files/kenyacasesstudyfinal_1.pdf> accessed 11 December 2017.

¹⁴⁰ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACRWC) 22 March 2011 <<http://www.refworld.org/cases,ACRWC,4f5f04492.html>> accessed 4 April 2018.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *Nubian case* (n 140) para 2.

¹⁴⁴ *ibid.*

¹⁴⁵ CRIN (n 139).

¹⁴⁶ Article 6 of the CRC, Art 5 of the ACRWC.

¹⁴⁷ Article 7(1) of the CRC, Art 6 of the ACRWC.

¹⁴⁸ Article 24 of the CRC, Art 14 of the ACRWC.

¹⁴⁹ *Nubian case* (n 140) para 1.

¹⁵⁰ *ibid* para 69.

¹⁵¹ Article 2 of the CRC; Art 3 of the ACRWC.

and to take positive action to promote their rights. The critical point about the realisation of children's rights is the extent to which the duty-bound state displays the will to take not only legislative steps to realise those rights, but also other measures beyond legislative steps to fulfil these rights.¹⁵²

THE DEMOCRATIC REPUBLIC OF THE CONGO

The DRC faces numerous challenges in terms of children's rights implementation.¹⁵³ On 10 January 2009, the Congolese government adopted the Law 09/001 of 2009 on the Protection of the Child. This legislation builds on previous commitments to comply with international conventions.¹⁵⁴ However, the Congolese legal framework and judicial institutions remain powerless to protect children's rights and have become completely dysfunctional as protective organs of the rights of children throughout the country.¹⁵⁵ Currently, in the DRC, children are victims of abuse, deprivation and exploitation, reflecting the social and economic dysfunctionality in the country.¹⁵⁶ Literature on the implementation of children's rights in the DRC context is limited, and most of the scholars have focused on armed conflict in the DRC and its impact on civilians with only a few researchers mentioning implications of armed conflict on children's rights.¹⁵⁷ For example, in 2003, the Human Rights Watch emphasised that all parties involved in conflict in the DRC should immediately halt abuses against children and uphold all international obligations to protect children's security and rights.¹⁵⁸ In 2009, World Vision recommended that the DRC government should fully support an inclusive peace process that guarantees core human rights provisions, especially those affecting children, women

¹⁵² Olubayo Oluduro and Ebenezer Durojaye, 'The Normative Framework on the Right to Health under International Human Rights Law' in Ebenezer Durojaye (ed), *Litigating the Right to Health in Africa: Challenges and Prospects* (Ashgate 2015) 28.

¹⁵³ For the purpose of this article the word 'implementation' is used interchangeably with the word fulfilment as they are synonyms.

¹⁵⁴ Article 1 of the Child Protection Law 09/001 of 2002. World Vision, 'Children's Rights in the Democratic Republic of Congo' Stakeholder Report on DRC <http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/cd/WV_COD_UPR_S06_2009.Pdf> accessed 7 February 2014.

¹⁵⁵ Mangu (n 41) 235.

¹⁵⁶ Sancha Cadogan-Poole, 'Exorcising Spirits Instead of Exercising Rights? The Recent Phenomenon of Child Witch Accusation in the DRC' (2013) <http://whrin.org/wp_content/uploads/7/SanchaCadoganPoole-1> accessed 1 February 2014. See also Dunia Zongwe, Francois Butedi and Phebe Clément, 'The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview' (2007) <https://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html> accessed 7 February 2014.

¹⁵⁷ Graca Machel, 'The Impact of Armed Conflict on Children: Note by the Secretary-General' A/51/306 (1996) A/51/306.

¹⁵⁸ See Watchlist on Children and Armed Conflict, 'The Impact of Armed Conflict on Children in the Democratic Republic of Congo (DRC)' <www.Watchlist.org> accessed 5 February 2014.

and displaced persons.¹⁵⁹ Similarly, Mobekk confirms that the DRC has been troubled by continued conflict and violence.¹⁶⁰ In a 2011 article, Kjeksrud and Ravndal also focus on armed conflict.¹⁶¹ They elaborate on the problem of protection, the conflicts in the DRC and the UN peacekeeping mission in the country.¹⁶² These authors only discuss the three dimensions along which UN military units can be expected to contribute to the protection of civilians in general.¹⁶³ With the same idea of civilian protection, Neethling points out that the DRC's government needs to ensure that it creates a secure and peaceful environment, especially for civilians.¹⁶⁴ It is clear that children's rights are not receiving the attention they deserve.¹⁶⁵ Whitman focuses on the use of child soldiers and asserts that children have been used as soldiers by both rebel groups and government forces in many conflicts; this is particularly evident in Sierra Leone and the DRC conflict.¹⁶⁶ He concludes that the fact that the International Criminal Court investigated the DRC case, sets an important precedent with respect to the criminality of the use of child soldiers.¹⁶⁷ Whitman's insightful point is that, in order to ensure peace and stability, there is a need to improve children's protection, security and well-being.¹⁶⁸

It is in light of this gap that this article identifies poverty, non-enforcement of the law and armed conflicts as posing major impediments to the protection of children's rights across the DRC.¹⁶⁹ In addition, the DRC is one of the poorest countries in the world with an estimated forty-seven per cent of the population living in severe poverty while the average citizen earns less than two dollars a day.¹⁷⁰ What emerges from the above discussion is that the three selected countries all face challenges with regard to the fulfilment of children's rights.

¹⁵⁹ World Vision (n 154).

¹⁶⁰ Eirin Mobekk, 'Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting Civilians in the East' (2009) 16 *International Peacekeeping* 273

¹⁶¹ Stian Kjeksrud and Jacob Aasland Ravndal, 'Emerging Lessons from the United Nations Mission in the Democratic Republic of Congo: Military Contributions to the Protection of Civilians' (2011) *African Security Review* 3.

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ Theodor Neethling, 'From MONUC to MONUSCO and Beyond: Prospects for Reconstruction, State-building and Security Governance in the DRC' (2011) 18 *South African J of Intl Affairs* 23.

¹⁶⁵ *ibid.*

¹⁶⁶ Shelly Whitman, 'Preventing the Use of Child Soldiers: The Role of International Criminal Court' <<http://www.childsoldiers.org/>> accessed 10 October 2013.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ Munyae Mulinge, 'Implementing the 1989 United Nations Convention on the Rights of the Child in Sub-Saharan Africa: The Overlooked Socio-economic and Political Dilemmas' (2002) 26 *Child Abuse and Neglect* 17.

¹⁷⁰ Conradie and Whitman (n 17).

A Brief Analytical Look into Congolese Case Law

As mentioned above, there is a paucity of judicial decisions on the protection of children's rights in the DRC. Most of the current cases related to children's rights violations in the DRC are brought before the International Criminal Court (ICC).¹⁷¹ In the *Germain Katanga* case, for example, it was alleged that the perpetrator and his accomplice-civilians committed crimes against humanity when they killed civilians including children.¹⁷² At least 200 civilians lost their lives in Bogoro village during armed conflicts in 2003.¹⁷³ It was alleged that the group was responsible for perpetrating crimes of sexual slavery, abduction and rape of girls and women. They forced and threatened women and girls to engage in sexual intercourse with the combatants. The court found that there was a violation of Article 7(1)(a) and Article 8(2)(b)(xxxvi) of the Rome Statute.¹⁷⁴ Furthermore, in *Lubanga's* case, the perpetrator was found guilty in the International Criminal Court for recruiting and using children as soldiers in violation of Article 8(2)(b)(xxvi) of the Rome Statute.¹⁷⁵ In addition, in *Jean Pierre Bemba's* case, the accused was a military commandant who failed to take appropriate measures to prevent his soldiers from committing crimes of rape and murder.¹⁷⁶ The court found that the accused committed crimes against humanity, in that the crimes were in violation of Article 28(a) of the Rome Statute.¹⁷⁷ In essence, the persisting effects of the armed conflict due to the presence of armed groups in the DRC have led to severe violation of children's rights. This situation remains one of the main concerns in the CRC Committee's concluding observations.¹⁷⁸

As far as enforcement of domestic law is concerned, there is a landmark decision of the South Kivu Military Court (set up as a mobile court) delivered on 13 December 2017. This case involves the *Government of the*

¹⁷¹ See (n 49).

¹⁷² Open Society Justice Initiative, 'Trial Background: Who are Germain Katanga & Mathieu Ngudjolo Chui?' <www.katangatrial.org/trial-background/who-are-katanga-and-Ngudjolo-chui?> accessed 2 December 2017.

¹⁷³ *Germain Katanga* case (n 49). Art 7(1) clearly explains the meaning of crime against humanity whereas Art 8(2)(b)(xxvii) of the Rome Statute provides the meaning of war crimes.

¹⁷⁴ *Germain Katanga* (n 49).

¹⁷⁵ Alison Cole, 'Thomas Lubanga: Landmark Decision for International Justice' (15 March 2012) <<http://www.justiceinitiative.org/voices/lubanga-a-landmark-decision-for-international-justice>> accessed 2 December 2019.

¹⁷⁶ *The Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05-01/08 <<https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf>> accessed 6 December 2019

¹⁷⁷ *ibid.*

¹⁷⁸ UN Committee on the Rights of the Child (CRC), 'Concluding Observations on the Combined Third to Fifth Periodic Report of the Democratic Republic of Congo' (3 February 2017) CRC/C/COD/CO/3-5 <<http://www.refworld.org/docid/589dc2794.html>> accessed 28 March 2018.

DRC v Frederick Batumike.¹⁷⁹ From the case, it was noted that there was persisting strife and violence in Kavumu, a poor village in the South Kivu province in the eastern part of the DRC. Between 2013 and 2016, more than forty young girls in this village, aged between thirteen months to twelve years, were kidnapped and raped during the night.¹⁸⁰ A similar pattern of violence and rape was observed in other cases. After being kidnapped by one or several men, the victim would be raped. Her hymeneal blood would be taken, sometimes with the help of a sharp object. Then the victim would be abandoned.¹⁸¹ Initially, local judicial authorities considered and treated the attacks as isolated incidents.

In May 2014, a task force was created by a group of NGOs led by Physicians for Human Rights to support the victims.¹⁸² In May 2016, Trial International joined the task force. A new judicial strategy was adopted after the victims' lawyers requested the military prosecutor to take over the case.¹⁸³ Since the acts committed were considered as attacks on the civilian population, they were regarded as a crime against humanity. The military granted the request and opened the investigation as a crime against humanity. The suspect belonged to a militia group named 'Jeshi la Yesu' (Jesus's Army). The group was allegedly responsible for the continuous rape of the Kavumu girls.¹⁸⁴ This movement was initially confined to the protection of Bishibirhu plantations, which started under the leadership of Walter Muller.¹⁸⁵ However, his successor, Batumike, transformed this movement into an army group that created insecurity in the Kabare territory.

In September 2017, Batumike and seventeen other suspects were charged with rape and crimes against humanity, murder and insurrectional movement, and attacks against Congolese military positions.¹⁸⁶ Batumike was accused of creating a militia and ordering attacks. After many incidents, the trial began on 9 November 2017.

On 13 December 2017, the military court of South Kivu convicted eleven militants for sexual violence as crimes against humanity, which they had committed against thirty-seven young girls.¹⁸⁷ The militants were also convicted for their participation in an insurrectional movement and for the murders of individuals who had denounced their abuses.¹⁸⁸ Batumike

¹⁷⁹ RP0105/2017. The final judgment in this case is available in French only and can be accessed at <<https://trialinternational.org/wp-content/uploads/2017/12/Arr%C3%At-final-KavumuCM.pdf>> accessed 4 April 2018.

¹⁸⁰ *Batumike* (n 179) para 1.

¹⁸¹ *ibid*.

¹⁸² See <<http://www.physiciannshumanrights.org/>> accessed 4 April 2018.

¹⁸³ Trial International <<https://trialinternational.org>> accessed 4 April 2018.

¹⁸⁴ *Batumike* (n 179) para 1.

¹⁸⁵ *ibid*.

¹⁸⁶ *ibid* para 3.

¹⁸⁷ *ibid* para 18.

¹⁸⁸ *ibid* para 19.

and eleven others were sentenced to life imprisonment for kidnapping and raping thirteen girls in Kavumu. Reparations amounting to USD 5 000 were granted to each survivor of that attack.¹⁸⁹ This case is relevant in the sense that it created a precedent for other victims in the DRC. Furthermore, this case represents the first example of an acting politician being found guilty (as a superior) of crimes committed by him, or by the militia he controlled and financed in the DRC. As a member of Parliament, Batumike enjoyed immunity in terms of article 107 of the 2006 Constitution. Article 107 states that 'no member of parliament may be prosecuted, searched, arrested, detained or judged for opinions or votes delivered in the exercise of his functions.' It is obvious that sitting parliamentarians enjoy immunities from prosecution conferred by the 2006 Constitution.¹⁹⁰ Nonetheless, the principle of irrelevance of official capacity in cases of investigation and prosecution for international crimes, as stated in Article 27 of the Rome Statute, prevails over the constitutional provision.¹⁹¹ As a result, Batumike's immunity was considered irrelevant, as there was no violation of the 2006 Constitution. Interestingly, the court's decision affirms the prevalence of the Rome Statute over the national Constitution as far as domestic immunities are concerned. It is submitted that the immunities conferred by the 2006 Constitution to government officials or to heads of state are not relevant when it comes to prosecuting international crimes.¹⁹² This case set an important example for the global fight against impunity.¹⁹³ Given the fact that a culture of impunity seemed to have taken root in the DRC on the part of both state and non-state actors, even the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) applauded the holding of this unprecedented trial and the ensuing court's decision.¹⁹⁴ MONUSCO referred to it as a major landmark in the fight against impunity for sexual violence in the DRC.¹⁹⁵ With this decision of the *Batumike* case, there is no doubt that the level of commitment to law enforcement slowly started to improve in the DRC state.

In summary, with respect to justiciability and law enforcement, it can be argued that both the South African and the Kenyan governments attempt, by

¹⁸⁹ *ibid* para 20.

¹⁹⁰ Danielle Perissi and Elsa Taquet, 'The Kavumu Trial: Complementarity in Action in the Democratic Republic of Congo' (2018) <<https://www.opensocietyfoundations.org/about/programs/open-society-justiceinitiative>> accessed 4 April 2018.

¹⁹¹ Article 27 of the Rome Statute focuses on the irrelevance of official capacity.

¹⁹² *ibid*.

¹⁹³ MONUSCO, <<https://monusco.unmissions.org/en/monusco-applauds-decision-rendered-south-kivu-military-court-kavumu-trial-against-frederic-batumike>> accessed 4 April 2018.

¹⁹⁴ Word Vision, 'Child Rights in the Democratic Republic of Congo: Submission to the Period Review of Human Rights: Mid-term Evaluation 2012' <https://www.uprinfo.org/followup/assessments/session19/democratic_republic_of_congo/Democratic_republic_of_congo-WV.pdf> accessed 8 November 2017. Art 58 of the Penal Code.

¹⁹⁵ MONUSCO (n 193).

all means, to enforce the law. However, a challenge still exists in DRC law enforcement, as most of the cases have to be brought before the International Criminal Court. As a result, the current domestic decision on Batumike seems a welcome step in the right direction. The next section will traverse practicalities in the realisation of children's rights.

PRACTICALITIES IN THE REALISATION OF CHILDREN'S SURVIVAL RIGHTS

In this article, children's survival rights entail children's socio-economic rights, specifically the right to basic nutrition, basic healthcare and the right to social assistance. In respect of the realisation of these three basic rights, it may be argued that South Africa is developed, as it runs school feeding schemes which ensure that the poorest children at least receive one meal a day. In addition, free medical care for pregnant women as well as children under six years of age is available in South Africa.¹⁹⁶ The social grants purport to assist in the maintenance of children.¹⁹⁷ As evidence of government commitment, from October 2016, the government increased the child support grant to R360 per month per child.¹⁹⁸ It has subsequently been raised to R430.

In the same vein, with regard to basic nutrition, healthcare services and social assistance, the three services can be regarded as a minimum benchmark. As in the case of South Africa, Kenya has also developed school nutrition and feeding systems to safeguard children's health and development.¹⁹⁹ Several policies are in place to ensure that Kenyan children at primary school level receive hot midday meals.²⁰⁰ In terms of the fulfilment of the children's rights to health, contrary to South Africa, it can be argued that the right to healthcare is available and accessible.²⁰¹ In Kenya, there has been a slight improvement on the right to healthcare.²⁰² This improvement is evidenced by the distribution of mosquito nets and the deployment of an increased number of skilled healthcare professionals.²⁰³

¹⁹⁶ The National Health Act 3 of 2003.

¹⁹⁷ The Social Assistance Act 13 of 2004.

¹⁹⁸ Aislinn Delany and Selwyn Jehoma, 'Implementation of Social Grants: Improving Delivery and Increasing Access' in Aislinn Delany, Selwyn Jehoma and Lori Lake (eds), *South African Child Gauge* (Children's Institute 2016).

¹⁹⁹ Republic of Kenya (Vision 2030), 'National Plan of Action for Children in Kenya 2015–2022' (2015) 2.

²⁰⁰ *ibid.*

²⁰¹ Patricia Martin, 'Children's Rights to Social Assistance: A Review of South Africa Child Support Grant' in Paula Proudlock (ed), *South African's Progress in Realising Children's Rights: A Law Review* (Children's Institute 2014).

²⁰² UN Committee on the Rights of the Child (CRC), 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Kenya' (21 March 2016) CRC/C/KEN/CO/3-5 para 47 <<http://www.refworld.org/docid/57aaeb8b4.html>> accessed 28 March 2018.

²⁰³ Republic of Kenya, 'Health Sector Strategic and Investment Plan July 2013–June 2017: The Second Medium Term Plan for Health (Ministry of Medical Services and Ministry of Public Health and Sanitation 2017).

In respect of children's right to social security and assistance, Kenya runs a social protection programme named CT-OVC to address the needs of families and children vulnerable to poverty.²⁰⁴ This programme has a positive impact on children's survival rights. Following its success, it was suggested that it should be expanded to assist any household with children living in poverty rather than orphans only.²⁰⁵

However, the realisation of survival rights in the DRC differs from that of Kenya and South Africa in the sense that there is a lack of school nutrition meals targeting children in the DRC.²⁰⁶ As a result, many children there suffer from chronic malnutrition.²⁰⁷ Fortunately, UNICEF is making a huge contribution in almost every aspect of children's lives in the DRC.²⁰⁸ Stating that the malnutrition issue is serious in the DRC does not infer that the case of malnutrition is non-existent in South Africa and Kenya.²⁰⁹ The authors have merely placed emphasis on the high rate of malnutrition in the DRC.²¹⁰ As a result, children's basic right to nutrition are yet to be realised. In relation to the right to health, the situation is as unacceptable as it is in Kenya, as there is a lack of adequate healthcare systems, including human and material resources.²¹¹ The dominant factors jeopardising the right to health in the DRC are a high child mortality rate, epidemics and environmental health hazards.²¹² In respect of the right to social assistance and social security, the DRC's position is different from that of South Africa and Kenya. The prolonged armed conflict had grave humanitarian implications; factors that destroyed the lives of a million people in the DRC.²¹³ As a result, there is an over-reliance on humanitarian assistance.²¹⁴ The DRC Humanitarian Fund, in collaboration with UNICEF, provides assistance of multipurpose cash, which is an unconditional cash transfer empowering households to meet

²⁰⁴ Carolyn Huang, Kavita Singh, Sudhanshu Handa, Carolyn Halpern, Audrey Pettifor and Harsha Thirumurthy, 'Investments in Children's Health and the Kenyan Cash Transfer for Orphans and Vulnerable Children: Evidence from an Unconditional Cash Transfer Scheme' (2017) 32 *Health Policy and Planning* 944.

²⁰⁵ *ibid.*

²⁰⁶ UNICEF, 'Democratic Republic of Congo: Country Programme Document 2013–2017' (2013) <https://www.unicef.org/about/execboard/files/2012-PL36_DRC_CPD-final_approved-English.pdf> accessed 9 November 2017.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ Martin (n 201); Odongo (n 42).

²¹⁰ World Bank, 'WASH Poor in a Water-Rich Country: A Diagnostic of Water, Sanitation, Hygiene and Poverty in the Democratic Republic of Congo' (2017) 4.

²¹¹ World Vision (n 194).

²¹² World Bank (n 210).

²¹³ UNICEF (n 206).

²¹⁴ Ngiangia-Bakwin Kandala, Tumweka Madungu, Jacques Emina and others, 'Malnutrition Among Children Under the Age of Five in the Democratic Republic of Congo (DRC): Does Geographic Location Matter' (2011) 11 *BMC Public Health* 261 <<http://biometriccentral.com>> accessed 15 October 2017.

basic needs of life.²¹⁵ This is done mostly in cases of emergency. Unlike South Africa and Kenya, where there is a regular monthly cash transfer to vulnerable families, in the DRC, the cash transfer is occasional. Against this backdrop, the shortcomings in respect of each country are discussed below.

SHORTCOMINGS IN RESPECT OF THE REALISATION OF CHILD SURVIVAL RIGHTS IN THE THREE COUNTRIES

In South Africa, as mentioned above, laws provide for the realisation of children's rights. Buchner-Eveleigh points out that South Africa has 'a wealth of legislation and policies'.²¹⁶ There is an abundance of case law to show that all human rights are justiciable in South Africa.²¹⁷ However, a comprehensive explanation of the substantive content of children's rights leaves room for improvement in South Africa as well.²¹⁸ Erasmus emphasises that

[i]n the process of giving substantive content to section 28(1)(c) [of the Constitution] the court should be guided by the Constitution, the constitutional values, the transformative aims of the Constitution, and international law. Defining section 28(1)(c) means the court should identify the minimum entitlement of the right because this section refers to the basic attenuated level of services needed for a dignified existence. Identifying the minimum entitlement of section 28(1)(c) does not entail an absolute rigid standard, in entitlement a high level of justification is set for situations where the minimum entitlement of this rights is not respected, protected and fulfilled.²¹⁹

What transpires from the above statement is that when interpreting section 28(1)(c), the court needs to set out clearly what 'minimum entitlement of rights is' and who the bearers of such rights are. The meaning of minimum entitlement will be of great assistance in case of AIDS orphans or members of child-headed households. In addition, poverty and social exclusion are factors that still hamper a full realisation of children's survival rights, even in South Africa.²²⁰

²¹⁵ DRC Humanitarian Fund, 'Annual Report Democratic Republic of Congo' (2016) <<https://reliefweb.int/report/democratic-republic-congo/democratic-republic-congo-drc>> accessed 24 December 2017.

²¹⁶ Mariana Buchner-Eveleigh, 'Children's Rights of Access to Health Care Services and to Basic Health Care Services: A Critical Analysis of Case Law, Legislation and Policy' (2016) De Jure 307

²¹⁷ See *TAC case* (n 47), *The Centre for Child Law and Others v MEC for Education and Others* case No 19559/06 (30 June 2006) (*Luckoff's case*).

²¹⁸ Erasmus (n 112).

²¹⁹ *ibid.*

²²⁰ Martin (n 201).

Kenya has taken steps towards designing and developing policies. In this way, the country has provided flesh to the framework of the 2010 Constitution.²²¹ The Kenya Vision 2030 seeks to transform Kenya into a newly advanced middle-income country that provides a minimum standard of living for all citizens.²²² However, some factors indicate that there are still challenges and constraints hampering the realisation of children's rights in Kenya. Factors include poor health services, the long-distance locations of health services from recipient communities, the unhygienic environment and persistent malnutrition and poverty.²²³ Under these conditions, enforcement of existing laws and policies remain weak in Kenya and needs improvement.²²⁴ Having a comprehensive legal framework alone is not sufficient to produce effective political, economic, social and financial support structures that ensure the efficient delivery of social rights.²²⁵ Although the duty bearers and constructive tools are present to make children's rights a reality,²²⁶ what complicates matters is that duty bearers do not have a clear understanding of various applicable laws, policies and guidelines relating to children.²²⁷ As a result, laws and policies are inadequately applied.²²⁸ There is also a shortage of resources to implement and monitor laws and policies effectively.²²⁹

In the DRC, legislation is also in place, but there is a huge gap between the promulgation of law and the development of policies, and the harmonised implementation of the legal framework.²³⁰ There is also a lack of law enforcement, or justiciability of children's rights in case of infringement.²³¹ Basically, 'justiciability' entails standing which 'relates to the relationship between the applicant in a case and the relief sought.'²³² It is the duty of the court to enforce the law and the right of an applicant to be given access to approach a competent court with an allegation that his or her right has been infringed. In addition to the lack of law enforcement in the DRC, a further shortcoming arises from the high rate of poverty, malnutrition, child mortality, malaria, outbreaks of epidemics and an environment that is not

²²¹ Odongo (n 42).

²²² Republic of Kenya (n 199).

²²³ *ibid.*

²²⁴ Eva Palmqvist, 'Children's Rights in Kenya: An Analysis Based on the CRC Reports' (Save the Children Sweden 2006).

²²⁵ The African Child Forum, 'Overview and Context: Harmonising Laws in Eastern and Southern Africa' (2007) <<https://www.africachildforum.org>> accessed 7 December 2017.

²²⁶ Palmqvist (n 224) 35.

²²⁷ Republic of Kenya Report, 'Taking Child Protection to the Next Level in Kenya' (2015) UNICEF.

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ CRC Committee Observations DRC (n 178) para 7.

²³¹ *ibid* para 8.

²³² Skelton (n 109) 598.

conducive to human well-being.²³³ There is a great need to design, develop and implement policies to strengthen the existing child protection law. The next section will elaborate on the best practice scenarios generating relevant lessons to be learnt.

BEST PRACTICE SCENARIOS AND LESSONS TO BE LEARNT

Best Practice Scenarios

Despite the shortcomings as pointed out above in respect of the three countries, there are also relevant lessons to be learnt and implemented at the domestic level in each country. This section will indicate the best practice scenarios in terms of the existing legal frameworks in light of the practicalities standing on the way of the fulfilment of children's survival rights.

First, from the perspective of the legal framework, in South Africa the best practice scenario is the 1996 Constitution, which empowers the Constitutional Court to develop ways for the implementation of socio-economic rights, specifically in the context of children's rights.²³⁴ As a result, the court enforces the law, ensures access to legal remedies and allows everyone to pursue a claim in court whenever denied any socio-economic right.²³⁵ In addition, the 1996 Constitution holds the government accountable when it does not respect, promote, protect and fulfil its obligations.²³⁶ However, these obligations must be fulfilled by taking reasonable legislative and other appropriate measures to the maximum extent of the state's available resources.²³⁷

In Kenya, similar to South Africa, the Constitution is the supreme law of the country. The Children's Act 2001 clearly reflects the principles of the CRC, particularly in terms of the 'best interest' principle, children's right to survival and development, the right to non-discrimination, as well as the right to participation.²³⁸ A further positive is that the Children's Act of 2001 does not only safeguard the rights of the child but also binds the child in terms of specifying his or her duties and responsibilities as emphasised in the ACWRC.²³⁹

In the DRC, the 2009 Child Protection Law clearly splits the protection of the child into three categories, namely, social, judicial and criminal

²³³ UN Committee on the Rights of the Child (CRC), 'Concluding Observations on the Second Periodic Report of South Africa (27 October 2016) CRC/C/ZAF/CO/2' para 35 <<http://www.refworld.org/docid/587ce86b4.html>> accessed 2 April 2018.

²³⁴ Section 39 of the 1996 South African Constitution.

²³⁵ Sections 38 and 172 of the 1996 South African Constitution, s 15 of the Children's Act 2005.

²³⁶ Section 7 of the 1996 South African Constitution.

²³⁷ Lizette Berry and Paula Proudlock, 'Children's Rights to Basic Nutrition: A Review of South Africa's Subsidy for ECD Programme' in Paula Proudlock (ed), *South Africa's Progress in Realising Children's Rights: A Law Review* (Children's Institute 2014) 38.

²³⁸ See ss 3–22 of the Children's Act 2001.

²³⁹ Sections 4–5 of the Children's Act 2001; Art 31 of the ACWRC.

protection.²⁴⁰ This comprehensive explanation of the protection provided to children enables a smooth adjudication of children's rights cases when a matter is brought to court. A further significant stride is the 2009 Congolese Child Law that is similar to Kenya and South Africa in that it also stipulates the duties and responsibilities of the child.²⁴¹ This is a unique conception reflecting the influence of the ACWRC.

Second, looking at the best practices in terms of the realisation of children's survival rights, South Africa and Kenya run support grant programmes, which contribute towards alleviating poverty. These grants adequately influence poverty, basic healthcare services, food security and nutrition.²⁴² By contrast, despite emergency cash transfers, the DRC runs no sustainable social protection programmes that provide for children's survival rights. As a result, children's rights are yet to be realised in the DRC.²⁴³

Lessons to be Learnt

From the foregoing, the lessons to be learnt in South Africa cannot be taken lightly. Despite its achievement in law enactment and enforcement, South Africa has a need to review the Children's Act 38 of 2005, as well as other pieces of legislation relating to health, and to clearly explain the substantive content of each child's rights guaranteed in section 28 of the Constitution. For example, when adjudicating children's right to basic healthcare, the National Health Act needs to be clearer on what it means by the right to basic health.²⁴⁴ International norms demand that the right to healthcare must be accessible, available, acceptable and of a good quality.²⁴⁵

It may be argued that a single piece of legislation that encompasses the four concepts above may be the way to go. The DRC, in the form of the 2009 Child Protection Law, clearly differentiates between judicial protection, social protection and criminal protection of the child.²⁴⁶ South Africa, on the

²⁴⁰ Title II, III, IV of the 2009 Law on the Protection of the Child (Child Protection Law).

²⁴¹ Article 44 of 2009 Child Protection Law, s 21 of the Children's Act 2001, s 16 of the Children's Act 2005.

²⁴² Michael Samson, Carolyn Heinrich, John Hoddinott and others, 'The Impact of a Promise Realized: South Africa's Child Support Grant' in Benjamin Davis, Sudhanshu Handa, Nicola Hypher and others (eds), *From Evidence to Action: The Story of Cash Transfers and Impact Evaluation in Sub Saharan Africa* (Oxford University Press 2016) 307.

²⁴³ Marito Garcia and Charity Moore, *The Cash Dividend: The Rise of Cash Transfer Programs in Sub-Saharan Africa* (The World Bank 2012) 232. See also Sarah Bailey, Paola Pereznioto, Nicolas Jones and others, 'Child-sensitive Protection in DRC: A Diagnostic Study' Overseas Development Institute (2011) <<http://www.Odi.org.uk>> accessed 12 December 2017.

²⁴⁴ Buchner-Eveleigh (n 216).

²⁴⁵ General Comment of the CESR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (2000) <https://www.nesri.org/sites/default/files/Right_to_health_Comment_14.pdf> accessed 12 December 2017.

²⁴⁶ Title II articles 1–3 of the 2009 Child Protection Law.

other hand, appears to have a more loaded framework that encompasses the Child Justice Act,²⁴⁷ which deals with criminal protection, and the Children's Act,²⁴⁸ which covers judicial and social protection. However, the general feeling is that an all-encompassing framework that provides and explains all kinds of protection to children will result in a more user-friendly system that facilitates better adjudication of children's right cases in South Africa.

With regard to child support grants in South Africa, there is a need to universalise this programme.²⁴⁹ To universalise child benefits means that all children need to receive the benefit irrespective of the level of the household income.²⁵⁰ As compared to targeting child support grants, which applies the means test, academic authors note that the means test creates institutional and administrative barriers when it comes to proving income or producing relevant documents.²⁵¹ In this way, the test can encourage fraud and corruption.²⁵² Basically, the child support grant shortcomings are not unnoticed. As previously mentioned, there are administrative factors and other challenges negatively affecting institutional capacity.²⁵³ These include confusion around the means test, problems with documentation, the direct cost of applying, the small monetary amount of the child support grant, and other obstacles.²⁵⁴ It can be argued that the South African child support grant has the potential to accomplish a full realisation of children's survival rights if implemented to benefit every child—just as in Norway.²⁵⁵

Kenya has a need to strengthen law enforcement and judicial effectiveness.²⁵⁶ In this regard, Kenya might learn a lesson from South Africa where the government is held accountable to realise socio-economic rights.²⁵⁷ The situation in Kenya is that numerous policies have been adopted, but have not yet been implemented, monitored and evaluated.²⁵⁸ There is also a need for public awareness and community orientation that will inform people in general and children in particular, on ways to approach the court to seek relief.²⁵⁹

²⁴⁷ 75 of 2008.

²⁴⁸ 38 of 2005.

²⁴⁹ Proudlock (n 82).

²⁵⁰ Selwyn Jehoma and Eleonora, Guarnieri, 'Universalisation of the Child Support Grant' in Delany and others (n 198) 80.

²⁵¹ Samson and others (n 242).

²⁵² Martin (n 201) 64.

²⁵³ Delany and others (n 198) 52.

²⁵⁴ *ibid.*

²⁵⁵ Kidrights Index (2017) <www.kidsrightsindex.org> accessed 12 December 2017. Although Norway falls outside the countries demarcated for analysis in this article, it has been instructive to look at it as a jurisdiction that has implemented a successful CSG programme.

²⁵⁶ Republic of Kenya Report (n 227) 22.

²⁵⁷ *Grootboom* (n 47).

²⁵⁸ Republic of Kenya Report (n 227) 22.

²⁵⁹ Kiprotich and Charles (n 22) 282. See also Art 42 of the CRC.

Throughout this article, it has been evident that the DRC faces many challenges in realising children's survival rights.²⁶⁰ After many years, despite efforts made to combat poverty, Congolese children are still not realising their rights to basic nutrition, healthcare services, as well as their rights to social security assistance and protection.²⁶¹ While comparing South Africa, Kenya and the DRC, this article reveals that poverty affects households when caregivers are not able to meet their children's basic needs. As a result, children become the most negatively affected by poverty. In order to alleviate such deep poverty levels and to comply with state commitment to the CRC, South Africa and Kenya have designed and implemented child social grant systems.²⁶² Research has shown the positive impact of the intervention that has operated by way of cash transfer on children's nutrition and health.²⁶³ Furthermore, as seen already, the cash transfer facility allows households to invest more effectively in children's schooling and learning.²⁶⁴ It can be said that child support grant programmes, if introduced timeously, can reduce risky behaviour among adolescents.²⁶⁵

In a nutshell, in order to realise the child survival rights, the DRC needs to learn a lesson from both South Africa and Kenya. The DRC needs to design, implement, monitor and evaluate a child support grant system, especially, which will target primarily ultra-poor families. At a glance, these interventions appear impossible and unsustainable given the fact that the DRC ranks 193th out of 196 countries in terms of its respect for the rights of the child.²⁶⁶ In terms of the design and implementation of child support grants, the DRC can follow the approach taken by Kenya. When it started the implementation of CT-OVC, Kenya was in a situation where the proposition was denied by some donors given the fact that this kind of intervention had not been operationalised in the country before.²⁶⁷ However, the Ministry of Home Affairs, in collaboration with UNICEF, SIDA and the

²⁶⁰ CRC Committee Observations DRC (n 178) para 6.

²⁶¹ Democratic Republic of Congo, 'Poverty Reduction and Growth Strategy Paper' (2006) 18.
²⁶² Article 4 of the CRC.

²⁶³ Huang and others (n 204) 943; Smriti Tiwari, Silvio Saldore, Maria Ruvacalba and others, 'Impact of Cash Transfer Program on Food Security and Nutrition in Sub-Saharan Africa: A Cross Country Analysis' (2016) 11 *Global Food Security* 72; Eleanor Fischer, Ramlata Attah, Valentina Barca and others, 'The Livelihood Impacts of Cash Transfers in Sub-Saharan Africa: Beneficiary Perspectives from Six Countries' (2017) 99(C) *World Development* <<http://dx.doi.org/10.1016/j.worlddev.2017.05.020>> accessed 4 April 2018; see also Lisa Hjem, Sudhansha Handa, Jacobus de Hoop and others, 'Poverty and Perceived Stress: Evidence from Two Unconditional Transfer Programs in Zambia' (2017) 177 *Social Science and Medicine* 110.

²⁶⁴ Joanne Bosworth, Carlos Alviar, Louis Cornal and others, 'The Cash Transfer Programme for Orphans and Vulnerable Children: The Catalyst for Cash Transfer in Kenya' in Davis (n 242) 117.

²⁶⁵ *ibid.*

²⁶⁶ See Children's Rights, 'Rankings of Countries According to Their Respect for the Rights of the Child' *Humanium*. <<http://www.Humanium.org/en/rcrri/>> accessed 12 December 2017.

²⁶⁷ Bosworth and others (n 264) 117.

Norwegian National Committee, initiated the programme to demonstrate the feasibility of cash grants as a response to its orphans and vulnerable children (OVC) crisis.²⁶⁸

The DRC can borrow a similar approach as used in Kenya, starting with a pre-pilot phase, selecting at least 500 poor households,²⁶⁹ and targeting children from 0–7 years. If successful, the DRC government may proceed from the pilot phase to expansion phases.²⁷⁰ Moreover, the lesson that the DRC needs to learn is that in the Kenyan experience, the government would needed to establish an evidence base of successful implementation in order to continue the programme.²⁷¹ Furthermore, community participation was crucial.²⁷² The community was involved in addressing the basic questions and in convincing the policy makers.²⁷³ The government of Kenya was also involved in order to locate both the programme and the evaluation phase firmly within the government structure and implementation time-frames.²⁷⁴

It is worth bearing in mind that the DRC is richly endowed with several mineral resources. However, the population is not benefiting from this wealth.²⁷⁵ As a result, with credible political will on the part of Congolese state authorities, in collaboration with international donors genuinely supporting the social security programme for children, the implementation of child support grants could be achievable.²⁷⁶ The authors are fully aware that attempts to improve social protections in the DRC have been made difficult due to challenges of poor governance and weak human resource capacity, varying through lack of national strategy, low prioritisation of social protections and against a background of very limited funding.²⁷⁷

Lessons the DRC needs to learn from South Africa relate to law enforcement, policy design, review and reform, as well as development and implementation. The DRC can learn a lesson from South Africa where the government is obliged to respect, protect, promote and fulfil rights provided for in the Bill of Rights so that the law and state conduct should always be in line with the Constitution.²⁷⁸ As Kamwuimbi recommended, the Congolese

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ Bosworth and others (n 264) 120.

²⁷¹ *ibid.*

²⁷² *ibid.*

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ Democratic Republic of Congo (n 261).

²⁷⁶ Valerie Arnould and Koen Vlassenroot, 'EU Policies in the Democratic Republic of Congo: Try and Fail' Paper Commissioned by the Human Security Study Group (2016).

²⁷⁷ Sarah Terlouw, 'The IRC in the DRC: Strategy Action Plan' (2017) <Rescue.org/where/DRC> accessed 14 November 2017.

²⁷⁸ Sections 2 and 7(1) of the 1996 South African Constitution.

government needs to make significant progress in areas of prosecution, protection and prevention of violations.²⁷⁹

From the foregoing discourse, it is submitted that the three countries under discussion can derive worthwhile lessons from the respective jurisdictions. With regard to law enforcement, both the DRC and Kenya can adopt the South African approach in terms of the appropriate measures taken to fulfil children's rights.²⁸⁰ In respect of the promulgation of laws, for example, legislation relating to children's matters with a comprehensive content appears to be an attractive proposition. South Africa can learn from the DRC's detailed 2009 Child Protection Law. Regarding social protection, it was submitted that South Africa needs to universalise its child support grant programme. Kenya also needs to expand its CT-OVC programme to include more children that are vulnerable. The DRC needs to borrow the Kenyan procedure and model to create the child support grant programme. Nonetheless, for better realisation of children's survival rights, it is suggested that the three countries need to take cognisance of the guidelines proposed in this article, which is clearly set out in the case of *Social and Economic Rights Action Centre and Another v Nigeria (Ogoni case)*.²⁸¹ These guidelines will be discussed below.

GUIDELINES FOR THE EFFECTIVE REALISATION OF CHILDREN'S SURVIVAL RIGHTS

Article 4 of the CRC insists that the state parties need to take appropriate measures designed to implement the children's rights. Moreover, Article 5 of ACRWC indicates 'that the States Parties shall ensure to the maximum extent possible the survival, protection and development of the child.' Basically, the *Ogoni* case deals with the military government of Nigeria, which has been involved in oil production through the state oil company—the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation—and that these operations have violated the Ogoni people's right to a healthy environment.²⁸² It was alleged that the Nigerian government had destroyed and threatened the Ogoni food sources through a variety of means.²⁸³ The oil development had poisoned much of the soil and water upon which Ogoni farming and fishing relied.²⁸⁴ The Nigerian security forces destroyed crops and killed farm animals. Furthermore, it was alleged that the security forces

²⁷⁹ Kasongo Theodore Kamwimbi, 'Forced Child Labour: A Critical Analysis of the Democratic Republic of Congo's Compliance with International Labour Standards' (LLM thesis, University of Cape Town 2013).

²⁸⁰ Article 4 of the CRC.

²⁸¹ Communication N 155/96.

²⁸² *Ogoni* (n 281) para 1.

²⁸³ *ibid* para 9.

²⁸⁴ *ibid*.

had created a state of terror and insecurity that rendered it impossible for the Ogoni villagers to return to their fields and tend to their animals.²⁸⁵ The devastation of farmland, crops and animals has amounted to malnutrition and starvation among certain Ogoni communities.²⁸⁶ As a result, a Communication²⁸⁷ was brought to the African Commission to deal with this matter.

On the merits of this case, the African Commission indicated four layers of duties, which every state party has a duty to carry. The Commission clearly points out that 'these obligations are universally applied to all rights and entail a combination of negative and positive duties.'²⁸⁸ First, the Commission explained that the duty to respect obliges the state party not to interfere with the beneficiary's enjoyment of a fundamental right.²⁸⁹ The state needs to respect the right holders, their freedoms, resources and liberties in all their actions.²⁹⁰ With regard to socio-economic rights, the commission ruled that the state has an obligation to afford individuals access to their rights even if it involves taking legislative and other measures within its available resources.²⁹¹

Second, the Commission further elucidated that the duty to protect requires state parties to ensure an effective interaction of laws and regulations to enable full realisation of the rights.²⁹² The laws should enable individuals to freely exercise their rights.²⁹³ Third, with respect to the duty to promote, this duty relates more to 'promoting tolerance, raising awareness and even building infrastructures.'²⁹⁴ Lastly, the duty to fulfil implies that the state has to move its mechanisms close to the people in order to facilitate realisation of the rights.²⁹⁵ 'This could comprise the direct provision of basic needs, such as food or resources that can be used for food (direct food or social security).'²⁹⁶

Ideally, it is with reference to the four duties highlighted by the African Commission that this article establishes the guidelines. As a result, all the African state parties to the CRC and ACRWC need to respect, protect, promote and fulfil children's survival rights in accordance with the *Ogoni* case.

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ 155/96 by Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR).

²⁸⁸ *Ogoni* (n 281) para 44.

²⁸⁹ *ibid* para 45.

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *ibid* para 46.

²⁹³ *ibid.*

²⁹⁴ *ibid.*

²⁹⁵ *ibid* para 47.

²⁹⁶ *ibid.*

This article suggests that all three countries should follow the key principles for better realisation of children's rights; these include non-discrimination, human rights-based law, cultural sensitivity, availability of resources, public awareness and law enforcement. These principles form part of the discussion below.

Non-discrimination

Non-discrimination is particularly significant in the realisation of children's survival rights due to the fact that non-discrimination embodies one of the key principles of the CRC and ACRWC.²⁹⁷ The best approach in realising children's rights is to avoid preference to particular groups of children, but instead, the state needs to target all children without distinction of race, sex, language, religion, social or ethnic origin, birth or other status. Essentially, in most cases, children living in rural areas, children with disabilities and unaccompanied children are vulnerable to marginalisation.²⁹⁸ Therefore, countries have to take the principle of non-discrimination into serious consideration, especially when legislatures pass legislation affecting the welfare and well-being of children.

Human Rights-based Law

When designing a policy and promulgating laws, as mentioned above, the law should protect individuals.²⁹⁹ In children's matters, any law, policy or programme should be developed in line with the provisions in the CRC and ACRWC.³⁰⁰ The law should promote, protect and support the rights and freedoms of children.³⁰¹ In light of the fact that the law changes with advances in technology, there is also a need to review and amend law periodically after every three years to ensure that it is still in line with the needs of children.

Cultural Sensitivity

As this guideline specifically concerns the African context, programmes and policies should be community oriented.³⁰² As a result, local cultural realities should be taken into consideration. Legislations, policies and programmes should be sensitive to local cultures. The CRC encourages the rights and responsibilities of the family to care, socialise and develop their children in accordance with local values, customs and traditions.³⁰³ Furthermore, the

²⁹⁷ Article 2 of the CRC, Art 3 of the ACRWC.

²⁹⁸ Martha Santos Pais, 'Monitoring Children's Rights: A View from Within' in Eugene Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 129.

²⁹⁹ *Ogoni* (n 281) para 46

³⁰⁰ Article 3 of the CRC, Art 1 of the ACRWC.

³⁰¹ *Ogoni* (n 281) para 44.

³⁰² Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Reflection' (2005) 5 *African Human Rights LJ* 225.

³⁰³ Article 30 of the CRC.

ACWRC is more inspiring when it provides not only the rights but also the responsibilities of the child. This is a unique conception reflecting the influence of African countries.³⁰⁴ In the same vein, policies encouraging and supporting families through the fulfilment of children's rights should be developed.

Availability of Resources

In light of the *Ogoni* case, the government needs to improve policy and legislation to respect children and their families.³⁰⁵ The government needs to allocate resources for the benefit of families. The state must always budget to provide material assistance and support programmes to beneficiary communities.³⁰⁶

Public Awareness

Awareness of children's rights means enforcement of legal mechanisms at all levels, through advocacy and social mobilisation.³⁰⁷ In order to create supportive environments for children, people need to be able to approach the court to enforce their rights. The community at large needs to be educated and empowered to protect children's rights against infringement. As a result, the media, such as television and radio, should be utilised to enhance awareness of societal issues in a balanced way so that issues related to children's rights receive wide publicity.³⁰⁸

Law Enforcement

The government should be held accountable for the fulfilment of its responsibilities to support children's rights.³⁰⁹ Governments should always monitor their own performance in the realisation of children's rights.³¹⁰ While reporting in line with the CRC norms, governments are now compelled to make their reports available to the public in their specific countries.³¹¹ In the same vein, the ACRWC provides that governments should report on the measures they have adopted which gives effect to the provision of the Charter and the progress made in the enjoyment of these rights.³¹²

³⁰⁴ Article 31 of the ACRWC.

³⁰⁵ *Ogoni* (n 281) para 47.

³⁰⁶ Article 27(3) of the CRC, Art 11 of the ACRWC.

³⁰⁷ Article 17 of the CRC.

³⁰⁸ Kiprotich and Charles (n 22) 279.

³⁰⁹ Article 44 of the CRC.

³¹⁰ Pais (n 298) 141.

³¹¹ *ibid.*

³¹² Article 43 of the ACRWC.

CONCLUSION

This article compared South Africa, Kenya and the DRC from three aspects, namely, the legal position, shortcomings, and best practices and lessons to be learnt.

With regard to the legal position, the promulgation of the laws, justiciability and law enforcement and practicalities of the fulfilment of child survival rights were analysed. As indicated, the three countries under discussion created laws guaranteeing children's survival rights. However, relating to law enforcement, policy designing, monitoring and evaluation, a clear substantive content is needed. Kenya still needs to work on policy implementation and to strengthen law enforcement. The DRC also needs to tighten its law enforcement and to develop further policy directives.

This article went further and discussed selected case law in respect of justiciability of children's socio-economic rights covering the three countries under discussion. In South Africa, the article relied on *Grootboom* and *TAC* case law. An analysis of the case law indicated that South Africa has made strong efforts to enforce the law. Its courts are accessible to litigants and scrutinise each case on its own facts. In respect of Kenya, the *Omukanda* and *Nubian* case law was discussed to highlight the role of law enforcement and discrimination in realising socio-economic rights in Kenya. In the DRC, it was submitted that the ICC dealt with most of the claims at international level. However, the recent case of *Batumike* set a domestic precedent when dealing with abuse and violence against children.

With respect to the shortcomings, the article highlighted poverty within the DRC as a worrying challenge. However, as was pointed out earlier in the article, in order to comply with the CRC and ACRWC requirements, both South Africa and Kenya have instituted child-benefit programmes so as to alleviate poverty in line with these instruments. The authors conclude that the addition of a cash transfer system enhanced poverty alleviation in a manner that has had a positive spin-off for child survival rights. By contrast, the DRC does not command such a track record. Its lack of a sustainable social programme catering for children is a cause for concern.

In relation to the best practice scenarios and lessons to be learnt, this article suggests that South Africa could facilitate the introduction of the child support grant system across all sections of the population in order to avoid any differentiation. In terms of promulgation of comprehensive laws, it was suggested that South Africa could follow a better approach taken by the DRC. Likewise, Kenya could consider what it could benefit from success scenarios of CT-OVC by including all children irrespective of considerations of income. With regard to law enforcement, Kenya could consider the South African model of approaching the court in respect of enforcing the law.

In the case of the DRC, the proposition was that the country needs to design, implement, evaluate and monitor a child support grant system. The

most instructive approach was the Kenyan experience where the pre-pilot, pilot and expansion phases proved to be a success. In addition, the DRC could also learn from the law enforcement method adopted in South Africa. In summary, it is suggested that for better realisation of children's survival rights, all three countries should adhere to the model guidelines produced in this article.