

**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

**THE CRC AND THE MARGINALIZED CHILD**

**BY**

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Being a paper submitted in partial fulfillment of the examination requirements for the degree Bachelor of Laws (LLB) of the University of Zambia.

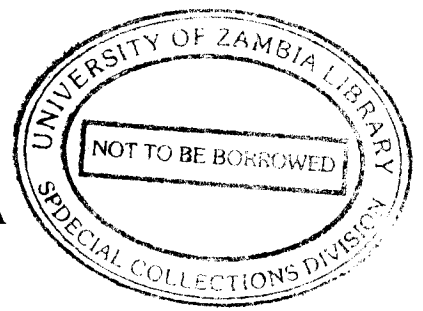
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**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

I recommend that this directed research prepared under my supervision

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Entitled

**THE CRC AND THE MARGINALISED CHILD**

Be accepted for examination. I have checked it carefully, and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing directed researches.

Dated 6<sup>th</sup> February 2008

Supervisor.....  
**Ms Lwatula**

## PREFACE

This paper has been written in order to shed some light on the CRC and the marginalized in Zambia. It will attempt to show to what extent the rights of the marginalized child are respected. Its areas of interest will include the right to education, health and housing.

This paper is divided into five chapters. The first chapter mainly defines who is a child as the paper is concerned with the CRC and the marginalized. A brief history on the rights of the child will be given and there will be mention of other instruments which provide for the rights of a child.

Chapter two discusses the Convention on the Rights of the Child and the principles which guide it. The African Charter will be included in this chapter as it is an important instrument which also acknowledges the rights of the child. In this chapter the areas of interest are highlighted. These areas include the right to education, health and Housing.

Chapter Three is dedicated towards discussing the life of an orphan in general. It will also give a situational analysis of the orphan may be deprived of his rights to education, health and housing due to inadequate provision of these facilities by the state.

Chapter Four discusses state and non-governments attempt in addressing the problems the marginalized child faces and what extent these bodies have specifically dealt with the rights of an Orphan.

The last chapter shall be dedicated to conclusions and recommendations.

## DECLARATION

I, **GODFRIDAH AKUPELA.- COMPUTER No. 25047426** do hereby declare that I am the author of this Directed Research Paper entitled: The CRC and the Marginalized Child, and confirm that it is my work. I further declare that due acknowledgement has been given where other scholars have been used. I verily believe that this research has not been previously presented in the school for academic purposes.

Students Signature: *Godfridah Akupela*.....

Date: *6<sup>th</sup> February 2008*.....

## DEDICATIONS

I would like to dedicate this paper to my beloved Parents, Apostle Peter Akupela and Mrs Prisca Akupela. Thank you for being there for me emotionally and financially. You have been so supportive through it all. Thank you for believing in me and motivating me to carrying on every time I lost hope. I would not have done it without you.

To my brother Peter I'm extremely grateful for all your efforts toward ensuring I had a Personal Computer in my room where I typed this paper. Really I appreciate this you have shown that you are truly someone I can always count on.

To my other brothers Bartholomew, Frazer, Abraham, Nicholas. You are guys the best. Thank you for being so loving and believing in me. I can never doubt your loyalty to me.

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To my Dad Apostle Peter Akupela and my Mum Mrs Prisca Akupela thank for showing me the value of education. Thank you for the way you have always believed in me and done everything in your power to ensure I have a sound education. Thanks to you both, I have learnt to be optimistic at all times and to press on in life.

To my brothers Bartholomew, Peter, Frazer, Abraham, and Nicholas thank you for all your encouragement as I embarked on this project. Thank you for all the love you show me I know I can always depend on you.

To my friends Chileshe Kalembo, Erica Chakota, Sharon Kasoma, Mpundu Kalebaila thank you for being such wonderful friends. Life on campus wouldn't have been the same without.

To Mwitumwa Kanyanga thank you for all your encouragement and support. You are truly a special friend.

## **TABLE OF ACRONYMS**

<b>CRC</b>	The Convention on the Rights of the Child
<b>ICESCR</b>	The International Covenant Economic Social Cultural Rights
<b>ICCPR</b>	The International Covenant on the Civil and Political Rights
<b>NGOs</b>	Non Governmental Organisations
<b>CBOs</b>	Community Based Organisations
<b>ZDHS</b>	Zambia Demographic and Health Survey

## STATUTES

The Constitution CAP 50, Laws of Zambia

Subordinate Court Act, Cap 28 of the Laws of Zambia

The Convention on the Rights of the Child

The International Covenant Economic Social Cultural Rights

The International Covenant on the Civil and Political Rights



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## **CHAPTER ONE**

### **1.0 INTRODUCTION**

#### **1.1 STATEMENT OF THE PROBLEM**

Children had for long time not received attention as a social group especially where their rights as children were concerned. Previously there was little recognition either of community, state or parental obligation towards children.<sup>1</sup> In fact their rights were only recognized in the past decade. This was evidently shown through the enactment of the Convention on the Rights of the Child (CRC) in 1990. This instrument was enacted so that the rights would be recognized on the international plane with the aim of making them enforceable.<sup>2</sup>

The CRC covers civil, economic, social cultural and political rights.<sup>3</sup> The paper is concerned with the CRC and the marginalized child. It will particularly shade light on to what extent the rights of the marginalized child have been respected. A marginalized child for the purpose of this investigation simply refers to orphans, street children and any other vulnerable children this paper however shall focus on orphans. The word marginalization has been used deliberately to show the demarcation between the orphaned the non-orphaned and for the purpose of investigating to what extent the rights of these marginalized children are respected.

The problem being addressed is that often when a child is orphaned he or she encounters financial difficulties which deprive them of certain basic rights such as the right to health, housing, and education. This occurs partly because the marginalized child is almost as though they are invisible<sup>4</sup> lacking support from the extended family, the state itself and other non-

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<sup>1</sup> Collier's Encyclopedia Vol Collier PF, 1995, Ontario, Canada

<sup>2</sup> Children's Rights in Europe. International Journal Of Children's Right Vol no 3-4

<sup>3</sup> General Joseph Garba Nigerian Ambassador to UN addressing General Assembly 20<sup>th</sup> November 1989

<sup>4</sup> State of the World Children 2006, [www.unicef.org](http://www.unicef.org) : (last visited December 2, 2007)

governmental institutions. Due to the lack of support a child may be left devastated, homeless, financially handicapped and may miss out on some of the basic rights entitled to them by virtue of being a child.

The CRC was enacted to provide for the rights of the Child, to what extent have the rights of the marginalized child been recognized by the CRC and any other legislation? To what extent has the marginalized child enjoyed economic rights such as the right to education, health and housing? Does the fact that these rights are economic hinder the government from fully implementing the same rights? Would the situation have been different if these the rights were civil and political rights? What can the Zambian government do the fully implement the economic rights for the sake of the marginalized child?

## **1.2 AIM/OBJECTIVE**

The paper is concerned with the CRC and the marginalized child. The aim of this paper is investigate to what extent the rights of the marginalized child have been respected. The areas of interest are the rights to health, education and housing.

## **1.3 METHODOLOGY**

In order to carry out this investigation the method of data collection will be mainly by way of desk research. There will also be interviews carried out to supplement the desk research. The use of case law, textbook, statute, articles and the internet will also be employed for the purpose of furthering the research. With this method there is an assurance that the collection of data will be qualitative and quantitative.

This chapter will give definition of a child, the rights of a child and the CRC (Convention on the Rights of the Child). The instruments that provide for the rights of the child will also be

highlighted. As this paper is concerned with the CRC and the Marginalized child) there will be brief mention of the institutions care for these children. There are a number of Institutions which offer care to vulnerable children (orphans, homeless, abused etc) but for the purpose of this paper the focus will be on orphanages.

Children in general are the weakest social group in society. They are vulnerable and dependent on their parents for survival. Because of their vulnerability children have been identified as a subject of special care by a number of International instruments. Unlike adults, they do not have a voice of their own and as such need protection. This protection firstly has to come from the household they come from i.e. their family<sup>5</sup>.

The CRC and the African Charter on the Rights and Welfare of the Child, among other international instruments spell out that the family is the most important pillar for the child's social security, source of information, knowledge, attitude and skills.<sup>6</sup> Within a family each child is meant to be protected, learn values, provided with shelter, educated, develop as person and enjoy his childhood.<sup>7</sup> Unfortunately due to the HIV/ AIDS pandemic there has been family disintegration leaving a negative impact on the development of a child. Conversely poverty has also caused some parents to abandon their children<sup>8</sup>. This leaves the children no option but to fend for food and shelter on the streets. Although some orphans are taken in by their extended family they usually end up on the streets. This is due to the fact that in developing countries there is a high level of poverty.

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<sup>5</sup> Children's Rights in Europe, The International Journal of Children's Rights pg 100

<sup>6</sup> Himes, JR (1993) 'The United Nations Conventions on the Rights of the Child: Three Essays on the Challenge Implementation.' Innocent Essays' no Siena 5United Nations pg 3

<sup>7</sup> Ibid

<sup>8</sup> Ibid pg 3

As a result of this, extended families are unable to take care of the dead relatives' children. They are already overstretched with their own family needs therefore orphans end up drifting to the streets to fend for themselves without a home to return to<sup>9</sup>. This is heartbreaking because a child has a right to shelter but due to circumstances beyond his control he or she is deprived of this right.

#### **1.4 WHO IS A CHILD**

There is no one definition on who is a child. The Convention on the rights of a child (CRC) defines a child as a person less than eighteen years of age unless under the law applicable to the child, majority is attained earlier.<sup>10</sup> Notably the CRC allows States Parties to provide an earlier age for the attainment of majority. There had to be some flexibility because different countries have different ages for attainment of majority. This leniency, has contributed to there being no uniform definition of a child, more especially in the domestic law of state parties. The Zambian law does not have a uniform definition of who a child is<sup>11</sup>. The age limit for receiving national registration card is 16, a person upon attaining the age of sixteen is entitled to receive national registration card according to the registration Act whilst for a person to be entitled to vote he ought to have attained the age of 18 years as stipulated by article 75(1) of the constitution. Under section 33 of Marriage Act<sup>12</sup> the minimum age for marriage is fixed at the age of sixteen unless the judge gives consent for two people who are below age to get married.<sup>13</sup>

Apart from the CRC the African Charter also provides for the rights of a child. This convention

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<sup>9</sup> [www.Kabissa.org](http://www.Kabissa.org), ;(Last visited 13 October 2007)

<sup>10</sup> Article 1

<sup>11</sup> Chanda, A, W, (2000) Gaps in Law & Policy in the Implementation of the Convention on the Rights of a Child in Zambia,' In Zambia Law Journal vol 32 pg3

<sup>12</sup> CAP 50, Laws of Zambia

<sup>13</sup> CRC/c/11Add 25 Report, [www.childsoldiers.org](http://www.childsoldiers.org): ( last visited 2 November 2007)

under Article 2 goes on to define a child as every human being below the age of 18 sixteen years. In every African country there also exists what is known as the African customary law. The African customary law has its own definition on who is considered a child. Before we go on further, it is important to mention that this system of law is appreciated by the courts.<sup>14</sup> Zambian courts recognize customary law, and its applicability. Of course there is a condition set for this applicability. In the Zambian court system customary law will only apply if it is not repugnant to justice, equity or good conscience or if it is not incompatible with any written law for the time being in force in Zambia.<sup>15</sup> The definition of a child in customary law differs to that of statutory law. What determines childhood is the physical development. This goes on to show that age is irrelevant when determining adulthood. The main concern is usually physical development and ability. When a girl reached puberty she is considered to be an adult, as she has physically developed into a woman.<sup>16</sup> The development is coupled with ability and as such Puberty is usually marked with initiation ceremonies to ensure the child now has the ability to performances of an adult.<sup>17</sup>

## **1.5 THE RIGHTS OF A CHILD**

Historically there was little attention given to children as a social group. The main concern was really more on the high rates of infant mortality than their rights. There was little recognition either of community, state, or parental obligation towards children.<sup>18</sup> Infant and child abandonment were common.

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<sup>14</sup> Mulembe, E(1999) Understanding the United Nations Convention on the Rights of the Child; the Zambian Context pg 11

<sup>15</sup> Section 16 of the Subordinate Court Act, Cap 28 of the Laws of Zambia

<sup>16</sup> Mulembe, E(1999) 'Understanding the United Nations Convention on the Rights of the Child ; the Zambian Context in Lesotho Law journal vol 12 pg 11

<sup>17</sup> Ibid pg 11

<sup>18</sup> Collier's Encyclopedia vol 6 Collier PF, 1995. Ontario, Canada pg 1123

It wasn't only till 20th century that the rights of children were recognized. However even though their rights were recognized different laws reflected the position of children as an object for example, "The child will be given....." as was provided by the Declaration of 1924 and the Declaration of the Rights of the child of 1959.<sup>19</sup> It was not until the 1970s and 1980s that this position was challenged by different sectors. They challenged the treatment of children as objects. They argued that children must be considered to have human rights with the capacity to exercise such rights this consequently led to the enactment of the convention on the rights of the child. This convention acknowledged that children must be considered as having rights with the capacity to exercise them. Evidently this has been illustrated in the manner in which the rights are provided,' The child has the right to.....',<sup>20</sup>

The CRC had to be adopted to protect the rights of child worldwide to illustrate that children were equally as important as adults and they had to have special right. There was more focus placed on the rights of a human being. Though children are human beings they were a special group which required special attention.<sup>21</sup>

Having given a brief history of the rights of the child, it is also imperative to identify the fact these rights are also human rights. Children's rights are peculiar in that adults are not entitled to these rights. An adult for example cannot claim the right to parental guidance.<sup>22</sup>

Human or fundamental rights is the modern name and but traditionally they are referred to as natural rights. These are rights which every human being everywhere, at all times ought to have

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<sup>19</sup> Michael Freeman, Children's Rights in Europe' The International Journal of Children's Rights Vol 1 no3 4 ,1993 p358

<sup>20</sup> Ibid

<sup>21</sup> Children's Rights in Europe, The International Journal of Children's Rights pg 110

<sup>22</sup> Ng'andu Fredrick , ' The Rights of the Child and their protection in Zambia,' Lesotho Law Journal 1991



simply because he is human<sup>23</sup>. Human rights are inalienable accorded to everyone by virtue of being a human being. The fundamental rights are designed to define the relation of the individuals to the state, and to protect the individual against the arbitrary or oppressive conduct of the state.<sup>24</sup>

Human rights are peculiar. They are individual rights which are natural and inherent. These rights are not a gift from society or any government. They are not the rights of British subjects, concessions extracted from, and limitations imposed on, pre-existing, established government, in the tradition of Magna Carta and subsequent Bill rather, they are freedoms and entitlements of all men everywhere, antecedent and superior to government<sup>25</sup>. Human rights do not derive from any constitution but are retained under and protected by the constitution.<sup>26</sup> They are superior to any other law, this was illustrated in the case of **Ransome Kuti V Attorney General of the Federation** where it was stated that a human right is

*'A right which stands above ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence.....and what has been done by our constitution is to have these rights enshrined in the constitution so that the right could be immutable, to the extent of non immutability of the constitution itself'*<sup>27</sup>

Since this paper is focused on rights of the child there is need to give recognition to the instruments which provide for the same rights. These will be discussed in depth later in this paper. Merit is given to two particular instruments that is, the United Nations Convention on the

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<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Henkin, I (1981) Economic- Social Cultural Rights as 'Rights '. A United States Perspective.' Human Rights Journal vol 2 Part 3 pg 224

<sup>26</sup> Ibid

<sup>27</sup> Onyekpere, E (1995)'Human Rights and the Nigerian Constitution.' In Human Rights Law and Practice vol 5 pg13

rights of the child including the African Charter on the Rights and Welfare of the Child.

The CRC is an international instrument established specially for the recognition of the rights of the child. This document sets out the civil, political, economic, social and cultural rights of a child. The UN committee on the rights of a child monitors the CRC.<sup>28</sup> It is composed of members from countries around the World. Government of these countries (that have ratified the convention) are to report to and appear before the United Nations Committee on the Rights of the Child periodically to be examined on their progress with regards to the advancement and implementation of the CRC and the rights of the child<sup>29</sup>. As stipulated by in part 1, Article 2 (1) of the CRC. State parties have to respect and ensure the rights set forth in the present Convention on the Rights of the child are respected without any discrimination of any kind irrespective of the child's parent or legal guardian's race, sex, colour, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.<sup>30</sup> The African Charter also provides for the rights of the child.

One might ask why all this emphasis on this particular social group? Children are the most politically powerless citizens in all nations. They actually do not have a voice of their own.<sup>31</sup> Conversely Infants are and young children are the most vulnerable. Children need to receive special protection and have instruments created to ensure a proper development through enjoying their rights. A child's development affects what he becomes later in future.

Notably it is clear that children are important because Children are the future. In fact, 'a caring society will give freedom and dignity to young people creating the conditions in which they are

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<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Article 2 (1) of the Convention on the Rights of the Child

<sup>31</sup> Ibid

can develop their full potential and so look forward to full and satisfying adult life<sup>32</sup> It is for reason that its not so much of surprise that even ICCPR emphasizes need to protect rights of the child. Naturally this instrument was created to protect the rights and freedoms of human beings in general but we find that the same instruments also contain special provisions relating to children in particular, either expressly or by implication.<sup>33</sup> For the purpose of the ensuring that the children of the World are given an opportunity to receive some form of education, ICESPR categorically<sup>34</sup> provides that primary education shall be compulsory and available free to all. This international instrument also provides that the widest possible protection and assistance be accorded to the family which is the natural and fundamental group unit of society charged with the responsibility of caring and educating dependant children.<sup>35</sup> The ICESPR also provides for the protection of mothers during a reasonable period before and after childbirth.

The International Covenant on Civil and Political Rights also shows its concern for the welfare of the world's children as it has some provision which are particularly relevant to children The ICCPR protects the life of the unborn child by prohibiting the execution of pregnant women, the separation of juvenile inmates from adults and Article 24 outlines the right of child to registration after birth to a name and to a nationality.

## **1.6 ORPHANAGES**

The orphanage has been a place of refuge for many children who have been deprived of the right entitle to them by virtue of being a child A long time ago under the African set children were

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<sup>32</sup> Kisekka S.M.B. (1989), in the preface of A situation Analysis of " Children and Women in Uganda" kampla UNICEF

<sup>33</sup> Sharon, D (1999) A Commentary on the United Nations Convention on the Rights of the child. The hague: Martnus Nijhoff Publishers pg 52

<sup>34</sup> Ibid

<sup>35</sup> Ibid

considered everyone's child. Each child was a gift to every member of his community. This in turn meant that each member was responsible for the welfare of the child. This meant that a child had more people providing for his shelter, food, clothing, education and in some cases parental guidance. This however is not the situation today. Many children due the poverty and the HIV/AIDS pandemic today have no one to take care of them. Others may have a guardian, who unfortunately cannot afford to care for them.

It is for this reason that special institutions had to be created to provide for them. For a child to have a proper development he needs a home, food and clothing, in addition he also needs education. As a child is growing he needs medical services, school, and religious services. All these mentioned help shape that he becomes in his adulthood<sup>36</sup>. It is however unfortunate that not every child has the privilege of growing with all their basic rights.

The term orphanage has been given way to softer language as a 'group home' 'children's home' or 'rehabilitation centre' It is an institution created for the purpose of caring for those children who are orphaned, some come from<sup>37</sup> dysfunctional, abusive, or poverty stricken homes.

## **1.7 CONCLUSION**

This chapter has endeavored to define who is a child. The institution called an orphanage has been be discussed and its functions. It is clear from the foregoing that there is no uniform definition of the word child. However we can safely conclude that a person who qualifies to be a child ought to accorded special protection and is entitled to the right provided for in the CRC and

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<sup>36</sup> [www.wikipedia.ac](http://www.wikipedia.ac): (last visited 15 November 2007)

<sup>37</sup> Ibid  
[www.wikipedia.ac](http://www.wikipedia.ac)

other instrument. An orphanage has in the chapter an institution created for the welfare of children in need especially those marginalized.

## CHAPTER TWO

### **2.0 INTRODUCTION**

This chapter will discuss the Convention on the rights of the Child and the principles that guide it. The African Charter will also be included in this chapter as it is an important instrument which acknowledges the rights of the child besides the CRC. The areas of interest for the purpose of this paper will be highlighted. Finally the inadequacies of the convention will be given.

### **2.1 THE CONVENTION ON THE RIGHTS OF THE CHILD**

The United Nations Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20<sup>th</sup> November 1989 and it entered into force on 2 September 1990. Zambia ratified the convention on 6<sup>th</sup> December 1991. The CRC covers civil, economic, social cultural and political rights.<sup>38</sup>

The adoption of this particular convention was very significant and brought so much hope where the children's rights were concerned. It clearly demonstrated the rights of a child would be recognized on the international plane with the aim of making the same rights enforceable. This was vividly expressed by General Joseph N. Garba,

*'Today with the adoption of the convention on the rights of the child, the Assembly has taken a new and decisive step along the road towards ensuring respect for the dignity and rights of the child; for the rights of the child have now gone from a declaratory statement of purpose into what will become a binding piece of international legislation'<sup>39</sup>*

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<sup>38</sup> Children's Rights in Europe, The International Journal Of Children' Rights Vol no3-4

<sup>39</sup> General Joseph Garba Nigerian Ambassador to UN addressing General Assembly 20<sup>th</sup> November 1989

### **2.3 The Nature of the Convention**

The scope of the CRC is so broad and as such it will not be dealt with in so much depth. To begin with the CRC in its drafting required a lot of negotiation and limberness. This to some extent illustrates its flexibility in accommodating many different approaches of nations in pursuit of one goal.<sup>40</sup> Generally, The CRC is guided by the principle 'first call for children'- a principle that the needs for all children should be given priority in allocation of resources at all times at national international, and at family level.<sup>41</sup>

Before a detailed discussion is given on the principles that govern the CRC, it is important to note that unlike other international human rights treaties, notably the International Covenant on Civil Political Rights and the International Covenant Economic, Social and Cultural Rights; the Convention contains both sets of rights in one document. The convention also realizes that although a child may be adequately nourished, the right to develop fully is not adequately protected unless the child is also educated (a social and cultural right), allowed to participate in culture and religion and is shielded from such things as arbitrary detention and exploitation at work (a social and economic right). It may be suggested that it is for this very reason that the welfare of the child can be fully realized with the combination of both sets of rights in one document<sup>42</sup>.

The Convention applies to all persons below the age of eighteen years as provided in first article. The Convention even includes children's social welfare rights, and emphasizes that states must

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<sup>40</sup> Fortin Jane, *Children's Rights and the Developing Law*, 4<sup>th</sup> edition, 2003 Lexis Nexis Butterworths, London UK, pg 37

<sup>41</sup> UNICEF, *The state of the World's Children*, (oxford University press)2003

<sup>42</sup> United nations , a Compilation on International Instrument(New York; United Nations) 1988 pg 408

not only protect children but safeguard their fundamental freedoms and also that the state should devote resources to ensure that they realize their potential for a maturing into adulthood.<sup>43</sup>

## **2.4 CRC AND ITS GENERAL PRINCIPLES**

Articles of the Convention are interrelated and considered together, except the Committee elevated article 2 'freedom from discrimination', Article 3 'The Child's best interest', Article 6 'the right to life' and Article 12 'respect for the child's views', to the status of general principles. In theory however none of these is more important than any other: nevertheless Article 3 the child's best interest, requiring commitment, underpins all the other provisions.<sup>44</sup>

The Convention on the rights of the child are guided by some of these principles Article 2 'Freedom from discrimination' for example guides the convention in that it emphasizes the fact that, the rights enshrined in the CRC are to be accorded to every child regardless of colour, sex, nationality and other factors. The principle provided by article 3 'the best interest of the child,' is for the purpose of ensuring that, 'in all actions concerning children, whether undertaken by public institutions, courts of law, administrative bodies, or legislative bodies, the best interest of the child shall be of primary. It makes other provisions more effective as they are read in the light of this article. In addition it brings out reality to the rest of the other provisions<sup>45</sup>.

The four principles that govern the CRC clearly outlined,

1) The Freedom from all forms of Discrimination, The state is under obligation to protect children from any form of discrimination and take positive action to promote their rights

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<sup>43</sup> Children's Rights in Europe, International Journal of Children's Rights Vol no 3 pg 28

<sup>44</sup> Fortin Jane, Children's Rights and the Developing law, fourth ed, 2003, Lexis Nexis Butterworths, London Uk, pg 37

<sup>45</sup> Ibid pg 36



## Article 2 of CRC

*State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.*

2) Every child has inherent right to life and the state has an obligation to ensure that the child's survival and development.

## Article 6 of the CRC states

*'States Parties recognize that every child has the inherent right to life. States Parties ensure to the maximum extent possible that survival and development of the child.'*

3) All actions concerning children shall take full account of his or her best interests. The state is obliged to provided the child with adequate care when parents, or others responsible fail to do so, whether undertaken by public or private sector

## Article 3 of the CRC states

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

#### 4) Article 12 of CRC states

*'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child, the views of the child given due weight in accordance with the age and maturity of the child.'*

Article 12 (2) goes further to say

*"....For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with procedural rules of national law....."*

Having talked about the rights contained in the CRC and the principles that govern it is only that right to point out who is meant to uphold the same. Article 5, stipulates the importance of the family and parents in so far as parental guidance in attaining these rights concerned. Apart from Article 5, article 4 places the onus on the state to ensure a conducive atmosphere is created, not only for the child, but the family. It ought to be pointed out that when the onus is placed on the state to uphold the rights of the child, it does not mean that the state is only 'person' apart from the family which may uphold the rights of the child. Apart from the state there are other non-government authorities, charitable organization, and other institutions which uphold the rights of a child.

The Convention recognizes that even children who are without parental care, homeless, mainly orphans and the other vulnerable children are also entitled to the rights contained in the CRC and are to be protected by the state under Article 3(3) the state is obliged to protect and provide for

children without parental care or for one reason or another particularly in the areas of health, safety etc.

From the articles alluded above it can be deduced that the drafters deliberately placed obligations on the key persons knowing that the rights of the child could only be upheld fully if these persons were under a legal duty and obligation to ensure they offer resources and services for the welfare on the child.

## **2.5 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

Apart from the CRC the other instrument which provide for the right of the child among these included the African Charter, the ICESCR. Because this paper is an investigation based in Lusaka, Zambia brief mention will be given to the African Charter as it relates more to Zambia. The ICSECR is only applicable to this paper because the areas of interest for this paper are economic rights. On another note the progressive obligation placed on the state parties is relevant towards the investigation to paper.

The African Charter has been for the continent of Africa considered to be a, 'great leap in history since Africa's elite have contented that the human rights philosophy is a western concept, wholly irrelevant to Africa, given the cultural differences between the West and Africa, and the prevailing socio-economic realities in most African countries.'<sup>46</sup> The African Charter on the rights of the child as the name suggests is a regional treaty. It is in fact the first regional treaty on the rights of the child. The charter was adopted by the twenty-sixth Ordinary session of the Assembly of Heads of State and government of African Unity, Addis Ababa, Ethiopia on 11<sup>th</sup>

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<sup>46</sup> Hazel Fox, 'Africa's charter on children's rights; A Normative break with cultural traditionalism' International and Comparative Law Quarterly, vol 41 part 2, 1992, pg 432

July 1990. It only entered into force on November 29<sup>th</sup> 1999. Zambia is a signatory to the charter.<sup>47</sup>

It is quite noticeable that the charter is not as comprehensive as the CRC but it is not that different from it either. Like the CRC the charter has principles of non-discrimination, best wishes of the child, survival and development. Some of the rights protected by the charter are actually similar to those in the CRC. The charter is basically in conformity with the convention with some of its articles only that relates more with the African Child<sup>48</sup>. Under the charter there is provision for the right to education under Article 11, which is an area of interest for this paper. It also provides for another right which is an area of interest and that is the right to health. Concerning the right to education, the charter like the CRC stipulates a time when each state will provide education free and compulsory. Notably the Charter differs in that it provides for situations best suited for the African child as stipulated under section 3(d) of Article 11 it caters for drop-outs and for 'children with children' (young girls who bare children whilst still in school) which are a common problem in the African continent.

## **2.6 AREAS OF INTEREST**

After having given a broad outline of the CRC the areas of interest for this paper are the rights to education, health, and the right to housing. In passing there will also be mention of the right to parental guidance. The three instruments that will be referred to when looking at these rights are the CRC, ICESCR and the Africa Charter. The ICESCR and the African Charter also give recognition to both the right to education and the right to health. The ICESCR also provides for

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<sup>47</sup> Brownie, J AND Goodmin-Gill G.S (ed) (2002) Basic Documents on Human Rights( Fourth Edition) New York; Oxford University

<sup>48</sup> Ibid pg 434

the right to housing economic which also affects the welfare of all children including the orphaned and the vulnerable.

### **2.6.1 The Right to Health**

Article 24 of the CRC, states the child is accorded the right to the highest standard of health and medical care attainable. The Onus is placed on states to provide primary and preventive health care with the hope inter alia, of reducing infant mortality through combat of disease and malnutrition with a framework of primary health care.

Like the CRC the Africa shows concern for the children's health. The charter provides for the right to Health and Health Services.

The article is meant to ensure the child's welfare in terms of health through provision of medical services, combating diseases, malnutrition, providing the required drugs or treatment at affordable prices and finally also reduce infant mortality. Disease and malnutrition are obvious big threats to child development<sup>49</sup>. These two have the effect of preventing a child from enjoying other rights such as the right to education or the right to leisure. It is difficult for a child to attend school when he or she is ill. On another note it is difficult for his illness to be cured if there aren't drugs available for the same illness. A child may also be prevented to enjoy his right to leisure because he will be too unwell to go out and play. For some children particularly the orphans and the vulnerable they are deprived of the right to health facilities as they cannot afford medical services. Some are deprived of the right to education because when orphaned they are forced fend for themselves in the adult world.<sup>50</sup>

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<sup>49</sup>The State of the Worlds's Children 2006 Report, [www.unicef.org](http://www.unicef.org): (last visited November 2 2007)

<sup>50</sup> Ibid

As a state party to the ICESCR Zambia has committed to respect, protect and realize the right to health. Zambia as a state party has the obligation to progressively realize the right to health. That means it has to provide highest standard for the health services and facilities. The right to health is an economic right and can only be realized to the maximum extent of their available resources. The realization of this right has been a struggle because most states claim they cannot implement this right fully due to lack of funds and resources. But one might ask is this really a valid excuse?

For most developing countries providing highest standard of health care facilities has been almost impossible 'due to lack of funds'. This means that both the adults and the children easily become victims of illness and premature death. Lack of health services or poor health facilities is a hindrance to the enjoyment of this right and other rights. In some cases the medical facilities are available except they are under-stuffed and have insufficient drugs. This has a negative impact on all children. Poor health facilities may deny an innocent child the right to life as it is known to contribute to high levels of Infant Mortality.

Due of poor or lack of health facilities orphans are deprived of the special privilege of being a child. The HIV/AIDs pandemic has caused most children to be orphaned at very tender age. As a result of this situation children are forced to take up adult roles and fend themselves.<sup>51</sup>

These are only few of some of the negative impacts deprivation of the right to the health can do. It must be brought to the attention of the reader that childhood is peculiar because once it has past it can never be regained. Every child including the orphans and vulnerable should be able to enjoy his childhood. A child should not be deprived of his childhood because the State is failing to provide the enjoyment of the right to health. .

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<sup>51</sup> Ibid

Governments are expected by the ICESCR to progressively provide for health care facilities and services according to the resources available in the country. This is actually an obligation placed on the state parties to the ICESCR. As much they have to provide some of these facilities progressively, there are a few which the government has to provide immediately. The Committee to the ICESCR in its general commentary pointed out that a state has minimum immediate core obligations which include access to essential drugs and basic healthcare. A state party to the ICESCR is under the immediate obligation to facilitate access to and provide health care services and conditions necessary for health.

### **2.6.2 Education**

Under Article 28 of the CRC, a child is given a right to education. According to the same provision this is to be compulsory and free to all. The Convention goes as far as recognizing the need for skills training in addition to academic education. This is evident as it states, ‘state parties shall in particular encourage the development of different forms of secondary education, including general and vocational education.....’

Article 29 illustrates the aim of providing the child with education. The aims are

- a) The development of the child’s personality, talents and mental and physical abilities to the fullest potential.
- b) The development of respect of human rights
- c) The development of respect for child parents

Under the charter there is provision for the right to education under Article 11 and just like the CRC it stipulates a time when each state will provide education free and compulsory. The charter also provides for the right to education, under section 3(d) of Article 11 it caters for drop-outs

and for 'children with children' (young girls who bare children whilst still in school).The ICESCR also places an obligation on states to progressive realize this right

The right to education has been a powerful tool available to both privileged and the under-privilege. Education not only opens doors of opportunities and employment but also helps every child in the development of his personality, awareness of the world around her. The state is obliged by the ICESCR to provide for compulsory and free primary education for all children. This is supposed to enable even orphaned and vulnerable children to enjoy the right to education, a chance to have a better future.

This right also entails that there must be provision of books, access to desks, and qualified teachers available.

One might wonder whether in reality providing free education would mean all the children will definitely be able to attend school. As this paper is concerned with orphans and other vulnerable children, the provision of free education does not necessary entail that these children will be able to enjoy this right. In fact, it is usually this group of children (orphans) which miss out on the right to education. Attending may still be a struggle as orphans are forced to go into the adult world fending for themselves, overwhelmed with domestic chores, or forced to take up employment as domestic workers. Though these children are entitled to protection by the government not all orphan or vulnerable child have institutions, government or not, giving them an opportunity to benefit from the right to education.

On another note the right to education entails there must be access to books, and at time uniforms as well, teachers should be available without these a child cannot be said to be fully enjoying this right. Some orphans are unable to attend school because they cannot afford book and uniforms so



perhaps the government would have to intervene that all even orphans have access to these facilities.

Also it is worth noting that to a large extent developing countries have managed to provide for free primary education. These schools however, in most developing countries have operated on an inferior standard where equipment, school premises, pupil-teacher ratio, size of classes to at times quality of teacher are concerned.<sup>52</sup> This illustrates that though primary education has been offered freely the children do not enjoy this right to fullest extent because social and economic development in less developed countries has been attained to the maximum of its potential.

The right to education is meant to be available for all including children without parental care. Under articles 20 and 22 of the CRC the state is obliged to provide for children without parental care and special protection. However it must be brought to our attention that this assistance is not forthcoming and only a few are privileged to enjoy the right to education through with aid of some of orphanages foster homes, NGOs and government institutions. For the sake of this paper there will be investigation on to what extent the marginalized child enjoys the right to education compared to any other child.<sup>53</sup>

### **2.6.3 The Right To housing**

The right to housing is provided by the ICESCR. Article 11(1) of the ICESCR recognizes: the right of everyone to an adequate housing, a state party is under obligations to respect, protect and fulfill the right to adequate housing.

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<sup>52</sup> State of the World's Children 2006, [www.unicef.org](http://www.unicef.org), (last visited 10 November 2007)

<sup>53</sup> Ibid

The state is under duty to ensure that right is enjoyed. The Committee in its General Comment No.3<sup>54</sup> stated that a state party has the obligation to *respect*, this requires a state to refrain from interfering, directly or indirectly, in the enjoyment of rights (para 6). The clearest violation of the obligation to respect would be forced evictions conducted by the state. The obligation to *protect* requires the state to prevent violations of human rights by third parties including private actors. Protection of the right to adequate housing includes steps such as setting up a legal framework to prevent forced evictions by landlords and discrimination in private rental housing from taking place. Finally, the obligation to *fulfill* requires the state to take positive measures to ensure the enjoyment of right by individuals and communities, including legislative and budgetary measures. States' duties to fulfill housing rights include the provision of housing assistance such as public housing and rental assistance<sup>55</sup>.

Children are also entitled to the right of adequate housing as this directly affects their development. As the paper is concerned with orphans and vulnerable children it is important they are the most affected. Most orphans after the death of a parent or parents usually have no-one to care for them and as a result end up on the streets. Homeless children at times set up temporary shelter which may be made of plastics. This is what they would consider home.<sup>56</sup> Deprivation of the right to housing entails deprivations of other rights too such as the right to security of the person, the right to privacy, the right to the highest attainable standard of health, the right to education.<sup>57</sup> For most children on streets it is difficult for them to attend school successfully because from time to time they are forced to move from one shelter to the next making it difficult

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<sup>54</sup> [www.unhcr.org](http://www.unhcr.org);( last visited November 30 2007)

<sup>55</sup> UN general Comment no 3 State Obligation under ICESCR, [www.unhcr.org](http://www.unhcr.org) ;( last visited 10 November 2007)

<sup>56</sup> The State of the World's Children 2006[www.unicef.org](http://www.unicef.org) ;( last visited 10 November 2007)

<sup>57</sup> Ibid

to stick to one school. This is usually the situation in developed countries like the USA.<sup>58</sup> In a developing country most homeless children do not even attend school. They would rather go out looking for jobs on the streets such as washing cars, being a vendor, or working as domestic worker.<sup>59</sup> The state or any other non-government institutions are obliged to provide shelter for the homeless children.

**2.7 THE CRC AND ITS INADEQUACIES**

Having discussed the areas of interest a brief discussion will be give on some of the inadequacies of the CRC. Notably there is a shortfall in article 1 of the CRC,’ a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. The shortfall is that this is leniency gives the state party power to lessen the ages to serve purposeless ambitions.

Another disadvantage is Article 4 where it is stated that parties can only implement these rights, ‘.....to the maximum of their available resources and where needed, within the framework of international co-operation. The idea behind availability is a subjective test. How is a country to ascertain what its available resources are? Also, where the country does not realize it may easily claim that it did not have enough funds and resources.

One of the aims set out in the preamble of the CRC is difficult to reconcile. It emphasizes the need to promote children’s capacity for eventual autonomy, whilst simultaneously supporting the traditional role of family in society and the authority of parents over their children. This inevitably led to many disagreements during the drafting sessions. Delegates from Islamic countries expressed contrary views. They deeply opposed to giving the children freedom from

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<sup>58</sup> Ibid  
<sup>59</sup> Ibid

parental and religious teaching while countries like the United States who were influenced by their own constitutional history, strongly favoured the concept of children enjoying similar civil and political rights to adults.<sup>60</sup>

Article 5 respects the parents' right to direct and guide their children. McGoldrick observes the wording of this article 5 itself is fraught with difficulty, since those obliged to fulfill it are the very individuals who may have a personal interest in ensuring that children do not exercise their rights.<sup>61</sup>

Further more Article 55 gives state parties a right to make a reservation where they feel they are unable to meet the objectives of the CRC. This would in fact encourage a situation where state parties give other things precedent over the rights of the child.

The CRC to some extent is perceived to be a western philosophy as such it does completely cater for the rights of a child in Africa. The way the Africa charter does.

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<sup>60</sup> L Le Blan (1995) ch 1 and pg 112-117

<sup>61</sup> Ibid pg 258

## **2.7 CONCLUSION**

This chapter has discussed some of these international instruments concerned with the rights of the child. A brief discussion of the CRC was given. The areas of interest were stated and finally some of the inadequacies of the CRC were given.

## **CHAPTER THREE**

### **3.0 Introduction**

This chapter will discuss the life of an orphan in general. Thereafter general statistics will be given. Factors such as poverty and the HIV pandemic will be mentioned as they contribute to orphans not enjoying the rights contained in the CRC and other international instruments. Finally a discussion will be given in the shortcoming of the government towards implementing the rights of a marginalized child.

### **3.1 General statistics on orphans in Zambia**

Zambia is a sub-Saharan country which has been substantially undermined in its development by the mutually high HIV/AIDS, prevalence, chronic and acute food insecurity and poverty, and weak governance. This has threatened the human rights of millions of Zambians. The most disadvantaged are the vulnerable children and women. For the purpose of this paper we will focus on orphans.<sup>62</sup>

The life of an orphan is one full of strife and hardships. With few social support systems that exist outside of families and inadequate social services an orphan is forced to fend for himself in this cruel world<sup>63</sup>. Terrifyingly there will more and more children in this predicament.

A survey was conducted in 1999 called the 1996 Living Conditions in Zambia Monitoring which gives a few statistics about orphans in Zambia. According to the same, there are approximately four million<sup>64</sup> and one hundred thousand children in Zambia: thirteen percent of these are orphans .While according to a more recent survey only sixty-two percent of children under the

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<sup>62</sup> : International Journal of Inclusive Education, Volume 11, Issue 4 July 2007 , pages 417 - 430

<sup>63</sup> A UNICEFact sheet, July 2002

<sup>64</sup> Orphans and Vulnerable Children ; A situation Analysis, Zambia 1999 Joint USAID, UNICEF, SIDA, [www.zamsif.org.zm](http://www.zamsif.org.zm): (last visited 20 December 2007)

age of fifteen years are living with both natural parents, eighteen percent of them live only with their mothers, whereas four percent live only with their fathers and sixteen percent are fostered or not living either with parents.<sup>65</sup> Furthermore the ZDHS (Zambia Demographic and Health survey 2001-2002) shows that fathers of twelve percent of children under fifteen are dead and both parents of three percent of the children are dead. Eleven percent of children under 15 were paternal orphans, 3 percent maternal orphans and 4 percent dual (or double) orphans (children who have lost both parents).<sup>66</sup>

From the facts given it can be deduced that there are a lot of children who have been orphaned by one or both parents, and there are some only living with one of their natural parents. There are some who are single orphans or double orphans. All in all being orphaned by both parents is the worst of the situations mentioned.

The number of orphans is still increasing. At the end of 2003 alone there was an estimate of 143 million orphaned children under the age 18 years in 93 developing countries.<sup>67</sup> With the increase in the HIV pandemic there will be more children orphaned. Currently there are about six hundred and thirty thousand children orphaned by HIV/AIDS in Zambia while it has been estimated that the number of orphans will rise to nearly one million by the year 2014.<sup>68</sup>

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<sup>65</sup> Zambia Demographic and Health survey, 2001-2002 by Central Statistics Office in partnership with Central board of health pg 20

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid

### **3.2 SOME OF THE FACTORS WHICH HAVE HINDERED ORPHANS FROM ENJOYING THEIR RIGHTS**

Apart from lack or inadequate provision and access to economic rights there are two factors among other factors which have really affected orphans and other children negatively in their opportunities of enjoying their rights. Poverty and the HIV pandemic are two obstacles which have deprived children (orphans included) of their right to education, health and housing and other rights. These impediments have caused millions of children, make their way through life impoverished, abandoned, uneducated, malnourished, discriminated against, neglected and vulnerable.<sup>69</sup> In addition these predicaments also cause them to risk missing out on their childhood, or be excluded from essential services such as hospitals and schools.<sup>70</sup>

Poverty has impacted negatively on Children in Zambia. The poverty levels in Zambia are high. Seventy percent of the persons living in Zambia live below the poverty line. Even worse is the fact that three quarters of the children live below the poverty line<sup>71</sup>. Poverty by definition entails a group of people who cannot even afford three meals with a balanced diet, a situation where the majority of the people live on 1 dollar per day.<sup>72</sup> Poverty has deprived children of the essential basic rights to education, health and housing. Basically this means that a child may not afford medical services available, and may be – excluded from essential services such as schools because he cannot afford uniform, books, stationary etc. The worst victims of poverty are orphans especially where they have no parental care and have to fend for themselves on the streets.

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<sup>69</sup> State of the World's Children 2006 Report [www.unicef.org](http://www.unicef.org);( last visited 20 November 2007)

<sup>70</sup> Ibid

<sup>71</sup> [www.unaids.org/en/Regions\\_Countries/Countries/zambia.asp](http://www.unaids.org/en/Regions_Countries/Countries/zambia.asp),(last visited 26 November 2007)

<sup>72</sup> Zambia Deregulation & denial of Human Rights [www.unicef.org](http://www.unicef.org) (last visited November 2007)



The HIV pandemic has also had a devastating impact on children. There about six hundred and thirty thousand children orphaned by this disease. By the 2014, there has been an estimation that the number will rise to nearly one million.<sup>73</sup> This will leave the orphaned devastated, without parental care and love and consequently deprived of some of the rights contained in the CRC eg the right to parental care. When orphaned children may be forced to go into the adult world fending for themselves <sup>74</sup>and consequently missing out on the right to education for example because the job he undertakes is not flexible for him to attend school such as working as a domestic worker .

In the olden days a child was treated as one belonging to everyone in the community. This notion is however not so practical today. Back then the extended family, a traditional mechanism for caring for the orphaned, was more readily available to care for a dead relative's child. Today, due to the high levels of poverty the traditional system has failed to care for their deceased relative's child as they are already over-stretched with their own large families' needs.<sup>75</sup> Subsequently, orphaned children have ended up drifting to the streets to fend for themselves. In addition at present with the increase in the number of adults dying of the HIV/AIDS in the next decade, there will be increase in orphans growing up without parental love and care and as a result will be deprived of the basic rights to shelter, food, health and education .<sup>76</sup>.

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<sup>73</sup> Zambia Demographic and Health survey, 2001-2002 by Central Statistics Office in partnership with Central board of health

<sup>74</sup> State of the World's Children 2006 Report, [www.unicef.org](http://www.unicef.org), (last visited 30 November 2007)

<sup>75</sup> [www.Kabissa.org](http://www.Kabissa.org): last visited (10 November 2007)

<sup>76</sup> Ibid

### **3.3 CHALLENGES OF AN ORPHAN**

Living the life of an orphan is the most heartbreaking thing a child could ever go through. They go through life marginalized as though they are invisible. When a parent passes on, they experience emotional distress and the marginalization they go through worsens the feeling of shame, fear, and rejection, a feeling that often surrounds people affected by HIV/AIDS<sup>77</sup>. Children whose parents have died of AIDS are presumed to have AIDS. As a result of this association they may even be denied proper health care and access to education.<sup>78</sup> They are likely to be denied health care facilities to ‘avoid’ spreading the diseases to other kids or simply because their illness is untreatable.<sup>79</sup>

When a child orphaned they may be marginalized from society and the extended family living them in a desperate financial crisis. This in turn causes them to miss out on school because they are forced to go into the adult world, take on domestic jobs, vending or cleaning cars on the streets.<sup>80</sup> Education is an important tool and the orphans missing out on it means missing out on an opportunity of bettering one’s life.<sup>81</sup>

Though a few orphans have access to shelter where a relative takes care of them, they are also likely to be discriminated. They are often given less food than every other child in the household compared to other kids. The orphan is expected to do heavier and more difficult chores.<sup>82</sup> The more difficult chores would include washing laundry for everyone in the house while the other

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<sup>77</sup> The State of the World’s Children 2006, [www.unicef.org](http://www.unicef.org), (last visited 30 November 2007)

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid,

<sup>82</sup> [www.phenriot@jesuits.org.zm](mailto:www.phenriot@jesuits.org.zm): (last visited 10 January 2008)

kids do not do their laundry because they are considered too young for such a task .Below is an insert where an orphan in Serenge gave a testimony was of the discrimination they faced while staying with a relative

“..... Their action took us by surprise we thought that they being our relatives would take care of us. Life was not easy at all.....when my relatives cooked food they used to hide it from us. Sometimes they would invite us to eat but then make all sorts of ugly remarks behind our backs<sup>83</sup>”

Such instance can leave a child emotionally disturbed to the extent that though he or she able to go school he may not perform so well in his studies because of the psychological pain he goes through at home.

From the general overview it has been observed that orphans face a lot of hardships and are deprived of their rights, especially where they lack any form of parental care. Being orphaned at a young age they are robbed of the motherly and fatherly care of their parents. These kids are forced to face the challenges of the adult world for them to survive in their hardships<sup>84</sup>. They live a life of struggle especially where they are not protected and cared for by any institution. Only a few orphans end up in orphanages or institution where they are offered an opportunity to go to school.

With a few orphanages to take in all the orphans some of them are raised by a grandparent. This lives some orphans disadvantaged because they still face limited access to education, health and

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<sup>83</sup> Situational Analysis of an Orphan in Zambia 1999 Report, [www.zamsif.org.zm](http://www.zamsif.org.zm); (last visited 10 January 2008)

<sup>84</sup> State of the World's Children 2006, [www.unicef.org](http://www.unicef.org); (last visited 28 December 2007)

housing. Grand parents in particular find the task of looking after orphan and raising them a big challenge,' ever since these were brought to me I have been suffering'<sup>85</sup>

They are subjected to attending schools which are sub-standard due to the high levels of poverty<sup>86</sup>. Sometimes they cannot even afford health services. Also the housing may be of poor standard. Article 11(1) of the ICESCR recognizes: *the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*. Due to high levels of poverty the few children who take in by the grand parents still live a life full of lack. Despite the fact that they might have some form of parental care and guidance, the orphans may not have adequate food, clothing, and housing<sup>87</sup>.

### **3.4 WEAKNESSES OF THE GOVERNMENT IN RESPONDING TO THE PLIGHT OF AN ORPHAN**

Having mentioned some of the hardships orphans encounter, one might wonder why these innocent children should have to go through all this when Zambia has ratified the CRC, the African Charter and other international instruments. These instruments place an obligation on states to protect these children and provide shelter, health, and educational services. Notably under Articles 20 and 22 of the Convention on the Rights of the Child the state is obliged to provide them without parental care special protection and assistance.

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<sup>85</sup> One seventy-year old woman told researchers,

<sup>86</sup> The state of the Worlds Children

<sup>87</sup> Ibid

The government should intervene to ensure that the rights of the marginalized child are realized. The state should implement measures and procedures that would ensure that orphans do not miss out on their rights, to health, education and housing

As mentioned earlier orphans have been marginalized, forgotten, treated as though they were invisible. There should be more attention given this social group as they are children desperate need of assistance. In fact compared to children growing up with parental care and guidance, they should actually be accorded more protection and more access to education, health and housing. The government ought to embark on protective measures such as establishing social programmes to provide necessary support for the child, as well as other forms of preventing, reporting, referral, investigation, treatment and follow-up of instances of child mal-treatment and as appropriate judicial involvement.<sup>88</sup>

The government has failed to produce adequate facilities especially for the orphans and other vulnerable children. These children have not been able to able benefit from free access to education<sup>89</sup>. Even though primary education is free, acquiring books and uniforms is often a struggle for the orphaned. Consequently with lack of education these children are more at risk to abuse. Girls often feel they have to give into sexual abuse or prostitution in order to raise money to put food on the table.

Education is important in every child's life as it gives a child hope for the future as it makes him or her aware of the world around him and develops his skills and personality<sup>90</sup>. Furthermore education offers a decent standard of living. Looking at the situation in Zambia attending school for an orphan would still be a struggle because they have to consider money for transport or end

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<sup>88</sup> CRC/c/11/Add 25 Repot, [www.childsoldiers.org](http://www.childsoldiers.org) last visited ( 2 November 2007)

<sup>89</sup> Zambia Deregulation and the Denial of Human Rights report [www.unicef.org](http://www.unicef.org); (last visited 15 November 2007)

<sup>90</sup> State of the World's Children Report, [www.unicef.org](http://www.unicef.org), last visited ( 26 November 2007)

up walking very long distances in order to go to school.<sup>91</sup> We must emphasize that some of these child do not come from homes which are not headed by an adult. Some children are already financially handicapped to start looking for extra money for uniforms, transport money, and food. The government ought to look into this matter.<sup>92</sup> The government should ensure that orphans attend school so that they may be educated more on their other rights

Where health facilities are concerned there are few affordable health facilities in general. The UTH (University Teaching Hospital) is considered to be the most affordable.

However it is under-staffed, and has limited resources. It is under-staffed because of the brain drain of Zambian doctors and nurses to developed countries<sup>93</sup>. If a hospital has few members of staff it is difficult for it to attend to all its patients on time. This causes instances where a patient goes to the UTH but only attended to days later after being admitted.

Still on the same note it has been an observation that there is a difference between availability of health facilities and access.<sup>94</sup> The state has attempted to provide the medical facilities except the one has to wonder about the accessibility of its medical resources good. In most cases orphan cannot access these medical facilities because of the costs.

Orphans are likely face discrimination where the right to health is concerned is. They may face discrimination in their treatment because they may be presumed to be HIV positive because the parent died of HIV<sup>95</sup>. Perhaps the government could build health facilities for orphaned so that they may be attended by someone more qualified in the area dealing with orphans of this kind.

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<sup>91</sup> Answer given by an interviewee

<sup>92</sup> The State of the World's Children 2006, [www.unicef.org](http://www.unicef.org), :(last visited 28 December 2007)

<sup>93</sup> Ibid

<sup>94</sup> The UN General Comment No 4, [www.unhcr.org](http://www.unhcr.org); { last visited 30 November 2007).

<sup>95</sup> The State of the World's Children Report 2006 [www.unicef.org](http://www.unicef.org), :(last visited 28 December 2007)

On another note orphans are disadvantaged in their enjoyment of right to health. The elder orphans might not be able to afford treatment because free medical care in government hospitals in Zambia is only entitled to children up to the age of five years<sup>96</sup>. This means orphans above five years have to always have extra money for their medical expenses. With the low-income jobs they undertake such as being a domestic worker, vendoring, cleaning cars etc it would definitely be a struggle to raise extra money. The government should therefore be more flexible with this policy.

The right to housing has not been enjoyed by the orphans fully especially by those who living on the streets. It is for this very reason that they are forced to build temporary shelters which are sometimes made of plastic bags<sup>97</sup>. The government ought to make policies towards providing shelter and protection for children on the streets. It is after all, the duty of the government to take care of the children, who have no parental care and guidance for one reason or the other. It must noted, that shelter and the security play an important role in the development of a child. A child needs to have a shelter where he or she can play freely.

The biggest problem that is hindering orphans and other vulnerable children from enjoying their rights is enforcement and implementation of the rights contained in the CRC and other international instruments. Zambia has been slow in implementing the provision of the CRC fully especially the economic rights. Apart from the issue of limited resources there are no means of enforcing these rights. Basically even though Zambia has ratified the CRC and other international instruments which deal with the welfare of the child, these rights cannot be fully enjoyed because most of these provisions have not been domesticated.

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<sup>96</sup> Zambia Deregulation and the Denial of Human Rights Report 2000

<sup>97</sup> The State Of The World's Children 2004

This paper has focused on the economic rights such as the right to education, health and housing. It must be brought to the attention of the reader that these rights are to be realized progressively according to the availability of a state's resources. Most states usually claim they cannot realize these rights fully especially where the country has low income. The progressive obligation has to some extent prevented the realization of this right because states have used the excuse of limited resources as a hindrance of achieving this right. However it must be stated that the UN General Assembly No 3 questioned the excuse of limited resources. How can countries claim they do not have resources to realize these rights fully? It was suggested that they do have the income except the resources have not spent it efficiently. This basically meant that governments do have the income and should re-consider foregoing certain expenditures on some of the projects in order to realize these rights.

### **3.5 CONCLUSION**

This chapter has given a situational analysis of some of the obstacles orphans encounter. This was an analysis in the light of education, health and housing. All this was given with reference to the situation in Zambia.



## **CHAPTER FOUR**

### **4.0 INTRODUCTION**

This chapter will highlight some of the responses the government and non-governmental organizations have undertaken to deal with the problems orphans are facing. There will also be a brief discussion on to what extent rights of the marginalized child's right to health, education, and housing have been respected by government either through its policies or legislation.

### **4.1 RESPONSE TO ORPHANS**

The Zambian government has not been as successful in upholding the right of an orphan. In most cases orphans have suffered silently without any assistance from the government<sup>98</sup>. As mentioned earlier that initially the best support system for a child who had lost both parents was the extended family however this has changed due to increase in the poverty level.

It must be noted that only a few orphans are taken in by the members of the family. According to statistics about 40 per cent of these children are raised by grandparents, while about 30 per cent are reared by aunts and uncles.

The consequences for the family, however, can be devastating. One 70-year-old woman raising her four grandchildren told researchers that "ever since these children were brought to me I have been suffering. I am too old to look after them properly. I cannot cultivate ... and the food does not last the whole year."<sup>99</sup>

Clearly from the above statement orphans need the assistance of the government because though a member manage to takes them in they still end up living below the poverty line which is a

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<sup>98</sup> [www.africarecovery.org](http://www.africarecovery.org),: ( last visited November 2007)

<sup>99</sup> Ibid

hindrance to them enjoying the right to education, health, housing and other rights. Mr. Lewis acknowledged "It is an unbelievable act of self-sacrifice on the part of the families because frequently it pushes them over the edge". "They have just enough for themselves and suddenly they take [in] two kids.... I don't think anybody imagined the unprecedented assault on the extended family system which has occurred in grievously affected countries. This is just a huge challenge."<sup>100</sup>

This burden can only be lightened if the government intervened more aggressively towards the hardships of an orphan.

Conversely the state has been placed under the obligation to care for the children who for one reason or the other have lost a parent.<sup>101</sup> Without government intervention fewer orphaned children may enjoy their rights fully. Sadly although orphans and other vulnerable children entitled to the right to be care for by the by the government, this right cannot be enforced against the government of Zambia. The reason being though Zambia has ratified the CRC and other international instruments which provide for the rights of the child it is still in the process of domesticating these instruments. This also includes economic rights such as the right to education, health and housing. It therefore follows where a right is unenforceable the government can easily evade the progressive obligation of providing and implementing such rights.

Where provision of economic rights is involved most governments have claimed to not adequately implement these rights due to lack of funds. Statistics in Zambia showed Per capita income, was just \$490 in 1990, but slumped to \$330 by the end of the decade, while debt service

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<sup>100</sup> Ibid

<sup>101</sup> Article 20 and 22 of the Convention on the Rights of the Child

payments consumed a larger share of the national budget last year than did health and education spending combined.<sup>102</sup> It may therefore be submitted that a state should not claim lack funds as a reason for not implementing these rights. In order to implement these rights a government should reduce its debt services expenditures and focus more on implementing the rights to education health and housing.<sup>103</sup>

There have been attempts by the Zambian government to carry out programmes with the aim of solving the hardships that orphans are facing in Zambia. Relevant Ministries have developed policies regarding orphaned children. Positive efforts have been made through the formation of the Task force on Orphans. There is also a technical committee comprised of various professionals from each of the ministries. Additionally the Disaster Management and Mitigation Unit at the office of the president is critically examining its role in the care of vulnerable children. It is worth mentioning also that NGO (non-governmental organizations) and CBO (Community Based organizations) have also have also implemented donor-funded activities towards mitigating the suffering of orphan by providing only education, health care but also shelter.<sup>104</sup> There's also been the establishment of Open Community schools program. These schools run without fees or dress codes created for orphans and vulnerable children. Orphanages such as the SOS village have also worked providing shelter for the orphaned.<sup>105</sup>

Having mentioned some of the attempts by the government it must be brought to the attention of the reader that as this paper is concerned with the economic rights of the marginalized child, these rights have not be respected fully. Yes, there have policies enacted for this except

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<sup>102</sup> Unicef Humanitarian Report 2007, [www.unicef.org](http://www.unicef.org) (last visited, 30 November 2007)

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Ibid

implementation and enforcement have been inadequate. This is mainly due to the fact that these rights have not been domesticated and worse, are not enshrined in the *grund norm* the constitution. On the same note it has been observed that with reference to orphans there isn't a law specifically enacted for the protection of the rights of the orphans. The CRC merely protects those rights entitled to orphans by virtue of being a child but we all know that orphans ought to be treated as a separate special group, because of their needs are peculiar.

#### **4.2 CONCLUSION**

This chapter has discussed the responses of government and non-governmental organizations towards the plight of an orphan. It has been observed that though there have been attempts by the government to tackle this social crisis, the fact still remains that the rights of an orphan have not been respected to the level and extent that they supposed to be.

## **CHAPTER FIVE**

### **4.0 Summary, Recommendations, Conclusion,**

This obligatory essay has been devoted to the most emotive topics of all topics- Children. It has been written in the light of the CRC and the marginalized child (orphan) and to what extent his or her rights are respected in comparison to a child not marginalized.

Chapter one introduces the topic by defining who is a child. A brief background on the rights of the child was highlighted. As this paper is concerned with the CRC and the Marginalized child there is mention of one of the institutions that care for the marginalized child.

Chapter two discusses the Convention on the Rights of the Child and the principles which guide it. The African Charter is also included in this chapter as it is also an important instrument which acknowledges the rights of the child. In this chapter the areas of interest discussed are the rights to education, health, and housing.

Chapter Three gives the situational analysis of the life of an orphan. It shades light on the different hardships child goes through when orphaned. It also places emphasis on how these hardships are a hindrance to their enjoyment of the rights to education, health, and housing. A brief discussion was given on the areas of interest in relation to the fact that they are economic rights and the state has progressive obligation to provide for these rights. The progressive obligation was highlighted as most states use lack of funds as an excuse for not adequately providing adequate facilities.

Chapter four- discusses the attempts of government and non-government organizations in providing for the rights of an orphan. It was stated in this chapter that though government and non government have attempted to tackle the social crisis of orphans it is still an obstacle as there is still an increase in the number of Orphans due to the ever increasing level of the HIV pandemic.

#### **4.1 RECOMMENDATIONS**

From the foregoing it may be deduced that the rights of an orphan have not been respected to their fullest extent. In fact orphans have generally faced more deprivations than children who are not orphaned<sup>106</sup>. The plight of the orphan has caused deprivations of the basic rights such as the right to education, health and housing. Worse still there is little evidence of active government involvement in responding to the needs of orphans.<sup>107</sup> This part of the essay will outline issues which have contributed to the rights not been upheld and recommendations will be given.

To begin with the CRC and other international instruments have recognized the rights of the child in general. Though Zambia has ratified CRC (The Convention on the Rights of the Child) there has not been a further step of enacting legislation to focus and protect the rights of orphans as a special group here in Zambia. As a result of this orphans where health facilities are concerned are subjected to pay the same medical fees as those not orphaned. Orphans ought to be treated as a special group with special needs. The state should also implement a health scheme which would exempt orphans from paying the standard medical fees.

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<sup>106</sup> The Orphan Crisis in Zambia, Kelly Michael, S. J, 2006, [www.jctr.org.zm](http://www.jctr.org.zm) (last visited 10 December 2007)

<sup>107</sup> Ibid

On another note as this paper is concerned with economic rights, it is worth mentioning that these rights are not guaranteed by the constitution.<sup>108</sup> This means a citizen can not commence proceedings against the state if it has failed to implement these rights. To some extent this has contributed to the state not providing for these rights to the fullest capacity.

Sadly even though the state and other organizations are obliged to provide educational, health services and shelter, for the orphans and other vulnerable children these economic rights are not enforceable against the state. Once more, although Zambia has taken the important step of ratifying the CRC and other instruments, it is still in the process domesticating these rights in its constitution and other pieces of legislation. Consequently as these rights are not enforceable the state is able evade its progressive obligation to providing for the same claiming it does not have enough funds and resources to provide for economic rights. As a recommendation it may be submitted Zambia should domesticate the economic rights into its constitution so they become enforceable and should enact legislation which specifically deals with the needs and challenges of orphans.

It must be noted that the Constitution of Zambia does not explicitly provide for Economic rights.<sup>109</sup> On the other hand however it expressly provides for Civil and Political rights in its Part Four which contains the Bill of Rights. Though there is mention of a few economic rights in its Directive Principles, the Zambian constitution emphasizes that these rights are not enforceable.<sup>110</sup> The non-enforceability has somewhat contributed to the state placing less importance in providing for these rights sufficiently. Moreover lack of funding cannot really be

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<sup>108</sup> [www.jctr.org.zm](http://www.jctr.org.zm)

<sup>109</sup> Ibid

<sup>110</sup> Ibid

the major obstacle preventing the state fact that Economic rights are not enforceable against the state.

Still on the same note it appears that the Civil and Political rights have been favoured and protected by the constitution because ‘they are less costly’. However in providing for these rights does it mean that the state does not spend a single penny?

In answering the question above it is our submission that indeed funding is required for the implementation of Civil and Political rights. The right to vote for instance is costly as the state spends a lot of money providing for registration of voters, issuing of voter’s cards including the process of voting itself. It therefore follows that the state should re-visit its decision of not guaranteeing the economic rights under the constitution. The state ought to ensure each citizen (including orphans) are given the best health, education and housing facilities according to its resources.

It is worth mentioning that there are some African countries which have made their economic rights enforceable. These include Malawi and South Africa. In these countries the state cannot easily evade the implementing as citizens are entitled to commence proceedings before the courts when their economic rights are infringed.<sup>111</sup>

As mentioned earlier in the paper poverty and the HIV pandemic have affected all children negatively in their enjoyment of the rights. It has been illustrated that with reference to the

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<sup>111</sup> Zambia Economic, Social and Cultural Rights, Why Should These Rights Be In The Next Constitution , 2004 :[www.jctr.org.zm](http://www.jctr.org.zm) :(last visited 14, January 2008)



poverty level in Zambia there are less orphaned children attending school than those not orphaned. Though the government has offered free education, poverty experienced by orphans has caused them not to attend school because they cannot afford uniforms and books for school. The government should put in more effort in providing access to books and uniforms for orphans and other vulnerable children.

Where health is concerned there is a policy that allows children below the age of five free access to medical facilities, this however does not apply for the orphans above five. This means that orphans above the age of five still have to pay same medical fees as those not orphaned. Consequently with the high cost of medication most orphans are stunt in their development due to lack of vaccination, malnutrition, distress.<sup>112</sup> This government should implement policies which enable the orphaned to have access to medical services at lower prices.

Also the UTH (The University Teaching Hospital) does not always have adequate medication and as such patients are expected to buy prescribed medicine from pharmacies this can be rather costly and unaffordable for orphans<sup>113</sup>. As UTH is a governmental institution the state should intervene to assist the hospital in acquiring sufficient medication for the people. Also the conditions of service to the staff should improve to reduce on the brain drain occurring in the country.

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<sup>112</sup> Regional Network for Equity in Health in Central and Southern, 2007, [www.equinet.africa.org](http://www.equinet.africa.org) last visited 10 January 2008)

<sup>113</sup> Ibid

## **4.2 CONCLUSION**

This paper has endeavoured to discuss to what extent the rights of the marginalized are respected. It can be submitted that these rights of the marginalized child have not been implemented to the extent that they should be. It has been observed that for purpose of this essay which focused on economic rights, shown that this is because they are not guaranteed by the Zambian Constitution. Because they are not enforceable, it makes it easy for the state to not place these rights as top priority when drawing its budget. Thus it has been submitted that these rights should be enshrined in the Constitution. Thereafter because orphans are a special group, there should be specific legislation adopted for ensuring their rights are upheld not merely for just being a child but with reference to their needs as orphans.

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