

**Social Impact Assessment (SIA) as a Tool for the Protection of Children's
Socio-Economic Rights**

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ABSTRACT

Environmental degradation in South Africa is one of the pressing human rights challenges facing humanity today. Children suffer a disproportionate share of the burden, as they are still developing and are particularly vulnerable to environmental damage. All over South Africa, children experience the negative causes of environmental degradation, including water shortage, compromised air quality and soil erosion as caused by unsafe management and disposal of toxic and dangerous wastes. The *Constitution of the Republic of South Africa*, 1996 expressly places a duty on the State to ensure that all children have the right to live in an environment that is not harmful to their health and well-being and to ensure that the environment is protected for the benefit of present and future generations. The *National Environmental Management Act* 107 of 1998 was enacted in an attempt to ensure such protection. It provides that everyone (including children) has the right to an environment that is not harmful to his or her health or wellbeing and places their needs at the forefront of concern. The *National Environmental Management Act* contains innovative mechanisms for regulating the conduct of natural and legal persons in South Africa, and one such mechanism is the Environmental Impact Assessment (EIA), a tool used to evaluate the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and health impacts, and, identifying measures to minimise or negate those potential impacts. As EIA is required to take cognisance of *social* consequences, Social Impact Assessment (SIA) gradually became a part of project planning and policy evaluation. This study is concerned with SIA, which is the focus of a fairly broad and relatively new field of study in South Africa. The study investigates the likelihood of making use of SIA to protect the socio-economic rights of children and to ensure that, with the assistance of SIA, South African children will live in a good, healthy environment.

Keywords: Environmental Impact Assessment, Social Impact Assessment, children's socio economic rights

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
AISA	African Institute of South Africa
AJICL	Arizona Journal of International and Comparative Law
BBSEEC	Broad Based Socio-Economic Empowerment Charter
DME	Department of Minerals and Energy
DSD	Department of Social Development
DOJ&CD	Department of Justice and Constitutional Development
EAP	Environmental Assessment Practitioner
EIA	Environmental Impact Assessment
HIV	Human Immunodeficiency Virus
I&AP	Interested and Affected Parties
IAIA	International Association for Impact Assessment
IEM	Integrated Environmental Management
IJCR	International Journal of Children's Rights
IJLF	International Journal of Law and the Family
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NEPA	National Environmental Policy Act
PPP	Public Participation Procedure
SAJHR	South African Journal on Human Rights
SIA	Social Impact Assessment
SLP	Social and Labour Plan
UNCRC	United Nations Convention on the Rights of the Child
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
WHO	World Health Organisation

WRI

World Resource Institute

1. Introduction

In today's society, children are regarded as a uniquely vulnerable group.¹ Their physical characteristics and special emotional and developmental needs are the features from which their vulnerability arises.² When faced with environmental problems, for example, children can be said to be at a disadvantage due to their physique, age and stage of development.³ Adults are presumed to be responsible for themselves and capable of deciding what is in their interest whereas children are presumed to be incomplete human beings who are not fully competent to determine and safe guard their own interests.⁴ To a large extent, the degree of vulnerability of children is determined by the quality and nature of the care and protection they receive.

One of the main duties and responsibilities of parents, as the natural protectors of their children, is to ensure that their children are afforded the necessary care and protection they require for their survival.⁵ However, as the natural protectors of their children, parents may not always succeed fully in providing such protection.⁶ South Africa is subject to a number of natural and manmade risks and hazards which include, amongst others: severe weather events, drought, flooding, extreme hailstorms, winds, earthquakes due to mining activity, and mass events like outbreak of diseases such as meningitis and cholera and epidemics such as tuberculosis and HIV.⁷ The majority of South Africa's population lives in vulnerable conditions due to the nation's high levels of poverty, low standards of living, high levels of unemployment, lack of access to resources, lack of education, environmental degradation and slow economic growth, all of which can be considered factors which influence the ability of a

¹ Nugent 2006 *Public Interest Law Journal* 219.

² Rankin P 2002 "Protecting the Best Interest of the Child; Some Issues and Solutions" 1.

³ Rankin P 2002 "Protecting the Best Interest of the Child; Some Issues and Solutions" 1.

⁴ Goldstein "Beyond the best interests of the child" 33.

⁵ Declaration of the Rights of the Child 1959.

⁶ Hafen 1976 *Brigham Young University Law Review* 625.

⁷ Botha and van Niekerk 2013 *Jamba: Journal of Disaster Risk Studies* 3.

parent to adequately provide the protection required by his or her child or children.⁸ If a parent is unable to suitably care for and protect his or her child then the responsibility is presumed to belong to the State.⁹ The government generally has the power and authority to implement the necessary mechanisms to protect children whose interests are threatened.¹⁰

The socio-economic rights of children in South Africa reflect their basic interests and are entrenched in section 28(1)(c) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution). This provision compels the government to ensure that every child has the right to basic nutrition and shelter and to access to basic health care services and social services.¹¹ In the wider sense the Constitution guarantees a range of socio-economic rights for everyone (including children),¹² and these include the rights of everyone to basic education¹³ and further education; to have access to health care services,¹⁴ social security,¹⁵ sufficient food and water,¹⁶ and adequate housing.¹⁷

Section 28(2) of the Bill of Rights provides that “a child’s best interests are of paramount importance in every matter concerning the child.”¹⁸ The standard of the “best interest of the child” is entrenched in South African statute law by virtue of section 7 of the *Children’s Act* 38 of 2005, hereafter referred to as the Children’s Act. Section 7 “gives flesh”¹⁹ to the “best interests” standard by setting out a long list of factors that must “where relevant” be considered by every decision-maker who takes a decision that may involve or impact upon children.

⁸ Botha and Van Niekerk 2013 *Jamba: Journal of Disaster Risk Studies* 3.

⁹ Hegar 1989 *International Social Work* 110.

¹⁰ Rankin P 2002 “Protecting the Best Interest of the Child; Some Issues and Solutions” 1.

¹¹ Section 28 (1) (c).

¹² Wickeri 2004 “Grootboom’s Legacy: Securing the Right to Access to Adequate Housing in South Africa?” 5.

¹³ Section 27 (1) (a) – (c).

¹⁴ Section 27 (1) (a).

¹⁵ Section 27 (1) (c).

¹⁶ Section 27 (1) (b).

¹⁷ Section 26 (1).

¹⁸ Section 28(2).

¹⁹ *Govender v Moodley* Unreported 4889/2008; 5874/2008 at para 15.

In upholding the best interests of the child, South Africa's Bill of Rights, in section 7(2), obliges the State to respect, protect, promote and fulfil each of the rights set forth therein.²⁰ This section imposes both negative and positive obligations on the State.²¹ The State is, for example, obliged to refrain from violating a child's right to basic health care services (fulfilling the duty to respect), to protect children from third parties violating their right to basic health care services (fulfilling the duty to protect) and to put in place the necessary policies, laws, programmes and services for the fulfilment or realisation of children's right to basic health care services (fulfilling the duty to promote).²²

The idea that decision-makers and others should respect the "best interest of the child"²³ is further recognised at an international level. It is *inter alia* expressed in the Convention on the Rights of the Child (1989)²⁴ and the African Charter on the Rights and Welfare of the Child (1990).²⁵

As already said, children are a uniquely vulnerable group and are therefore more prone to the harmful impacts of environmental hazards.²⁶ A variety of environmental hazards exists in South Africa which include, amongst others, contaminated water, poor hygiene, inadequate sanitation, atmospheric pollution, caused by poor water resource management and infrastructure and by the use of unsafe fuels.²⁷ When children are exposed to an environment that is polluted or degraded, they can suffer severe negative impacts on their health.²⁸ Children in South Africa are often in contact with environmental hazards due to their parents being involved in the rapid urbanisation and industrialisation taking

²⁰ Boezaart "Child Law in South Africa" 291.

²¹ Boezaart "Child Law in South Africa" 291.

²² Boezaart "Child Law in South Africa" 291-292.

²³ Schäfer "Child Law in South Africa: domestic and international perspectives" 154.

²⁴ Article 3(1) refers to the child's best interests as 'a primary consideration'.

²⁵ Article 4(1) provides: "(i) in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

²⁶ Bartlett 1999 *Environment & Urbanization* 65.

²⁷ UNICEF 2011 "Exploring the Impact of Climate Change on Children in South Africa" 6.

²⁸ UNICEF 2011 "Exploring the Impact of Climate Change on Children in South Africa" 6.

place in the country as a whole.²⁹ All of the aforementioned forms of environmental degradation and pollution may create health threats that are particularly devastating to children.³⁰

According to section 24 of the Constitution everyone (including children) has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of present and future generations.³¹ Prior to 1996, the environment, as referred to in section 24, was regarded, in terms of a legal description, as comprising primarily of the biophysical environment, with nature conservation as the main activity.³² This has changed with the social environment now being explicitly included in the legal definition of the environment.³³ The *National Environmental Management Act* 107 of 1998 (NEMA), states that “environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and *social* interests equitably.”³⁴

This reflects the adoption of an anthropocentric approach to environmental management and protection that acknowledges that people (including children) are an integral part of the environment and the legal protection afforded to it.³⁵ Anthropocentrism generally takes a holistic view of humanity in which people are central; the approach rejects the separation of human beings from their environment by focusing on the symbiotic relationship between them.³⁶ It follows that in the South African context, where a development (e.g. an industrial development and/or a mining development) has or may potentially have a negative impact on the biophysical environment, such a development could by implication have a negative impact on the physical and social

²⁹ Bartlett 1999 *Environment & Urbanization* 65.

³⁰ UNICEF 2011 “Exploring the Impact of Climate Change on Children in South Africa” 6.

³¹ Section 24(a) and (b) of the Constitution.

³² Aucamp 2003 “The Role and the Place of Social Impact Assessment” 1.

³³ Aucamp 2003 “The Role and the Place of Social Impact Assessment” 1.

³⁴ Section 2 (2) of NEMA (own emphasis).

³⁵ Amérigo *et al Underlying Dimensions of Ecocentric and Anthropocentric Environmental Beliefs* 98.

³⁶ Glazewski 2000 “Environmental Law” 7.

development of people (including children), therefore potentially infringing a number of their socio-economic rights.

The State has taken numerous legislative and other measures, operating under the dictates and guidance of the environmental right enshrined in section 24 of the Constitution, to provide for a more effective and efficient environmental regime for South Africa.³⁷ At the centre of these efforts was the promulgation of NEMA, South Africa's overarching framework environmental law, which contains innovative mechanisms, *inter alia*, for facilitating co-operative governance, incorporating provisions for precautionary approaches to decision-making and proactively regulating the conduct of natural and legal persons in South Africa, which may detrimentally impact on the environment.³⁸

Environmental Impact Assessment³⁹ (hereinafter referred to as EIA) is one of the mechanisms of NEMA.⁴⁰ EIA is regulated by sections 23 and 24 of NEMA and may be described as a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.⁴¹ It guides administrative agencies in balancing conflicting social values and environmental quality in decision-making and facilitates the precautionary principle provided for in section 2(4)(a)(vii) of the NEMA. A key role of EIA is to predict how a project could harm people, the affected community and their livelihoods. After having predicted the potential impacts,

³⁷ Paterson "Environmental Compliance and Enforcement in South Africa" 1.

³⁸ Paterson "Environmental Compliance and Enforcement in South Africa" 1.

³⁹ Sections 23 and 24 of the *National Environmental Management Act* 107 of 1998.

⁴⁰ EIA is a legislated framework for integrating environmental concerns and sustainability issues in developmental planning, derived from the USA's National Environmental Policy Act (NEPA) of 1969. The first legislated EIA requirements in South Africa came by way of the *Environmental Conservation Act* of 1989. EIA is now governed by sections 23 and 24 of NEMA in combination with detailed Regulations, the most recent of which are founded in GN R982 GG 38282 of 04 December 2014.

⁴¹ Modak 1999 "Conducting environmental impact assessment in developing countries" 364.

the EIA identifies measures to minimise the impacts and suggests ways to improve the project viability.⁴²

With the understanding that EIA involves evaluating inter-related socio-economic, cultural and human-health impacts,⁴³ agency planners and decision makers recognised a need for impact assessment that better identified and addressed the social consequences of projects, programmes and policies.⁴⁴ As a result, Social Impact Assessment (SIA) gradually became a part of project planning and policy evaluation and ultimately a part of the accepted concept of EIA.⁴⁵

SIA is an impact assessment instrument that focuses primarily on the social considerations of a community, rather than on the biophysical environment. SIA is over 40 years old and was introduced by the 1969 legislation of the United States; the *National Environmental Policy Act* (NEPA).⁴⁶ NEPA - like legislation has since been adopted all over the world, including in countries such as Australia, Canada, the Philippines and South Africa, as well as the European Union.⁴⁷ According to the International Association for Impact Assessment (IAIA), “social impact assessment (SIA) includes the process of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions.”⁴⁸ SIA accordingly helps decision-makers to understand how a proposed action (e.g. the development of a new mine) will change the lives of persons (particularly vulnerable persons such as children) in communities.⁴⁹

⁴² Singh 2013 *IJEEM* 227.

⁴³ Singh 2013 *IJEEM* 227.

⁴⁴ The Interorganisational Committee 1993 *Guidelines and Principles for Social Impact Assessment* 1.

⁴⁵ Burdge and Vanclay 1996 *Impact Assessment* 64.

⁴⁶ Burdge and Vanclay 1996 *Impact Assessment* 65.

⁴⁷ Burdge and Vanclay 1996 *Impact Assessment* 66.

⁴⁸ Vancaly 2003 *Impact Assessment and Project Appraisal* 6.

⁴⁹ Burdge 2003 *The Practice of Social Impact Assessment* 85.

Social impacts refer to impacts that are actually experienced by people on physical and/or cognitive levels.⁵⁰ Environmental hazards, as discussed earlier, will potentially have impacts on a person's (including a child's) socio-economic rights. It will potentially impact on a person's health and wellbeing. For instance, an increase in the world's human population could potentially lead to the development of poor hygiene or an inadequate provision of sanitation infrastructure, which could in turn lead to the proliferation of infectious diseases such as cholera, typhoid and hepatitis. SIA therefore identifies the potential issues and concerns arising from the proposed project.⁵¹ Decision-makers are being put in a position to adequately determine suitable measures to minimise or possibly eliminate risks.⁵² For example, with an increase in the population in a community it would be necessary to improve the management of solid waste by building additional ablution blocks within the area. Social impacts therefore affect people's rights to health and wellbeing. Rights must be realised by means of legislative and other measures and SIA may potentially be one such "other measure". Against this background, the main question at hand is to what extent SIA (as part of EIA) could be used for the protection of children's socio-economic rights in South Africa.

In order to accomplish the aim of this study, a literature study of SIA (as part of EIA), examining the theoretical perspectives contained in different sources will follow. Sources such as relevant legislation, decided cases, text books, articles and internet sources will be used to arrive at a conclusion as to whether and how SIA could contribute to the protection of the socio-economic rights of children in South Africa. An initial review of the context of socio-economic rights in South Africa is conducted in Chapter 2, including the socio-economic rights pertaining specifically to children. International measures to protect children's rights will further be examined in Chapter 3. Environmental law in South Africa with a focus on EIA will be analysed in Chapter 4. SIA as a tool for the

⁵⁰ Vanclay 2002 *Environmental Impact Assessment Review* 201.

⁵¹ Vanclay 2002 *Environmental Impact Assessment Review* 201.

⁵² Vanclay 2002 *Environmental Impact Assessment Review* 202.

protection of children's socio-economic rights will be considered in Chapter 5. This Chapter will further focus on children's rights in the mining sector in an attempt to link SIA to children's socio economic rights in South Africa. The study concludes with a critical analysis and recommendations relating to the extent to which SIA could be used as a tool for the protection of children's socio-economic rights in South Africa.

2. Children's socio-economic rights in South Africa

2.1 Introduction

"There can be no keener revelation of a society's soul than the way in which it treats its children." This oft cited statement by former President Nelson Mandela accentuates the importance of the protection of the rights of children in South Africa.⁵³

South Africa established a new legal order with the commencement of the interim Constitution of 1993⁵⁴ on 27 April 1994, and thereafter with the Constitution of the Republic of South Africa of 1996. One of the most vital features of this new constitutional order is the introduction of a comprehensive Bill of Rights which forms part of the Constitution itself.⁵⁵ The Bill of Rights aims to safeguard, protect, promote and advance the rights it incorporates, which are the rights of all people living within the territory of the State, including adults, minors, citizens and aliens alike.⁵⁶ Yet all over South Africa, children experience the negative effects of environmental degradation, including water shortage, compromised air quality, fisheries depletion and soil erosion caused by unsafe management and disposal of toxic wastes and products.⁵⁷ The aim of this chapter is to establish and consider the relevant provisions of the Bill of Rights relating specifically to children's socio-economic rights. The overarching

⁵³ Abrahams and Matthews *Child Rights Manual* 4.

⁵⁴ Act 200 of 1993.

⁵⁵ The Bill of Rights is incorporated in the Constitution as Chapter 2.

⁵⁶ Section 7 (1) of the Constitution specifically states that the Bill of Rights enshrines the rights of all of the people of South Africa.

⁵⁷ South African Human Rights Commission <http://www.sahrc.org.za>.

objective is to ascertain the relevant rights available to children and to use the provisions of such rights, through literature based research, in an attempt to discover ways in which to protect them from the harmful environment in which they live. Children's socio-economic rights as protected on the international level will be investigated and elaborated in the next chapter.

2.2 Protection of children in the Constitution

2.2.1 Socio-economic rights in the Bill of Rights

Socio-economic rights are sometimes referred to as "second generation" human rights.⁵⁸ In general these rights do not require the State to refrain from doing something specific but instead to take positive action.⁵⁹ The inclusion of socio-economic rights in the Constitution was encouraged largely by the recognition of the interrelatedness of human rights and the basic social conditions in which people live.⁶⁰ Socio-economic or "second-generation" rights are considered to be "positive" rights in that they impose obligations on the government to secure for all members of society a basic set of social goods, namely, education, health care, food, water, shelter, access to land and housing.⁶¹

The Bill of Rights contains a wide range of socio-economic rights in sections 26, 27, 28, 29 and 35 of the Constitution. Section 26 entrenches the right of "everyone"⁶² (including children) "to have access to adequate housing,"⁶³ and section 27(1) guarantees the right of everyone "to have access to (a) health care services; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social

⁵⁸ Currie and de Waal *The Bill of Rights Handbook* 567.

⁵⁹ Kleyn and Viljoen *Beginners Guide for Law Students* 247.

⁶⁰ Currie and de Waal *The Bill of Rights Handbook* 567.

⁶¹ Currie and de Waal *The Bill of Rights Handbook* 567.

⁶² "Everyone" includes non-citizens such as permanent residents, as decided in *Khosa and others v Minister of Social Development and Others; Mahlaule and another v Minister of Social Development and others* 2004 (6) BCLR 569 (CC) paras 46-47.

⁶³ Section 26(3) prohibits unfair evictions.

assistance”.⁶⁴ The State is under an obligation to take reasonable legislative and other appropriate measures within its available resources to progressively realise these rights.⁶⁵ What follows is an overview of the socio-economic rights belonging specifically to children in South Africa under the ambit of the Bill of Rights in the Constitution.

2.2.2 *Socio-economic rights belonging to children specifically*

The Constitution recognises that children are especially vulnerable to violations of their rights and that they have specific and unique interests different from those of other groups in society.⁶⁶ As a result, children’s rights and interests deserve special protection, in addition to the protection to which they are entitled to as ordinary inhabitants of South Africa, as explained above.⁶⁷

The Constitution gives effect to this recognition in providing a set of basic socio-economic rights for children within the context of section 28, which is devoted specifically to children’s rights.⁶⁸ These rights provide special protection directed at children’s special needs and interests. Some of the rights in section 28 are rights that children are also entitled to under other provisions of the Constitution.⁶⁹ Section 28(1)(c) confers upon every child the right “to basic nutrition, shelter, basic health care services and social services,” for example.⁷⁰ Since children’s rights to basic nutrition, shelter, basic health care services and social services are not expressly limited by the concept of progressive realisation, human rights experts have interpreted this to mean that the State is under an obligation to immediately ensure a basic level of nutrition for all

⁶⁴ Liebenberg 2004 *Socio-Economic Rights* 81.

⁶⁵ Section 27 (2) of the Constitution.

⁶⁶ Bekink and Brand “Constitutional Protection of Children” 177.

⁶⁷ Bekink and Brand “Constitutional Protection of Children” 177.

⁶⁸ A child is defined in section 28(3) as a person under the age of 18 years.

⁶⁹ An example is s 28(1)(c), which guarantees the right of every child to “... basic nutrition, shelter, basic health care services.” This section embodies an enhanced, more direct and more specific version of everyone’s s 27 rights of access to health-care services, sufficient food and water and social security and their s 26 right of access to adequate housing.

⁷⁰ Liebenberg 2004 *Socio-Economic Rights* 81.

children.⁷¹ Section 28 of the Constitution therefore encompasses a variety of rights that provide solely for the protection of children, which provision is additional to the protection which they enjoy under the remainder of the rights in the Bill of Rights.⁷²

In this context it is important to understand who the duty bearers in terms of the rights are. Broadly speaking, all South Africans are responsible for the wellbeing of children. In terms of South African law, parents are responsible for the care and support of their children, and are bound by law to provide for their basic needs.⁷³ However, where they are unable to do so, perhaps for reasons of poverty, the Constitutional Court has ruled that the State must take on this responsibility.⁷⁴ In two cases before the Constitutional Court, the one dealing with the rights to housing and the other with those to health care services,⁷⁵ the Court has interpreted section 28(1)(c) as a whole, finding that, in the case of children in the care of their families, families bear the primary responsibility for taking care of children's basic needs as set out in section 28(1)(c).⁷⁶ The Court nevertheless made it clear that the State is still under an obligation to support families to care for their children, an obligation which it has to fulfil by providing families with:

...access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. One of the ways in which the State would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.⁷⁷

It must, however, be borne in mind that although the State has an obligation to provide material assistance and support programmes, this obligation must be

⁷¹ De Vos 1995 *SAPR/PL* 233.

⁷² Currie and de Waal *The Bill of Rights Handbook* 600.

⁷³ Bekink & Brand "Constitutional Protection of Children" 174.

⁷⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

⁷⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

⁷⁶ *Grootboom* para 77.

⁷⁷ *Grootboom* para 78.

realised by taking reasonable legislative and other appropriate measures to the maximum extent of the State's available resources.⁷⁸ The Constitution places an overarching obligation on the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.”⁷⁹ The “duty to protect” places a duty on the State to take legislative and other measures to protect vulnerable groups (including children) against violations of their rights by more powerful private parties.⁸⁰

The State’s duty to protect children and their socio-economic rights is considered in the next section of this chapter, with specific reference to the Children’s Act and other legislative measures.

2.3 The state’s legislative measures aimed at giving effect to children’s socio-economic rights

The South African government has in the past few years worked to ensure that the Constitution, legislation as well as international instruments are put in place to provide a better life for children.⁸¹ To give effect to the duties imposed by section 28 of the Constitution the government enacted additional legislation, namely the Children’s Act, which further sets out and unpacks the rights of children and the duties of parents and the State in relation to those rights.

2.3.1 The Children’s Act 38 of 2005

The Children’s Act, was created as a national legislative instrument for the protection of children and their rights.⁸² The Act provides for a range of social services for children and their families. Its aim is to promote children’s

⁷⁸ Proudlock 2014 “South Africa's progress in realising children's rights: A law review” 40.

⁷⁹ Section 7(2).

⁸⁰ Bekink & Brand “Constitutional Protection of Children” 174.

⁸¹ Pillay 2012 <http://www.medioclubsouthafrica.com>.

⁸² Department of Justice and Correctional Services <http://www.justice.gov.za>.

wellbeing, prevent abuse and neglect, and ensure appropriate care for children in need of care and protection.⁸³

The Act sets out general principles to guide the implementation of the Children's Act and all other laws that apply to children. According to the general principles, all proceedings, actions and decisions concerning a child must:

- respect, promote and fulfil children's constitutional rights,⁸⁴ the child's best interests,⁸⁵ and the rights and principles set out in the Children's Act;
- respect the child's dignity and treat children fairly and equitably;⁸⁶
- protect the child from unfair discrimination – including discrimination based on the health status or disability of the child or his or her family;⁸⁷
- recognise the child's need for development – including the need for play and recreational activities that suit the child's age;⁸⁸ and
- recognise a child with a disability and respond to his or her special needs.⁸⁹

The Children's Act is an important legislative instrument for the protection of children and their rights and the provisions therein must always be considered when decisions are made which may, by extension, impact on a child's well-being. Pollard and Rosenberg⁹⁰ define wellbeing as "a state of successful performance throughout the life course integrating physical, cognitive, and socio-emotional function that results in productive activities deemed significant by one's cultural community, fulfilling social relationships, and the ability to transcend moderate psychosocial and environmental problems." This definition recognises a number of critical contextual factors that impact on wellbeing,

⁸³ Mahery, Jamieson and Scott "Children's Act Guide for child and youth care workers" 18.

⁸⁴ Section 6 (1)(2)(a) of the *Children's Act*.

⁸⁵ Section 7 of the *Children's Act*.

⁸⁶ Section 6 of the *Children's Act*.

⁸⁷ Section 6 of the *Children's Act*.

⁸⁸ Section 6 of the *Children's Act*.

⁸⁹ Section 6 of the *Children's Act*.

⁹⁰ Pollard and Rosenberg *The strength based approach to child well being* 13 - 21.

which include culture, social relationships, and the ability to transcend moderate psychosocial and environmental problems. The promotion and protection of “wellbeing” entails that people, including children, must be protected against environmental harm which may impact on their ability to be content and at ease; and as can be understood from Pollard and Rosenberg’s definition of “wellbeing”, it has a spiritual and psychological meaning. This notion of “wellbeing” necessarily includes the way an individual (including children) lives in the built environment, the enjoyment of a sustainable livelihood, environmental benefit-sharing or the cultural and/or religious value that people, including children, attach to natural resources such as forests and lakes.⁹¹ Section 9 of the Act gives paramountcy to the best interests principle in “all matters concerning the care, protection and well-being of a child”,⁹² thus reflecting the overriding prescription in section 28(2) of the Bill of Rights and in international law.⁹³

It is clear from the aforementioned discussion that certain legislative measures have been put in place for the protection of children and that a child’s wellbeing must always be considered when decisions need to be made where children are involved. Although it is tempting to regard the Children's Act as a complete code due to its extensive scope, it should be understood that there are other statutes that also play an important role in relation to children. Some of these statutes are briefly considered below.

2.3.2 Further legislative measures aimed at giving effect to children’s socio-economic rights

A range of policies, laws and programmes is needed to realise socio-economic rights. For each socio-economic right, the policies, laws and programmes make

⁹¹ Du Plessis 2008 *SAJELP* 65.

⁹² Section 9 of the Children’s Act.

⁹³ Schäfer 2013 “Child Law in South Africa: domestic and international perspectives” 55.

up the State's overall plan for the realisation of that right. Within this plan, legislation has a crucial and distinctive role to play.⁹⁴

The adoption of the Constitution and Bill of Rights in 1996 required the State to re-conceptualise and re-write the majority of the existing laws.⁹⁵ This included all the laws governing the delivery of socio-economic goods and services. Laws which impact on children's socio-economic interests and rights which have been promulgated since 1996 include the *South African Schools Act* 84 of 1996,⁹⁶ the *Water Services Act* 108 of 1997,⁹⁷ the *Housing Act* 107 of 1997,⁹⁸ the *National Health Act* 61 of 2003,⁹⁹ and the *Social Assistance Act* 13 of 2004.¹⁰⁰ These laws, together with their regulations, respectively provide the primary legislative frameworks for the realisation and protection of children's rights to education, water (and sanitation), housing, health care services and social assistance.¹⁰¹

The existence of the aforementioned legislative frameworks assists in the long-term project of realising the respective rights provided for in the Constitution, as

⁹⁴ Sections 26(2), 27(2) and 29(1)(b) of the Constitution expressly oblige the State to take 'reasonable legislative and other measures' to give effect to each of the socio-economic rights.

⁹⁵ Proudlock *Children's Socio-Economic Rights* 295.

⁹⁶ This Act ensures that there is a uniform system governing schools. It sets out the laws for the governance and funding of schools. The Act recognises that a new national system for schools is needed to redress past injustices, and it supports the rights of learners, educators and parents and sets out the duties and responsibilities of the State.

⁹⁷ The Act provides a framework for the provision of water supply and sanitation to households in South Africa. It sets out the rights and duties of the State and of water services providers in monitoring water services, and promotes effective water resource management.

⁹⁸ The Act recognises the constitutional right to adequate housing access and clarifies the State's response to this right by setting out the legal plan for the sustainable development of housing.

⁹⁹ The Act aims to realise the rights set out in the Constitution by providing a framework for a structured and quality uniform health system in South Africa. It outlines the laws that govern the national, provincial and local government with regard to health services. The Act clarifies the State's duty to do what it can to address the right to have access to health care services. It recognises that no person may be refused emergency medical treatment and that everyone has the right to an environment that is not harmful to their health.

¹⁰⁰ The Act regulates the administration and payment of social grants. It determines who is eligible for grants and ensures that there are minimum standards for the delivery of social assistance. It also provides for the establishment of a body to monitor the quality of delivery: the Inspectorate for Social Assistance.

¹⁰¹ Proudlock *Children's Socio-Economic Rights* 295.

the roles and responsibilities of government spheres and officials are clearly defined and legislative duties oblige the government and parliament to allocate resources for the implementation of the laws.¹⁰² The primary enabling law has an important role to play within the State's overall plan for the realisation of each socio-economic right, in that it places a statutory obligation on the executive arm of the government to provide the services, programmes, human resources and infrastructure that are needed to give effect to the right.¹⁰³ For example, the Children's Act obliges the provincial Ministers of Social Development to provide and fund prevention and early intervention services (such as home-based care, counselling and diversion) for vulnerable children.¹⁰⁴ The primary enabling law also creates a statutory entitlement to the relevant services. For example, the National Health Act creates a statutory entitlement to free health care services for pregnant women and children under the age of six years.¹⁰⁵

As has been stated earlier, detailed analysis of the aforementioned acts falls beyond the scope of this study, but it is important to understand that a range of existing statutes plays a role in the realisation of children's socio-economic rights.

2.4 Conclusion

This chapter has focused on and discussed the specific rights of children, touching in brief on the general rights of children, under the Constitution. The Constitution provides for an inspiring collection of rights and other protection mechanisms for children, but it provides only a framework and this framework, needs to be filled out by different institutional and legislative mechanisms.

¹⁰² Proudlock *Children's Socio-Economic Rights* 295.

¹⁰³ Proudlock *Children's Socio-Economic Rights* 295.

¹⁰⁴ Act 38 of 2005. Section 146(1) provides that "the MEC for social development must, from money appropriated by the relevant provincial legislature, provide and fund prevention and early intervention programmes for that province."

¹⁰⁵ Act 61 of 2003.

The constitutional rights of children must effectively be realised through legislation, progressive court decisions and policy measures where other means fail. The South African government has been active since the arrival of the new constitutional order in creating legislative and policy measures to realise the constitutional rights of children. What is important to understand, however, is that the legal order, as generated by the courts, and the legislator, on the basis of a progressive Constitution, can have an effect on the lives of children only if supported by the community and all spheres of government acting in unison and being profoundly cognisant of the values and principles underlying the Constitution. It is also important that laws and policies provide for the instrumentation, tools or mechanisms to protect, promote and realise the rights of children, i.e. governance instruments such as impact assessments. These instruments, tools or mechanisms will be discussed in detail later in the study.¹⁰⁶

The next chapter focuses on the scope and status of international children's rights instruments in South Africa, with specific reference to the *United Nations Convention on the Rights of the Child (UNCRC)*¹⁰⁷ and the *African Charter on the Rights and Welfare of the Child (ACRWC)*.¹⁰⁸

3. Children's rights in international law instruments

3.1 Introduction

During the apartheid years the South African government's denial of human rights in its domestic policy was reflected in its foreign policy on international human rights.¹⁰⁹ South Africa's denial and dismissal of human rights at the time was reflected in its limited participation in international human rights instruments. It was only when the National Party government was under the presidency of State President FW de Klerk, that it committed itself to

¹⁰⁶ Refer to chapters 4 and 5.

¹⁰⁷ Signed by South Africa on 29 January 1993 and ratified on 16 June 1995.

¹⁰⁸ Entered into force 29 November 1999, signed by South Africa on 10 October 1997 and ratified on 7 January 2000.

¹⁰⁹ Olivier "The Status of International Children's Rights Instruments in South Africa" 197.

negotiations and political reform. It then formally aligned itself with international human rights standards.¹¹⁰ In 1989 the Department of Foreign Affairs, in conjunction with the South African Law Commission, initiated a comparative study into the compatibility of existing South African law and the most important international human rights instruments.¹¹¹ The outcome of the study showed a large disparity between South African law and international law.¹¹² As a result, major amendments needed to be made to South African law before South Africa could consider becoming a party to the majority of the international human rights instruments.

The UNCRC was one of the first human rights agreements signed by the South African government.¹¹³ The coming into operation of the 1993 Constitution placed the present government in the position to become party to most of the remaining international human rights instruments.

The body of international law pertaining to children's issues comprises a wide range of instruments. These instruments include treaties, which are legally binding, inter-state agreements governed by international law, as well as instruments of "soft law", being statements of general principles accepted by governments, but which carry no legal obligations as such.¹¹⁴ Some of these instruments, both binding and non-binding, deal specifically with children, and others would have an indirect impact on children.¹¹⁵ It is important to consider and understand the importance of children's rights under the dictates of

¹¹⁰ Olivier "The Status of International Children's Rights Instruments in South Africa" 197.

¹¹¹ The following international human rights instruments were studied: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Convention on Economic, Social and Cultural Rights; the International Covenant on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

¹¹² Olivier "The Status of International Children's Rights Instruments in South Africa" 197.

¹¹³ Signature took place on 29 January 1993.

¹¹⁴ Olivier "The Status of International Children's Rights Instruments in South Africa" 197.

¹¹⁵ Olivier "The Status of International Children's Rights Instruments in South Africa" 197.

international law in order to fully realise the importance of the rights of a child in South Africa. The following important, legally binding instruments are examined further in this chapter: the UNCRC and the ACRWC.

The next section of this study turns to stated instruments to distil the rights that afford protection to children in South Africa that are or may be exposed to threats to their health or wellbeing.

3.2 *The United Nations Convention on the Rights of the Child*

The UNCRC was adopted by the United Nations General Assembly on 20 November 1989 and it entered into force on 2 September 1990.¹¹⁶ South Africa ratified the UNCRC in 1995,¹¹⁷ meaning that the country is formally a “State Party” to the treaty and is therefore bound, under international law, to respect the rights and carry out the duties provided in the UNCRC.

The UNCRC is an international treaty that recognises the human rights of children. The rights in the UNCRC are based on what a child¹¹⁸ needs in order to be able to grow, survive, participate and fulfil his or her potential.¹¹⁹ The rights apply equally to all children, regardless of who they are or where they are from. It is the most complete statement of children's rights and is the most widely ratified human rights treaty in history.¹²⁰

States that have ratified the Convention, such as South Africa, are obliged to take legislative, administrative and other steps to give effect to all the rights contained in the Convention, and socio-economic rights in particular must be fulfilled in accordance with the maximum available resources of the State

¹¹⁶ Scott and Alston 2000 *SAJHR* 227.

¹¹⁷ Dugard *International Law: A South African Perspective* 325.

¹¹⁸ In article 1 the Convention defines a child as a person below the age of 18 years unless the national law of a particular country allows a person to attain majority status at a younger age.

¹¹⁹ Scott and Alston 2000 *SAJHR* 227.

¹²⁰ The UN Convention on the Rights of the Child <http://www.unicef.org.uk>.

concerned.¹²¹ The wording of article 4 implies that socio-economic rights depend on the availability of the required resources. Once those resources are available, however, it can be argued that the obligation on the State to fulfil those rights becomes more immediate.¹²²

3.2.1. *The four P's*

All the basic rights of a human rights instrument are contained in the Convention and the common overall classification of all the rights in the Convention is known as the four P's.¹²³ The term "the four P's" refers to the provision of, protection of, participation in and prevention (of the infringement) of rights in the Convention.

"Provision" has to do with the fact that children have to be provided with services to realise their basic needs.¹²⁴ In South Africa, poverty, and especially persistent poverty early in a child's life, puts the healthy development of the child at risk.¹²⁵ For this reason the Convention gives high priority to children's basic socio-economic rights and providing them with services to realise their basic needs.¹²⁶ An example would be the right to the highest attainable standard of health.¹²⁷

"Protection" and "prevention" rights are the protection of children from harmful acts of private or public bodies and the prevention of children from being subject

¹²¹ Article 4 read with General Comment 5 *General Measures of Implementation of the Convention on the Rights of the Child* (arts 4, 42 and 44, para 6) CRC/GC/2003/5.

¹²² McGoldrick 1991 *IJLF* 138.

¹²³ Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" 203.

¹²⁴ Article 24, 26 and 28 of the Convention.

¹²⁵ Rosa and Dutschke 2006 *SAJHR* 232.

¹²⁶ Rosa and Dutschke 2006 *SAJHR* 232.

¹²⁷ Article 24 of the Convention.

to such acts.¹²⁸ An example thereof would be a child's right to privacy and protection against unlawful interference into his or her private life.¹²⁹

"Participation" has to do with allowing children to participate in decisions affecting them,¹³⁰ and the right to freedom of expression.¹³¹ The four P's essentially highlight the four complementary approaches to children's rights. It is not a question of favouring one or two of the "P's" and ignoring the others. All are equally necessary when applied appropriately.¹³²

The breakdown of the Convention in the aforementioned way is useful, as it makes the treaty easy to explain and grasp for both adults and children, a duty which is expressly placed on governments or State Parties by the Convention.¹³³

3.2.2. *General principles of the UNCRC*

There are four important general principles identified by the United Nations Committee on the Rights of the Child, the body monitoring the Convention, and contained in the UNCRC which are fundamental to the implementation of the entire Convention.¹³⁴ These include "the principle of non-discrimination",¹³⁵ "the best interest principle",¹³⁶ the right to "maximum survival and development"¹³⁷ and "respect for the views of the child".¹³⁸

¹²⁸ Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" 204.

¹²⁹ Article 16 of the Convention.

¹³⁰ Article 12 of the Convention.

¹³¹ Article 13 of the Convention.

¹³² Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" 204.

¹³³ Article 42 of the Convention.

¹³⁴ Mahery "The United Nations Convention on the Rights of the Child: maintaining its value in International and South African child law" 315.

¹³⁵ Article 2.

¹³⁶ Article 3.

¹³⁷ Article 6.

¹³⁸ Article 12.

These general principles are considered below in order to establish the weight placed on children's socio-economic rights in South Africa when they are faced with threats to these rights.

3.2.2.1. The principle of non-discrimination

The principle of non-discrimination requires States to "take all appropriate measures to ensure that the child is protected against all forms of discrimination".¹³⁹ Discrimination may take the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education; or the inhibition of the free expression of the child's feelings and views.¹⁴⁰ This principle therefore requires States to actively identify individual children and groups of children that may be at risk of any form of discrimination and to develop special measures to protect them from such discrimination.¹⁴¹ The Committee on the Rights of the Child explains that the principle requires young children, in general, and particular groups of young children, not to be discriminated against on any grounds.¹⁴²

3.2.2.2 The "best interest" principle

In the UNCRC, the "best interest" principle requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."¹⁴³

The principle of the best interest of the child may be said to have two meanings. Firstly, it is a rule of procedure, meaning that whenever a decision is to be taken that will affect a specific child or a group of children, the decision making process must carefully consider the possible impacts (positive or negative) of

¹³⁹ Article 2 of the UNCRC and article 3 of the ACRWC.

¹⁴⁰ Mahery "The United Nations Convention on the Rights of the Child: maintaining its value in International and South African child law" 317.

¹⁴¹ Mahery "The United Nations Convention on the Rights of the Child: maintaining its value in International and South African child law" 316.

¹⁴² General Comment 7 at para 11 (a) and (b).

¹⁴³ Article 3 (1) of the CRC.

the decision on the child or children, and must give this impact primary consideration when weighing the different interests at stake.¹⁴⁴ For instance, when considering the construction of an industrial development (such as a new oil refinery) close to an informal settlement, as a rule of procedure the decision-makers must decide and/or determine whether the effect such development will have on the natural environment will influence the “wellbeing” of the children residing in the informal settlement.

Secondly, State Parties (or decision-makers) have an obligation to put in place mechanisms that will facilitate the consideration of the best interests of the child in decision-making, and must provide legislative measures to ensure that those with the authority to make decisions regarding children consider the “best interests” rule as a matter of procedure.¹⁴⁵ Following from the foregoing analysis, it is evident that the principle of the best interests of the child is one of the most important provisions of the CRC.¹⁴⁶ Decision-makers must therefore seriously consider what the best interest of children are in situations where children’s health and wellbeing are at stake.

3.2.2.3. Life, survival and development

The right to life is without a doubt a fundamental and important right and the inseparable link between life, survival and development is undeniable.¹⁴⁷ In order to realise a child’s right to life the State should put measures in place to protect the child’s life and to prevent the arbitrary deprivation of a child’s life. As examined in chapter 2 of this paper, South Africa has enacted the Children’s Act, which is just one of the measures put in place by the South African government to protect the child’s right to life, survival and development.

¹⁴⁴ Zermatten *The Best Interests of the Child* 7.

¹⁴⁵ Zermatten *The Best Interests of the Child* 7.

¹⁴⁶ Zermatten *The Best Interests of the Child* 7.

¹⁴⁷ Mahery “The United Nations Convention on the Rights of the Child: maintaining its value in International and South African child law” 320.

Article 6 of the Convention refers to “survival rights”.¹⁴⁸ ‘The term “survival rights” covers a child’s right to life and to the needs that are most basic to the child’s existence which include an adequate living standard, shelter, nutrition, and access to medical services.’¹⁴⁹ The codification of the right to survive represents an acknowledgement that individual rights such as the right to health, cannot be protected in isolation. Malnutrition, poverty and overcrowding also have an impact on the survival and development of children.¹⁵⁰

The right to development is also a concept which is considered to be very dynamic.¹⁵¹ The right to development is the right of individuals and groups to participate in, contribute to and enjoy continuous economic, social, political and cultural development in an environment in which all human rights can be realised. It also refers to a child’s health and the development of the individual child to a level which enables the child to benefit from the exercise of all the other rights of the child.¹⁵²

The duty on a State to ensure to the maximum extent possible the survival and development of the child highlights particular aspects of the right to life.¹⁵³ Both the right of the child to enjoy the highest attainable standard of health and the right to enjoy nutritious food, clean drinking water and an adequate standard of living, can be included under the duty of a State to ensure to the maximum extent possible the survival and development of the child.¹⁵⁴ Each of the aforementioned rights is equally important as it would be absurd to provide

¹⁴⁸ Article 6 incorporates the recognition by State Parties that every child has the inherent right to life and that State Parties should ensure to the maximum extent possible the survival and development of the child.

¹⁴⁹ Sloth-Nielson and Mezmur 2009 *IJCR* 10.

¹⁵⁰ Mahery “The United Nations Convention on the Rights of the Child: maintaining its value in International and South African child law” 320.

¹⁵¹ Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” 208.

¹⁵² Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” 208.

¹⁵³ Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” 208.

¹⁵⁴ Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” 209.

access to children to vaccinations against potentially life threatening diseases and then not to provide them with nutritious food and clean drinking water.

3.2.2.4. Respect for the views of the child

Article 12 of the UNCRC provides for the principle of participation. Article 12 reads as follows:

1. State Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. 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 the procedural rules of national law.¹⁵⁵

These provisions contain three main components: the right to express views, the right to do so freely, and the right to have those views given due weight.¹⁵⁶ The right to express views is complemented by the right to receive information.¹⁵⁷ Age and maturity determines the weight to be placed on the views of the child, but this provision does not detract anything from the right of the capable child to express his or her views freely.¹⁵⁸

Several reasons exist for the creation of the right to participation. Firstly, the participation of children conveys the recognition of the child as an active and influential subject and clearly supports the child's right to dignity.¹⁵⁹ Secondly, it enables a distinction between children while recognising each child's specific abilities and needs.¹⁶⁰ Thirdly, this right places children's concerns at the forefront of decisions that affect them.¹⁶¹ Fourthly, the right to participation is a

¹⁵⁵ Article 12 of the UNCRC.

¹⁵⁶ Morag 2014 *Michigan State International Law Review* 539.

¹⁵⁷ Morag 2014 *Michigan State International Law Review* 539.

¹⁵⁸ Stahl 2007 *AJICL* 807.

¹⁵⁹ Morag 2014 *Michigan State International Law Review* 539.

¹⁶⁰ Morag 2014 *Michigan State International Law Review* 539.

¹⁶¹ Morag 2014 *Michigan State International Law Review* 539.

sign of the transition towards the idea of rights suited to children and their evolving capacities.¹⁶²

In essence, the principle of participation therefore requires State Parties to “assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”¹⁶³ The international and regional recognition of children's right to participate in any decision that may directly or indirectly affect them is imperative.¹⁶⁴ If we consider, for example, the instance where industrial development (such as the construction of a new oil refinery) is planned to a human settlement of any kind, it is imperative that the children residing close to such development participate in discussion of the proposed development, thus realising their right to participate in any decision that may directly or indirectly affect them, specifically in instances where their health and wellbeing may be affected.

The right to be heard, as expressed in article 12, extends to individual children as well as to a group of children.¹⁶⁵ The child has the right to participate freely and voluntarily and can therefore not be forced to give his or her opinion or views. It must, however, be understood that although age and maturity determine the weight attached to the views of the child, this does not detract anything from the right of the capable child to express his or her views freely.¹⁶⁶ The South African Constitution gives effect to article 12 by giving children the right to have legal representation, and the right of children to participate in judicial proceedings has already been applied in numerous cases.¹⁶⁷

¹⁶² Morag 2014 *Michigan State International Law Review* 539.

¹⁶³ Article 12 (1) of the UNCRC; Article 4 (2) and 7 of the ACRWC.

¹⁶⁴ Mushunje 2007 *Children, Youth and Environments* 214.

¹⁶⁵ Mahery “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law” *Child Law in South Africa* 321.

¹⁶⁶ Stahl 2007 *AJICL* 803.

¹⁶⁷ For a few such cases see Sloth-Nielson 2008 *SAJHR* 49.

3.2.3. *Concluding remarks*

The Convention will without doubt continue to have an influence on children's rights and children's lives on an international, regional and national level. South Africa can pride itself on the way in which it has embraced the influence that the principles and standards of the Convention have brought to its judicial and legislative systems and processes. The Convention has, since coming into force in 1990, become both a peaceful and a powerful, evolutionary instrument of change.¹⁶⁸

3.3 *The African Charter on the Rights and Welfare of the Child*

The ACRWC was adopted in November 1999 by the Assembly of the Organisation of African Unity.¹⁶⁹ South Africa ratified the ACRWC on 7 January 2000.¹⁷⁰ The ACRWC is a binding international law instrument that identifies the child as a possessor of certain rights and makes it possible for a child to assert those rights in domestic judicial or administrative proceedings.¹⁷¹ The ACRWC was adopted in response to the suggestion that the UNCRC had not addressed important socio-cultural and economic realities of the African experience.¹⁷²

The provisions of the ACRWC have to be viewed against the reality of the position of children in Africa. As stated previously, children are more likely to be the victims of human rights violations than adults are, and African children are more likely to be victims than children on other continents. Human rights violations in Africa caused by phenomena, such as poverty, HIV/AIDS, warfare, famine and harmful cultural practices have a disproportionate impact on Africa's children.¹⁷³

3.3.1 *The substantive provisions in the ACRWC*

¹⁶⁸ Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" 209.

¹⁶⁹ Olowu 2002 *IJCR* 127.

¹⁷⁰ Viljoen 1999 *SALJ* 661.

¹⁷¹ Chirwa 2002 *IJCR* 157.

¹⁷² Olowu 2002 *IJCR* 127.

¹⁷³ Keetharuth S "Major African legal instruments" 3.

The ACRWC is best understood with reference to three crucial principles: the best interests of the child,¹⁷⁴ the principle of non-discrimination and the primacy of the Charter over harmful cultural practices and customs.¹⁷⁵ The “best interests” principle is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children. The ACRWC states in article 4 that in all actions concerning children, the best interests of the child “shall be the primary consideration”. As explained above, under the provisions of the CRC,¹⁷⁶ the principle of non-discrimination entitles children¹⁷⁷ to equal enjoyment of the rights under the Charter, irrespective of who they are and who their parents are.

Substantive rights in the ACRWC are discussed below in five categories: “survival rights”, “community rights”, “self-asserting rights”, “protection rights” and “development rights”. Each of these categories stems from a particular view of the child. A detailed analysis of each of them falls beyond the scope of this study, but, a brief overview of each would be beneficial in the understanding of the substantive rights provided in the ACRWC.

3.3.1.1. Survival rights

The right to life is the basic component of the right to survival and State Parties have the duty to protect the right to life of children.¹⁷⁸

3.3.1.2. Communal rights

Article 18(1) of the ACRWC considers the family as the “natural unit and basis of society.” Children are therefore entitled to enjoy parental care and every child is guaranteed membership of a broader community.¹⁷⁹

¹⁷⁴ Article 4 of the Charter.

¹⁷⁵ On the African Children’s Charter generally, see Arts “The international protection of children’s rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the child” 1992 *African Journal of International and Comparative law* 139.

¹⁷⁶ See para 3.2.2.1 above.

¹⁷⁷ Article 2 of the ACRWC defines a child as “every human being below the age of 18 years”.

¹⁷⁸ Article 5(1) of the ACRWC.

3.3.1.3. Self-asserting rights

The child should be afforded the opportunity to express his or her views about the interpretation of the concept of “the best interest” as the child is regarded as an active participant in proceedings that affect him or her.¹⁸⁰ Children are guaranteed the right to freedom of expression, freedom of association and freedom of thought, conscience and religion.¹⁸¹ It can therefore be said that the child is a self-asserting individual¹⁸² and an opportunity must be given to the child “who is capable of communicating his or her own views” to do so.¹⁸³

3.3.1.4. Protection rights

Children, as previously said, are viewed as vulnerable and in need of protection owing to their position in society generally or arising from their inherent vulnerability. All children are potential targets of physical, sexual and economic abuse, and State Parties should take measures to protect them against all forms of abuse.¹⁸⁴ The obligation on State Parties to realise this right is made subject to the availability of resources.

3.3.1.5. Development rights

Children may be viewed as potential in need of being developed, and a child can develop fully only if he or she is healthy and has access to *inter alia* education. These rights are clearly socio-economic in nature, as they require resource allocation on the part of the State. The right to health care is qualified in that the “best attainable” standard of health care is guaranteed.¹⁸⁵

3.3.2. *Concluding remarks*

¹⁷⁹ Article 19 of the ACRWC.
¹⁸⁰ Viljoen 1999 SALJ 221.
¹⁸¹ Arts 7, 8 and 9 of the ACRWC.
¹⁸² Viljoen 1999 SALJ 221.
¹⁸³ Art 4(2) of the ACRWC.
¹⁸⁴ Arts 15, 16, 27, 28 and 29 of the ACRWC.
¹⁸⁵ Art 14(1) of the ACRWC.

Human rights, including the rights of children, are of great importance in Africa. The Organisation of African Unity is increasingly arguing for the improvement of the human rights record in Africa.¹⁸⁶ The entry into force of the ACRWC must be welcomed, as it improves the level of protection for children in those states that have ratified it.

3.4. Conclusion

Upon examining the provisions of the UNCRC and the ACRWC, it is evident that importance is placed on the right of a child to grow, survive, participate and fulfil his or her potential. It has been emphasised extensively throughout this chapter that South Africa is obliged to take legislative, administrative and other steps to give effect to all the rights contained in the UNCRC and the ACRWC, and to ensure that the socio-economic rights of a child are fulfilled in accordance with the maximum available resources of the state.

We now have a better understanding of the important provisions contained in the Constitution, the Children's Act and the international instruments pertaining to children's rights, and are therefore in a position to consider the measures taken by the South African state to protect the child from an environment that may potentially be harmful to his or her health and wellbeing. The next chapter focuses on the environment and environmental protection, starting off with a brief introduction to environmental law in South Africa and then shifting into analysing how environmental impact assessment (EIA) and social impact assessment (SIA) protect children from an environment that may potentially be harmful to their health and wellbeing.

4. Environmental law in South Africa

4.1 Introduction

¹⁸⁶ Gawanas B "The African Union: Concepts and implementation mechanisms relating to human rights" 2.

Recently the understanding of the damaging effects of environmental pollution on human beings and their quality of life has improved radically. Many people's lives are dominated by concern over their exposure to environmental hazards.¹⁸⁷ Children are more prone than adults to being affected by the harmful effects of exposure to environmental hazards (e.g. contaminated water, poor hygiene and atmospheric pollution).¹⁸⁸ When children are exposed to an environment that is polluted and degraded, their health can suffer severely.¹⁸⁹ As stated earlier, children in South Africa are often in contact with environmental hazards due to the rapid urbanisation and industrialisation taking place in the country.¹⁹⁰ Children living in poor communities are at even greater risk of suffering from the effects of a combination of economic and environmental problems.¹⁹¹ Poor children suffer disproportionately from air, water and ground pollution; diminishing water supplies; inadequate sanitation systems; poorly regulated agricultural and industrial practices; and flooding brought on by deforestation.¹⁹² There is growing awareness of and concern about the connection between children's wellbeing and the state of the natural environment¹⁹³ and of the fact that environmental degradation and pollution create health threats that are particularly devastating to children.¹⁹⁴

In order to address the environmental issues faced by South Africans, including children, legislation has been implemented which is primarily issue-specific. Whilst it is not typical legislation, the Constitution operates as a framework within which South Africa's environmental legislation must operate.¹⁹⁵ The reason for this is that the Constitution contains what is called the "environmental

187 World Health Organisation <http://www.who.int>.

188 World Health Organisation <http://www.who.int>.

189 UNICEF <http://www.unicef.org>.

190 Bartlett 1999 *Environment and Urbanisation* 65.

191 Rogge 2000 *Social Development Issue* 46.

192 WRI, UNEP, UNDP, World Bank 1998 <http://documents.worldbank.org>.

193 Rogge 2000 *Social Development Issue* 46.

194 WRI, UNEP, UNDP, World Bank 1998 <http://documents.worldbank.org>.

195 Kidd *Environmental Law* 20.

right”, and because the Constitution provides for the allocation of responsibilities amongst the different spheres of government in the country.¹⁹⁶

The State has taken numerous legislative and other measures, operating in accordance with the dictates and guidance of the environmental right enshrined in section 24 of the Constitution, to provide for a more effective and efficient environmental regime for South Africa.¹⁹⁷ At the centre of these efforts was the promulgation of NEMA, South Africa’s overarching framework environmental law, which contains innovative mechanisms, *inter alia*, for facilitating co-operative governance, incorporating provisions for precautionary approaches to decision-making and proactively regulating the conduct of natural and legal persons in South Africa which may detrimentally impact on the environment.¹⁹⁸ EIA is one of the mechanisms of NEMA.¹⁹⁹

It should be useful at this juncture to examine in brief the “environmental right” as contained in the Constitution and elaborated on in South Africa’s framework environmental legislation in order to determine how NEMA protects children from an environment that may be potentially harmful to their health and/or well-being.

4.2 The environmental right as contained in the Constitution

In what follows, brief attention is paid to the objectives of the constitutional environmental right and the obligations imposed by it. A concise examination of the environmental right will be provided in order to understand the entitlements that people (especially children as vulnerable human beings) could have in terms of the right.

¹⁹⁶ Kidd *Environmental Law* 20.

¹⁹⁷ Paterson and Kotzé *Environmental Compliance and Enforcement in South Africa* 1.

¹⁹⁸ Paterson and Kotzé *Environmental Compliance and Enforcement in South Africa* 2.

¹⁹⁹ EIA is a legislated framework for integrating environmental concerns and sustainability issues in developmental planning originated from the USA’s National Environmental Policy Act (NEPA) of 1969. The first legislated EIA requirements came by way of the Environmental Conservation Act of 1989.

The foundation was laid for the development of an environmental law jurisprudence in South Africa by the inclusion of an environmental provision in the Bill of Rights chapter of the Constitution.²⁰⁰ It states:

24. Everyone has the right –
 - (a) to an environment that is not harmful to their health or well-being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 is an enforceable (people-centred) environmental right.²⁰¹ The objectives of the right seem to be evident in the meaning of the terms “environment”, “health” and “wellbeing”.²⁰² Each term will be briefly examined below in order to obtain an extended understanding of what the content of the “environmental right” may be.

4.2.1 *Environment*

South Africa has adopted an anthropocentric approach to the definition of the environment,²⁰³ which suggests that the environment should be understood to include the living and non-living natural world in which people live and on which they depend. As explained earlier, the definition further suggests that the notion should not be limited to the non-human natural environment, but must be understood broadly also to embrace the socio-economic and cultural dimensions of the inter-relationships between people (including children) and the natural environment, for example.²⁰⁴

²⁰⁰ Glazewski *Environmental Law in South Africa* 67.

²⁰¹ Kotzé and Du Plessis *Journal for Court Innovation* 159.

²⁰² Kotzé and Du Plessis *Journal for Court Innovation* 159.

²⁰³ As per section 1 of NEMA.

²⁰⁴ Kidd *Environmental Law* 20.

One of the main objectives of section 24 is to ensure the inter-relationship between people and the natural environment in which they live and work. It further ensures that the state of the environment is not or will not become harmful to people's health or their wellbeing.²⁰⁵ This inter-relatedness encompasses a wide range of interests that people have with respect to the natural environment, whether they be of a cultural nature or whether they reflect the need for a provision of the services that the natural environment provides, such as water to drink, air to breathe and food to eat.²⁰⁶

4.2.2 Health

"Health" in the environmental right context refers to the health of individuals or of the public at large. The World Health Organisation (WHO)²⁰⁷ defines being healthy as being in a state of complete physical, mental and social wellbeing, and not merely as the absence of disease or infirmity. Often, an individual's health, including the health of a child, is beyond the control of the State due to the nature of the causes of ill health (i.e. inherited medical conditions, genetics, etc.). In the context of the environmental right, health is relevant to the extent that it can be negatively affected by external factors and causes that are in fact and ultimately within the control of the State.²⁰⁸ Factors such as these include, for example, pollution, exposure to hazardous substances, or the provision of insufficient access to safe drinking water and sanitation.

The way in which the South African government deals with such external factors is the focus of this study and an examination will be made in due course of the measures put in place by the State to ensure that the natural environment, as the space where people live and work, is maintained at a level of quality that is not and will not potentially become harmful to the mental and/or physical health of the people, including children.

²⁰⁵ Du Plessis 2011 *SAJHR* 292.

²⁰⁶ Du Plessis 2011 *SAJHR* 293.

²⁰⁷ World Health Organisation <http://www.who.int/en/>.

²⁰⁸ Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 384.

4.2.3 Wellbeing

Section 24 (a) provides that everyone has a right to an environment that is not harmful to their wellbeing. While it is not easy to formulate an exact legal definition of “wellbeing”, it is suggested that the term implies that it provides for the protection of a person’s welfare, which covers those environmental interests that do not necessarily have health implications.²⁰⁹ For example, section 24 extends protection against the provision of insufficient environmental infrastructure for sanitation or the negative consequences of pollution.²¹⁰

In *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others*²¹¹ (*Hichange*) the High Court examined the scope of the right to environmental “well-being”. *Hichange Investments* was the owner of land adjacent to that of Cape Produce, whose tannery business produced a number of chemical waste products. At issue, *inter alia*, was the interpretation of section 28 of NEMA, which states:

Every person who causes... significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment.²¹²

In interpreting the phrase “significant pollution” the court referred to section 24 and found that the right to wellbeing is relevant in the pollution context in that it encompasses a sense of environmental integrity which entails the idea that the environment ought to be used in a “morally responsible, considered and ethical manner.”²¹³

²⁰⁹ Du Plessis *Fulfilment of South Africa’s Constitutional Environmental Right in the Local Government Sphere* 384.

²¹⁰ Du Plessis 2011 SAJHR 295.

²¹¹ *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 2 SA 393 E.

²¹² *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 2 SA 393 E at 415.

²¹³ *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 2 SA 393 E footnote 73 at 414I.

4.3 Framework environmental legislation: National Environmental Management Act

NEMA is considered to be South Africa's overarching framework environmental law. The definition of “environment” in NEMA means, “the surroundings in which humans exist and are made up of the land, water and atmosphere of the earth; micro-organisms, plant and animal life; any part or combination of the aforementioned and the interrelationship among and between them; and the physical, chemical and aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.”²¹⁴

It is evident that the statutory definition of the “environment” transcends mere ecological interests and goes further to include the socio-economic and cultural dimensions of the inter-relationship between people and the natural environment.²¹⁵ In keeping with the understanding of the aforementioned definition, it is implied that in an instance where the interests of the natural environment have been negatively affected, the socio-economic and cultural interests of the communities living in close proximity to that degraded environment will be negatively affected. The degraded and/or negatively affected environment will ultimately have damaging effects on a person's (including a child's) socio-economic rights and total health and wellbeing. Thus an increase in human population at a new industrial development, could potentially lead to poor hygiene or inadequate sanitation, which could ultimately lead to the spread of infectious diseases such as cholera, typhoid and hepatitis.

Certain environmental governance principles have been developed since the adoption of the Constitution in 1996. As a framework for decision-making, all organs of state need to apply the environmental principles in section 2(1). NEMA contains an extensive list of principles that –

²¹⁴ Section 1 of NEMA.

²¹⁵ Kidd *Environmental Law* 20.

'apply throughout the Republic to the actions of all organs of state that may significantly affect the environment²¹⁶ and –

- (a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
- (b) serve as the general framework within which environmental management and implementation plans must be formulated;
- (c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
- (d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and
- (e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.²¹⁷

The first two principles provide that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably;²¹⁸ and that development must be socially, environmentally and economically sustainable.²¹⁹

Environmental management can be defined as “the management of the interaction and impact of human activities on the natural environment”.²²⁰ Environmental management aims to ensure that ecosystem services and biodiversity are protected and maintained for fair use by future human generations, and also, maintain ecosystem integrity as an end in itself by taking into consideration ethical, economic, and scientific variables.²²¹ Environmental management tries to identify the factors that have a bearing on the conflicts that may rise between meeting the needs of communities of people while simultaneously protecting the environment.²²² Effective management of the interdependencies between ecosystem health, social equality and economic

²¹⁶ Section 2 (1) of NEMA.

²¹⁷ Section 2(1) (a) – (e) of the NEMA.

²¹⁸ Section 2 (2) of NEMA.

²¹⁹ Section 2 (3) of NEMA.

²²⁰ West Coast District Municipality <http://westcoastdm.co.za>.

²²¹ West Coast District Municipality <http://westcoastdm.co.za>.

²²² Lewis 'Managing conflicts in protected areas – IUCN'.

growth will further require a significant change in current governance practices, which need to derive from an integrated and co-operative environmental management approach to governance.²²³

4.3.1 *Integrated Environmental Management in NEMA*

Integrated Environmental Management (IEM) caters for management with respect to the social dimensions of human life as set out in section 2 (2) of NEMA and as entrenched in chapter 5 of NEMA.²²⁴

Section 23 (2)(b) - (f) of NEMA states that the general objectives of IEM are to make provision for the following actions:

- (b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view of minimising negative impacts, maximising benefits and promoting compliance with the principles of environmental management set out in section 2;
- (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
- (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
- (e) ensure the consideration of environmental attributes in management and decision-making which may have significant effect on the environment; and
- (f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.

Section 23 of NEMA therefore addresses the authorisation of activities likely to be detrimental to the environment, such authorisations being considered on the basis of EIA procedures, which will be considered later in this chapter. IEM is designed to ensure that the environmental consequences of development²²⁵ proposals are understood and adequately considered in the planning process.

²²³ West Coast District Municipality <http://westcoastdm.co.za>.

²²⁴ Lindeque *Integrated Environmental Management (IEM) in South Africa* 35.

²²⁵ Development is defined in s 1 of the *Development Facilitation Act* 67 of 1995 as land development which refers to any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes.

IEM is essentially both a philosophy and a formalised approach which acknowledges that all actions taken during the project development must be planned and that no consequences are overlooked or underestimated.²²⁶

Chapter 5 of NEMA, in addition to setting out the general objectives of IEM, provides for implementation in section 24. This section is headed “Environmental Implementation” and provides that in order to give effect to the general objectives of integrated environmental management the potential consequences of or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported to the decision-making authority.²²⁷ The rationale underpinning environmental assessment is that better results are achieved by carefully considering the consequences of an action before implementing it. NEMA, like the Environmental Conservations Act²²⁸ before it, requires specific activities (i.e. “listed” or “specified” activities) to be authorised on the basis of an EIA before work is commenced. The EIA Regulations Listing Notice 1, 2 and 3 of 2014²²⁹ (the latest version of the EIA regulations) enumerate the activities which may not commence without an environmental authorisation.²³⁰ Chapter 5 of NEMA fleshes out the environmental authorisation process, while the EIA regulations provide more detail of the contents of EIAs and the procedures to be followed.

The development of environmental legislation and the emergence of environmental assessment in South Africa has marked a definitive end to an era characterised by the perception of the environment as merely a resource for development. Undeniably, great strides have been made to establish progressive environmental legislation and entrench environmental management

²²⁶ Hugo *The Ecology of Natural Resource Management* 243.

²²⁷ Section 24 (1) of NEMA.

²²⁸ Act 73 of 1989.

²²⁹ EIA regulations promulgated in GN R982 in GG 38282 of 04 December 2014.

²³⁰ All the above Regulations came into effect on 08 December 2014 (with the exception of the Environmental Management Framework Legislation). These Regulations replaced on 30 July 2010 (GN R660 promulgated in GG 33411 of 30 July 2010) and 10 December 2010 (GN R1159 promulgated in GG 33842 of 10 December 2010).

principles in policies and plans, from project level to the most strategic forms of decision-making.²³¹ What follows is an investigation into the process of EIA and how it is used as a mechanism to inform decision making regarding activities which may have a detrimental effect on the environment on the lives of people, including children, living in close proximity to the potentially detrimental development.

4.4 Environmental Impact Assessment

4.4.1 What is environmental impact assessment?

EIA's are a key tool in effective environmental management.²³² Section 24 of the Constitution, as considered earlier in the study, calls on the State to secure to everyone the right to an environment that is not harmful to his/her health and/or wellbeing.²³³ An important component of ensuring a healthy environment is an understanding of the impact of human activities on the environment and the health and wellbeing of those who live in and depend on that environment, including vulnerable beings such as children.²³⁴ EIA's create a system of analysing and reporting on the impact of certain types of steps to enable decision makers to decide what types of activities should and should not be taken to mitigate the impacts of the activity.²³⁵ EIA is the tool that is most commonly utilised across Africa and in most developing countries for the purpose of integrating environmental concerns in development projects.²³⁶

Chapter 5 of NEMA, as discussed in greater detail above, provides for integrated environmental management and promotes “the application of

²³¹ One such stride has recently been taken by the Department of Environmental Affairs, which delivered a notice of intention to publish the Social Infrastructure Guidelines under section 24J of the NEMA. The information contained in the guideline is not intended to constitute legal advice but rather, to serve as a decision support tool related to various legal frameworks that govern development social infrastructure projects.

²³² Barrow “Environmental and Social Impact Assessment: An Introduction” 228.

²³³ Section 24 of the Constitution.

²³⁴ Resnik and Portier “Environmental Health” 59 – 62.

²³⁵ Enviropedia <http://www.enviropedia.com>.

²³⁶ Saidi 2010 *AISA Policy Brief 2*.

appropriate environmental management tools in order to ensure the integrated environmental management of activities.”²³⁷ EIA’s are conducted to analyse and predict the nature and extent of the consequences of a particular activity or development on the environment.²³⁸ As a tool, EIA’s are intended to facilitate informed and environmentally sound decision making. To be an effective tool in decision making and environmental management, EIA’s must predict and evaluate the impact not only on the environment but also on socio-economic conditions and cultural heritage.²³⁹ The EIA must also fully assess alternatives and possible mitigation measures.

4.4.2 *A brief introduction to the EIA process*

EIA’s are to be conducted by environmental assessment practitioners (EAP’s).²⁴⁰ EAP’s are required to determine whether the activity is subject to a basic assessment or a full scoping report.²⁴¹ For all activities the EAP must conduct a public participation procedure (PPP) and must compile a list of all interested and affected parties (I&AP).²⁴² The EAP must then submit the application for an environmental authorisation, the basic assessment or full scoping report and the details of the public participation procedure to the competent authority who must decide whether to grant the environmental authorisation, to grant it subject to various conditions or to refuse the application.²⁴³ This decision must be made within the timeline set out in the EIA regulations. Once the decision has been made, the decision can be amended, suspended and appealed.²⁴⁴ For the purposes of this study, it is not necessary to consider the procedure of EIA in further detail.

4.4.3 *What are the benefits of EIA?*

²³⁷ Section 23 (1) of NEMA.

²³⁸ Enviropedia <http://www.enviropedia.com>.

²³⁹ Barrow “Environmental and Social Impact Assessment: An Introduction” 228.

²⁴⁰ Barrow “Environmental and Social Impact Assessment: An Introduction” 228.

²⁴¹ GN R982 in GG 38282 of 04 December 2014.

²⁴² GN R982 in GG 38282 of 04 December 2014.

²⁴³ GN 603 in GG 33370 of 16 July 2010. Department of Environmental Affairs.

²⁴⁴ GN 603 in GG 33370 of 16 July 2010. Department of Environmental Affairs.

EIA's are important tools which employ an integrated and interlinked approach to evaluating relative costs and benefits in diverse spheres, thus demonstrating the linkages between environmental, social and economic issues.²⁴⁵ EIA's create an opportunity for the competent authority to decide on whether or not an appropriate development opportunity exists.²⁴⁶ EIA has proved to be an effective tool for integrated environmental concerns in project planning and development,²⁴⁷ including the promotion of better planning and design outcomes. These two main benefits of EIA will be considered and discussed below.

4.4.3.1 Integrating environmental concerns in development

For many years there has been growing consideration of the harmful environmental impacts of many development projects. One result of this has been the exertion of concerted efforts to identify specific formulae for avoiding or minimising such environmental impacts, and EIA is the most acclaimed tool in this regard.²⁴⁸ It has superseded tools such as cost-benefit analysis and risk assessment as a more rounded tool that takes into consideration bio-physical and socio-economic environmental factors in assessing the feasibility of proposed projects.²⁴⁹ The EIA has proven to be an effective tool for raising developers' and administrative authorities' awareness of the essential environmental issues that deserve attention.²⁵⁰

South Africa is country plagued by environmental hazards such as contaminated water, poor hygiene and atmospheric pollution, amongst others. When children are exposed to an environment that is polluted or degraded, they

²⁴⁵ United Nations Environment Programme <http://www.unep.org>.

²⁴⁶ United Nations Environment Programme <http://www.unep.org>.

²⁴⁷ Saidi 2010 *AISA Policy Brief 2*.

²⁴⁸ Saidi 2010 *AISA Policy Brief 2*.

²⁴⁹ Hugo, Viljoen & Meeuwis 1997 *The Ecology of Natural Resource Management: The quest for sustainable living*, Pretoria: University of Pretoria.

²⁵⁰ Saidi 2010 *AISA Policy Brief 2*.

can suffer severe negative impacts on their health.²⁵¹ It is therefore vitally important that EIA integrates and raises awareness of any environmental concerns in development before it negatively impacts a person and/or a child's health and wellbeing.

4.4.3.2 EIA promotes better planning and design outcomes

EIA regulations compel development planners to come up with alternatives in terms of project design, scale and location.²⁵² It obliges designers and planners to have a holistic view of any proposed project by considering all possible alternatives or scenarios, and this often results in better planning and design outcomes.²⁵³ For instance, EIA can result in the selection of an improved technology which lowers waste outputs, or an environmentally optimum location for a project (e.g. siting of a particularly noisy and wasteful plant away from residences). It may also encourage proponents to alter the preliminary project design to one that is environmentally friendly (e.g. incineration of waste rather than disposal in a landfill).²⁵⁴ A well-designed, properly located and optimally-scaled project can minimise risks and impacts on the environment and people, and thereby avoid associated costs and remedial treatment or compensation for damage.²⁵⁵

4.5 Conclusion

We have seen that children, a uniquely vulnerable group, are far more prone than adults to being affected by the harmful impacts of exposure to environmental hazards. In an attempt to address the environmental issues faced by South African citizens (including children), it has become highlighted

²⁵¹ UNICEF 2011 "Exploring the Impact of Climate Change on Children in South Africa" 6.

²⁵² Saidi 2010 *AISA Policy Brief 2*.

²⁵³ Department of Environmental Affairs and Tourism *Criteria for determining alternatives in EIA* Series 11.

²⁵⁴ Department of Environmental Affairs and Tourism *Criteria for determining alternatives in EIA* Series 11.

²⁵⁵ Bekhechi & Mercier 2002 *The Legal and Regulatory Framework for Environmental Impact Assessment* Washington: The World Bank.

that the Constitution, operating as a framework within which South Africa's environmental legislation must operate, makes provision for a more effective and efficient environmental regime. It was in accordance with the dictates of the Constitution that NEMA was promulgated and designed to specifically provide for innovative measures for proactively regulating the conduct of natural and legal persons in South Africa. EIA has shown to be a mechanism to be used by decision-makers in order to minimise and/or negate any harmful environmental impacts on a people's daily lives.

The understanding that an inter-relationship between people and the natural environment exists has been emphasised, as has the fact that the environment must be understood to include the living and non-living natural world in which people live and on which they depend. When this inter-relationship is appreciated, it is easy to grasp the concept that people's (including children's) health and wellbeing depends on the natural environment in which they reside and to which they have such a close connection.

This chapter has considered how NEMA attempts to protect this inter-relationship by demanding that project developers analyse the potentially harmful impacts a proposed project may have on the environment and the methods used by the developers to minimise and/or completely negate these harmful impacts. EIA has been shown to be a method used by developers to determine how and to what extent any proposed project may impact on the natural environment, and the ripple effect the impact will have on the livelihoods of the people living in close proximity to that project, taking into consideration their socio-economic rights and cultural heritage. It is therefore apparent that South Africa has made provision to mitigate harmful effects by identifying and implementing measures such as EIA as a tool for integrating environmental concerns in development projects.

Although it is understood that EIA is used as a tool to identify, predict and evaluate potentially harmful environmental concerns, a major subfield of EIA, is

social impact assessment (SIA). SIA will be considered in the following chapter in order to further determine how a child's socio-economic rights can be protected.

5. Social impact assessment as a tool for the protection of children's socio-economic rights

5.1 Introduction

Social considerations are usually considered only late in the process of a proposed activity. By the time a SIA is requested, it is almost a certainty that the activity will proceed.²⁵⁶ In general, little consideration is given to how the development will change the sense of place, or what the specific need that will be created by the activity will be.²⁵⁷ The aim of this study is to take a step towards creating awareness about the social impacts that may be experienced in proposed developments and to bring to fore the effects these may have on people's (especially children's) socio-economic rights. Towards the end of this chapter, focus will be directed to the mining sector to consider how mining corporations may use SIA as a tool for the protection of children's socio economic right.

5.1.1 What is SIA?

SIA is a mechanism that was developed as a specialised branch of EIA and it plays an important role in creating social awareness and bringing home the fact that the environment is not comprised of natural phenomena only, but also includes human nature.²⁵⁸ Numerous experts in the field of SIA have defined the concept of SIA according to their knowledge and understanding thereof.²⁵⁹ The IAIA defines SIA as being "the process of analysing, monitoring and managing the intended and unintended social consequences, both positive and

²⁵⁶ Aucamp "Social impact assessment and housing developments" 1 – 7.

²⁵⁷ Aucamp "Social impact assessment and housing developments" 1 – 7.

²⁵⁸ Aucamp "Social impact assessment and housing developments" 1 – 7.

²⁵⁹ Vanclay 2003 *Assessment and Project Appraisal* 5 – 11.

negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by interventions”.²⁶⁰ Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment.²⁶¹ The Inter-organizational Committee on Principles and Guidelines for Social Impact Assessment²⁶² defines SIA in terms of “efforts to assess, appraise or estimate, in advance, the social consequences that are likely to follow from proposed actions”. The planning and construction of projects²⁶³ can cause many social impacts. Good management is therefore needed to ensure that the benefits of projects are maximised and the negative impacts are avoided or minimised on an ongoing basis during the life of the project.²⁶⁴ SIA is a process that can greatly assist in ensuring the achievement of benefits and the avoidance of harm.

The Inter-organizational Committee on Guidelines and Principles for SIA expands the definition of SIA to include “all social and cultural consequences to human populations of any public or private actions that alter the ways in which people live, work, play, relate to one another, organise to meet their needs, and generally cope as members of society”.²⁶⁵ From a research perspective, SIA is a sub-field of the integrated social sciences that is developing a knowledge base to allow a systematic appraisal of impacts on the day-to-day quality of life of persons and communities whose environment is affected by a proposed policy, plan, programme or project.²⁶⁶ On the level of practice SIA aims to help individuals and communities, as well as government and private-sector organisations, to understand and better anticipate the possible social consequences for human populations and communities of planned and

²⁶⁰ Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

²⁶¹ Aucamp “Social impact assessment and housing developments” 1 – 7.

²⁶² The Interorganizational Committee on Principles and Guidelines for Social Impact Assessment *Impact Assessment and Project Appraisal* 231 – 250.

²⁶³ An example thereof would be the planned construction of new developments such as airports, mines and highways, as well as commercial agriculture and agroforestry developments.

²⁶⁴ Vanclay *et al* 2012 *Impact Assessment and Project Appraisal* 34 – 42.

²⁶⁵ Burge “A conceptual approach to social impact assessment” 93.

²⁶⁶ Burge “A community guide to social impact assessment: Revised edition” 4.

unplanned social change resulting from proposed policies, plans, programmes and projects.²⁶⁷

5.1.2 *The goals of SIA in South Africa*

SIA aims to bring about a more sustainable and equitable ecological, socio-cultural and economic environment.²⁶⁸ It promotes community development and empowerment, capacity building, and the development of social networks and trust.²⁶⁹ The focus of concern in SIA is to ensure better development outcomes, instead of negative, unintended outcomes occur. SIA is a methodology that can be applied to a wide range of planned interventions. SIA accepts that social, economic and biophysical impacts are interconnected. It is therefore apparent that SIA aims to provide a mechanism to incorporate values and local knowledge into decisions that need to be made and that it helps the decision-maker to identify the most beneficial course of action.²⁷⁰

5.1.3 *The benefits of SIA in South Africa*

In general, and according to Burge,²⁷¹ SIA provides a number of benefits:

- It helps people understand how a proposed action will change the lives of persons in communities and regions;
- It alerts planners, decision-makers and project proponents to changes in the primary and secondary zones of influences;
- A well-done SIA provides both qualitative and quantitative indicators of social impacts that can be understood by decision-makers and citizens alike;
- As is the case with all other assessments, SIAs are conducted before an action is taken and/or a decision is made, and therefore becomes a valuable tool in the planning/decision process;

²⁶⁷ Burge 2003 *Impact Assessment and Project Appraisal* 84 -88.

²⁶⁸ IAIA (2003) *SIA: International Principles 2*.

²⁶⁹ IAIA (2003) *SIA: International Principles 2*.

²⁷⁰ Interorganisational Committee on Principles and Guidelines for SIA (2004) 83.

²⁷¹ Burge 2003 *Impact Assessment and Project Appraisal* 84 -88.

- The SIA process includes suggestions for alternatives to the proposed action as well as enhancement and mitigation measures; and
- Many of the assessments of social impacts are carried out in the context of environmental follow-ups and even while the impacts are being generated.²⁷²

5.1.4 What are social impacts?

The IAIA considers that social impacts include all the issues associated with a planned project that affect or concern people (including children), whether directly or indirectly.²⁷³ If we consider specifically what a social impact is, it can be said to be something that is experienced or felt in either a perceptual (cognitive) or a corporeal (bodily and/or physical) sense, at any level, for example by an individual person and/or child, an economic unit (household), a social group, workplace or by a community in general.²⁷⁴ Environmental impacts can also be social impacts because people depend on the environment for their livelihoods and because people may have become attached to the places where the projects are being sited. Impacts on people's health and wellbeing are social impacts,²⁷⁵ considering that social impacts reflect changes to attitudes, values, beliefs and behaviour, and contribute to wellbeing.²⁷⁶

Vanclay²⁷⁷ has listed a number of common social impacts, and states that they are changes to one or more of the following:

- People's ways of life – that is, how they live, work, play and interact with one another on a day-to-day basis;
- Their culture – that is, their shared beliefs, customs, values and language or dialect;

²⁷² Burge 2003 *Impact Assessment and Project Appraisal* 84 -88.

²⁷³ Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

²⁷⁴ Vanclay 2005 *Encyclopaedia of global environmental change*.

²⁷⁵ Winkler et al 2012 *Impact Assessment and Project Appraisal* 43 – 52.

²⁷⁶ Harper "A framework for understanding the social impacts of policy and their effects on wellbeing" 1 – 19.

²⁷⁷ Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

- Their community – its cohesion, stability, character, services and facilities;
- Their political system – the extent to which people are able to participate in decisions that affect their lives, the level of democratisation that is taking place, and the resources provided for this purpose;
- Their environment – the quality of the air and water the people use; the availability of food and the quality of the food they eat; the level of hazard or risk; the dust and noise they are exposed to; the adequacy of the available sanitation; their physical safety; and their access to and control over resources;
- Their health and wellbeing – health is a state of complete physical, mental, social and spiritual well-being and not merely the absence of disease or infirmity;
- Their personal and property rights – particularly whether people are economically affected, or experience personal disadvantage which may include a violation of their civil liberties; and
- Their fear and aspirations – their perceptions about their safety, their fears about the future of their community; and their aspirations for the future and the future of their children.²⁷⁸

Considering the aforementioned, it can be said that, to a large extent, social impacts are socially constructed. They are perceived differently by different people through socially-mediated understandings of what is “normal” or “natural”, or “to be expected” or even “acceptable”.²⁷⁹ A limited view of SIA creates demarcation problems about what are the social impacts to be identified by SIA.²⁸⁰ The SIA community of practitioners considers that all issues that affect people, directly or indirectly, are pertinent to SIA.²⁸¹

5.2 EIA and SIA in South Africa

²⁷⁸ Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

²⁷⁹ Sairinen *Boreal Environmental Research* 509 – 512.

²⁸⁰ Burge 2003 *Impact Assessment and Project Appraisal* 8.

²⁸¹ Vanclay *Impact Assessment and Project Appraisal* 5 – 11.

SIA arose in the 1970's alongside EIA and originally attempted to imitate EIA as much as possible. SIA was often done as part of EIA, usually broadly, but over time the practice of SIA has deviated from that of EIA due to the growing realisation that social issues fundamentally differ from biophysical issues; that the primary task of SIA should be to improve the management of social issues; and that the effectiveness of SIA in terms of achieving better outcomes for affected communities will be maximised by being relevant to the proponents (commercial and public sector developers) who initiate and implement projects.²⁸² The fact that SIA, in South Africa, is fully incorporated into EIA and the fact that the definition of the environment includes people were discussed and proven in the previous chapter.²⁸³ This integration can also be due to the fact that environmental issues and social development cannot be separated in a country like South Africa.²⁸⁴

The above said, Burge,²⁸⁵ Du Pisani and Sandham²⁸⁶ refer to SIA as an "orphan" of an assessment process which has not been fully adopted by the decision-making process, the stated reason being that there is very little consensus about the meaning of SIA, the relationship between EIA and SIA, when an SIA is required, and what it entails. Also there is no research body that can assist and direct practitioners when doing an SIA. For Burge,²⁸⁷ the reason why SIA is often referred to as the "orphan" of assessment is due to the absence of SIA requirements in the early stages of development of SIA and the misplacement of public involvement therein. Du Pisani and Sandham²⁸⁸ identify that one of the main problems of SIA is that it is largely undertaken by persons

²⁸² IAIA *Social Impact Assessment: Guidance for assessing and managing the social impacts of projects*.

²⁸³ See Chapter 4.

²⁸⁴ Du Pisani & Sandham "Assessing the performance of SIA in the EIA context: A case study of South Africa" 712.

²⁸⁵ Burge 2002 "Why is social impact assessment the orphan of the assessment process?" 3.

²⁸⁶ Du Pisani & Sandham "Assessing the performance of SIA in the EIA context: A case study of South Africa" 709.

²⁸⁷ Burge 2002 "Why is social impact assessment the orphan of the assessment process?" 6 – 7.

²⁸⁸ Du Pisani & Sandham "Assessing the performance of SIA in the EIA context: A case study of South Africa" 713.

trained in natural sciences rather than in social sciences. SIA should therefore be undertaken by persons trained in a variety of social sciences; and not EIA practitioners trained in natural sciences. Further problems associated with SIA are that the size and focus of SIA is too narrow and that there are no clear, conceptual frameworks for SIA in South Africa. Barrow²⁸⁹ believes that developers do not adequately understand the potential and scope of SIA.

5.3 Core values and principles of SIA in general

An important feature of SIA is the professional value system that its practitioners uphold. The role of SIA goes beyond the prediction of adverse impacts and the determination of who wins and who loses and further encompasses: empowerment of local people; enhancement of the position of women, minority groups and other disadvantaged members of society; and a focus on poverty reduction.²⁹⁰ The IAIA has articulated the International Principles for Social Impact Assessment²⁹¹ which is a testament to the field's commitment to social justice and human welfare.

According to Vanclay,²⁹² core values are fundamental, ideal-typical, enduring statements of belief that are strongly held and accepted as premises. Principles are "general statements of either a common understanding or an indication as to a course of action about what ought to be done."²⁹³

5.3.1 Core values of SIA in general

SIA has evolved from the limited regulatory-defined role of predicting the negative impacts of specific projects to a discipline focused on development

²⁸⁹ Barrow 2010 "How is environmental conflict addressed by SIA?" 293 - 301.

²⁹⁰ Vanclay *Impact Assessment and the Triple Bottom Line* 33.

²⁹¹ IAIA 2003.

²⁹² Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

²⁹³ Vanclay 2003 *Impact Assessment and Project Appraisal* 5 – 11.

planning to improve the social wellbeing of communities.²⁹⁴ IAIA sets out the core values of SIA. They include the following:²⁹⁵

- Fundamental human rights are equally shared across cultures and gender;
- Laws protect those fundamental human rights and ensure they are equal, fair and available to everyone;
- People have the right to live and work in a healthy environment that promotes a good quality of life;
- The social dimensions of the environment are important aspects of peoples health and ‘the quality of their lives’;
- People and communities have the right to be involved in planned interventions that will have a likely effect on their lives; and
- People’s local knowledge and experience can greatly enhance planned interventions.

Notably, what is central to the core values of SIA is human rights. In fact, each of the core values identified above correlates with the rights set out in Chapter 2 of the Bill of Rights,²⁹⁶ especially the rights investigated in this study.²⁹⁷ Among these, the most prominent and perhaps most essential rights linked to the core values of SIA as set out above are the rights entrenched in sections 24 and 28 of the Constitution. Like the Constitution, the SIA framework is concerned with people’s (including children’s) socio-economic and environmental rights. It seeks to advance the enjoyment and protection of human rights, health and wellbeing by explicitly providing for the rights of people (including children) to live in a healthy environment that promotes a good quality of life.

5.3.2 *Fundamental principles of SIA in general*

²⁹⁴ Vanclay & Esteves *New directions in Social Impact Assessment: Conceptual and Methodological approaches* 356.

²⁹⁵ IAIA (2003) *SIA: International Principles* 5.

²⁹⁶ Chapter 2 of the Constitution.

²⁹⁷ Chapters 2, 3 and 4 of this study.

The aforementioned core values translate into a set of key principles relating to the practice of SIA specifically. SIA principles, according to IAIA,²⁹⁸ can be regarded as general statements of a common understanding or a statement of an indication via IAIA, e.g. an indication of what needs to be done. The SIA principles, according to IAIA,²⁹⁹ include the following: equity considerations should be a fundamental element of impact assessment and of development planning; many of the social impacts of planned interventions can be predicted; planned interventions can be modified to reduce their negative social impacts and enhance their positive impacts and SIA should be an integral part of the development process and involved in all stages from the inception to the follow-up audit.

IAIA³⁰⁰ sets out further principles of SIA which provides that: there should be a focus on socially sustainable development, with SIA contributing to the determination of best development alternatives – SIA (and EIA) have more to offer than just being judges between economic benefit and social cost; in all planned interventions and their assessments, avenues should be developed to build the social and human capital of local communities and to strengthen democratic processes and in all planned interventions, but especially where there are unavoidable impacts, ways to turn impacted people (and children) into beneficiaries should be investigated. The SIA must give due consideration to the alternatives to any planned interventions, but especially in cases where there are likely to be unavoidable impacts; full consideration should be given to the potential mitigation measures of social and environmental impacts, even where the impacted communities may approve the planned intervention and where they may be regarded as beneficiaries and local knowledge and experience and the acknowledgement of different local cultural values should be incorporated in any assessment. There should be no use of violence, harassment, intimidation or undue force in connection with the assessment or

²⁹⁸ IAIA (2003) *SIA: International Principles* 5.

²⁹⁹ IAIA (2003) *SIA: International Principles* 5.

³⁰⁰ IAIA (2003) *SIA: International Principles* 5.

implementation of a planned intervention and developmental processes that infringe upon the human rights of any section of society should not be accepted.

The principles set out above are consistent with the principles contained in chapter 2 of the South African Bill of Rights and NEMA. The necessity for applying these principles derives therefore not only from the need to follow best practice but also from the need to meet South Africa's legal requirements when it comes to assessing the potential impacts of a proposed development on the day-to-day quality of life of persons and communities.³⁰¹

5.4 How SIA can be used to protect children's socio-economic rights in South Africa

In an attempt to link SIA to children's socio-economic rights in South Africa this section will focus on children's rights in the mining sector. Children are unique stakeholders within a society.³⁰² They have the same human rights as adults,³⁰³ although there are rights that specifically apply to children due to their vulnerability and particular needs.³⁰⁴

It was highlighted in chapter 3 of this study, that the UNCRC and ACRWC spell out every child's right to survival; to develop to the fullest; to protection from harmful influences; and to participate fully in cultural and social life. These conventions elaborate the human rights of children, recognising the interdependence of their civil, political, economic, social and cultural rights.³⁰⁵ Children are more vulnerable than adults to harm arising from exposure to large-scale mining and to chemical waste, for example, and such exposure may have lifelong impacts on a child.³⁰⁶ In the context of children living in

³⁰¹ Barbour 2007 *Guideline for involving social assessment specialists in EIA process* 14.

³⁰² Refer to chapter 2.

³⁰³ Refer to chapter 2.

³⁰⁴ UNICEF 2015 *Children's rights and the mining sector* 7.

³⁰⁵ Chapter 3 of this study.

³⁰⁶ UNICEF 2015 *Children's rights and the mining sector* 7.

close proximity to mining operations, the most important concerns include access to education and health services, protection from exposure to harmful waste materials and the provision of a safe living environment.³⁰⁷

The local environmental impacts of mining can include dust, erosion, adverse effects on ecology and biodiversity, and the contamination of soil, ground and surface water by chemicals from the mining process, including arsenic, cyanide, sulphuric acid and heavy metals.³⁰⁸ These local environmental impacts have the potential to cause a variety of diseases in children, including respiratory, skin and eye diseases. Some mining processes require large amounts of water, for example, for cooling and lubricating cutting equipment. This type of mining could deprive communities of safe drinking water, impacting children's right to health, wellbeing and development.³⁰⁹ It is therefore imperative to consider the social impacts of mining activities on the socio-economic environment, affected individuals and communities, and to incorporate SIA into the operational activities of a mine as a management tool.³¹⁰

5.4.1 Importance of SIA in the mining sector

In the past mining development has been typically synonymous with a disregard for the social impacts it may have on the surrounding, affected communities.³¹¹ In many instances, mining companies invest large amounts of capital in African countries (including South Africa) for mining development with a promise to contribute to socio-economic development at a grass root level in mine-affected communities, however, in reality, this is not the case.³¹² In reality, these communities are left worse off than before the mine opened as

³⁰⁷ UNICEF 2015 <http://www.unicef.org>.

³⁰⁸ UNICEF 2015 *Children's rights and the mining sector* 7.

³⁰⁹ UNICEF 2015 *Children's rights and the mining sector* 9.

³¹⁰ Killian "Addressing the social impacts of mining activities on communities for sustainability" 4.

³¹¹ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 22.

³¹² Joyce & MacFarlane 2001 *Mining, Minerals and Sustainable development* 5.

they have usually been bypassed by any development benefits and are often left in a marginalised state.³¹³

As South Africa marks 21 years of democracy, the majority of mine-affected communities still live in polluted environments without sufficient water and adequate housing.³¹⁴ These residents' have been stripped of their constitutional right to live in an environment that is not harmful to their health and wellbeing.³¹⁵ The challenge faced by South Africa is to come up with innovative land uses, closure scenarios and waste management solutions that will promote sustainable development in mine-affected communities.³¹⁶

Legislation in South Africa, such as the *Broad Based Socio-Economic Empowerment Charter* (BBSEEC) for the mining industry and the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA) have confirmed the requirement for mining companies to assess the social impacts of their activities from start to closure, and beyond.³¹⁷ The Department of Minerals & Energy (DME) will not issue a mining right³¹⁸ to the applicant if the mining operation has not considered the social impacts and documented it. A Social and Labour Plan (SLP) also needs to be compiled by the mining company to promote socio-economic development in their affected communities and to mitigate or negate negative social impacts. These are key challenges for the mining industry, which must be incorporated into each mine's planning and operational processes.³¹⁹

SIA focuses on the identification and mitigation of both positive and adverse social impacts that may arise from a proposed development, including the

³¹³ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 22.

³¹⁴ Business Day Live 2014 <http://www.bdlive.co.za>.

³¹⁵ Business Day Live 2014 <http://www.bdlive.co.za>.

³¹⁶ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 22.

³¹⁷ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 22.

³¹⁸ MPRDA Regulation 2002.

³¹⁹ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 22.

establishment of a mine. The main aims of SIA in the mining sector are: to understand the socio-economic characteristics and baseline of the area that will be impacted by a given mining project and how these relate to the dynamics of affected communities and economies; to describe the socio-economic issues that may become problematic if not adequately addressed and to provide sufficient information for the compilation of a realistic and logical SLP.³²⁰

It is understandable from the above, that managing and assessing the social impacts of mining operations by incorporating SIA into its process will ensure that better development outcomes take place, that fundamental human rights are protected, that people (including children) live in a healthy environment, and that people and communities are involved in planned interventions.³²¹ SIA should therefore be used as a management tool in order to ensure that the mining corporation follows best practice and meets South Africa's legal requirements as extensively set out in this study.

5.5 Conclusion

It is evident from the discussion above that SIA can be used as a pre-project assessment tool, in order to determine and identify any social impacts, both negative and positive, which may occur during the project development. SIA is an important tool as it assists planners, project proponents, the impacted population and decision-makers to understand and be able to anticipate the possible social consequences on human populations and communities of proposed project developments or policy changes. SIA offers the opportunity to identify the most affected aspects of the social structure including vulnerable groups (e.g. children), and to propose mitigation measures to avoid or minimise the adverse effects.

³²⁰ Killian "Addressing the social impact of mining activities on communities for sustainability" *Civil Engineering* 23.

³²¹ Kilian "Addressing the social impacts of mining activities on communities for sustainability" 24.

If the developers of a proposed project follow the SIA process correctly by analysing the intended and unintended social consequences of their proposals; by identifying the potential social impacts, both positive and negative; by determining alternatives for minimising any potentially harmful impacts to people (including children's) socio-economic rights; and by monitoring these impacts, SIA can be said to be a tool used for the protection of children's socio-economic rights.

As has been set out earlier in the study,³²² the Constitution specifically provides that every child has a right to basic nutrition, shelter, basic health-care services and social services³²³ (these rights are free from internal limitation in terms of progressive realisation),³²⁴ all of which may be adversely affected if SIA is not utilised and strictly followed in a proposed development. In the event that children's socio-economic rights are not upheld in the SIA process in South Africa, the State would fail its obligation of protecting and promoting children's socio-economic rights and in ensuring that a child's best interest is considered in every proposed project. It is therefore imperative that SIA be used as a tool for the protection of children's socio-economic rights.

6. Conclusion and recommendations

An analysis of children and how they are a uniquely vulnerable group due to their physical characteristics and special emotional and developmental needs was investigated.³²⁵ It was shown that children need to be protected by their parents, and when their parents cannot adequately provide protection, the State is presumed to take on such responsibility. The State therefore has a duty to take legislative and other measures to protect vulnerable groups (including children) against violations of their rights.³²⁶

³²² Chapter 2 of the study.

³²³ Section 28(1)(c) of the Constitution.

³²⁴ Chapter 2 of the study.

³²⁵ Chapter 2 of the study.

³²⁶ Chapter 2 of the study.

South Africa protects children's socio-economic rights in a variety of ways by making use of national and international mechanisms. It was accentuated in chapter 2 of the study that the Constitution guarantees a range of socio-economic rights to everyone (including children), as well as the more specific rights associated with children (section 28 of the Constitution). It was noted that to give effect to the duties imposed by section 28, the government enacted additional legislation, namely the Children's Act.³²⁷ According to the Children's Act, all actions and decisions concerning a child must be made with respect, and such action or decision must promote and fulfil a child's constitutional rights.³²⁸

The study next assessed the international legal framework in order to identify South Africa's duties in terms of international law.³²⁹ South Africa overcame many obstacles before it became party to international human rights instruments. The UNCRC and ACRWC are two of the most important instruments signed by South Africa with respect to protecting children's interests. These instruments emphasise the importance placed on the right of a child to grow, develop and survive. It further emphasises the importance of South Africa's obligation, as a member State to take the necessary legislative, administrative and other legal steps to give effect to all the rights contained in the UNCRC and ACRWC, and that the socio-economic rights of a child be fulfilled in accordance with the maximum available resources of the State.³³⁰

In an attempt to answer the main research question at hand, South Africa's environmental framework legislation was investigated in order to determine whether or not it contained adequate measures to facilitate and guide the State in protecting children from harmful environmental impacts.³³¹ It was found that the Constitution, operating as a framework for South Africa's environmental legislation, made provision for an effective and efficient

³²⁷ Chapter 2 of the study.

³²⁸ Chapter 2 of the study.

³²⁹ Chapter 3 of the study.

³³⁰ Chapter 3 of the study.

³³¹ Chapter 4 of the study.

environmental regime based on the framework statute, the NEMA. It was found that NEMA contains several environmental management principles that provide generic guidance on decisions that will impact on the environment. It was further found that NEMA made provision for EIA and that EIA may be used as a tool for integrating environmental concerns in development projects in order to minimise or negate any harmful impacts on communities living in close proximity to the development projects.³³²

Finally, SIA was considered in the context of South African environmental law to illustrate the role, value and importance of SIA in the country.³³³ It was shown that SIA offers the opportunity to identify the most affected aspects of the social structure, including vulnerable groups (e.g. children), and to propose mitigation measures to avoid or minimise any adverse effects a proposed development project may have on the environment and the people living in close proximity thereto. SIA should serve as one of the tools used for the protection of children's socio-economic rights, in combination with and working within the ambits of the Constitution, the Children's Act, the UNCRC and the ACRWC.

The South African government must ensure that all the rights contained in the aforementioned legislation and legal instruments are adhered to by the respective governmental departments, legal representatives, authorities and decision-makers. The government must ensure that the parties involved in any aspect of a child's rights productively liaise with one another in order to guarantee the successful protection of children's socio-economic rights. For instance, the Department of Social Development (DSD) is the lead department for the Children's Act and it is essential in the implementation of the Children's Act that constant liaising between the DSD and the Department of Justice and Constitutional Development (DOJ&CD) occurs on all levels. This is just one of many instances where parties (or departments) responsible for protecting

³³² Chapter 4 of the study.

³³³ Chapter 5 of the study.

children's rights are obliged to liaise with each other to warrant a child's protection.

The following strong points with respect to the regulatory framework for SIA and the implementation of SIA in relation to the protection of children's rights, were found:

- The UNCRC recognises the human rights of children and that all the rights contained therein apply equally to all children, irrespective of who they are and where they are from. The rights in the UNCRC are based on what a child needs in order to be able to grow, survive, participate and fulfil his or her potential and places an obligation on South Africa, as a member State, to protect and fulfil those rights;³³⁴
- The ACRWC is a binding international law instrument that identifies the child as a possessor of certain rights and makes it possible for a child to assert those rights in domestic judicial or administrative proceedings;³³⁵
- The idea that decision makers and others should respect the best interests of the child is therefore fully recognised at an international level;³³⁶
- The Constitution guarantees a range of socio-economic rights to everyone (including children) and compels the government to ensure that every child has the right to health and wellbeing;³³⁷
- The State has a presumed responsibility to care for and protect children and uphold a child's best interest;³³⁸
- NEMA contains innovative mechanisms for incorporating provisions for taking the precautionary approach to decision-making and proactively

334 Chapter 3 of this study.

335 Chapter 3 of this study.

336 Chapter 3 of this study.

337 Chapters 2 and 4 of this study.

338 Chapter 2 of this study.

regulates the conduct of natural and legal persons in South Africa which may detrimentally impact on the environment;³³⁹

- EIA successfully predicts how a project could harm people and after having predicted the potential impacts, EIA identifies measures to minimise the impacts and suggests ways to improve project viability;³⁴⁰ and
- SIA analyses, monitors and manages the intended and unintended social consequences of a proposed development, both positive and negative, by determining alternatives for minimising any potentially harmful impacts to people's (including children's) socio-economic rights and by monitoring these impacts.³⁴¹

The following weak points with respect to the regulatory framework for SIA and the implementation of SIA in relation to the protection of children's rights, were found:

- There is a general need for a clearer mandate with measurable targets and objectives that require the State to implement tools that specifically protect children from an environment that is harmful to their health and/or wellbeing;³⁴²
- A limited view of SIA creates demarcation problems about what the social impacts to be identified by SIA are;³⁴³
- SIA is often referred to as the "orphan" of assessment due to the absence of SIA requirements in the early stages of SIA;³⁴⁴
- SIA's should preferably be undertaken by persons trained in a variety of social sciences, but in practice the majority of EIA consultants in South

339 Chapter 4 of this study.

340 Chapter 4 of this study.

341 Chapter 5 of this study.

342 Chapter 4 and 5 of this study.

343 Chapter 5 of this study.

344 Chapter 5 of this study.

Africa have a background in natural science rather than in the social sciences;³⁴⁵

- The size and focus of SIA is too narrow, and there are no clear, conceptual frameworks for SIA in South Africa;³⁴⁶ and
- Developers do not adequately understand the potential and scope of SIA in South Africa.³⁴⁷

In the light of the above findings it is recommended that the following actions should be taken:

- A clearer mandate with measurable targets and objectives that require the State to implement measures that specifically protect children from an environment that is harmful to their health and/or well-being must be implemented;
- A wider view of SIA must be created in order to demarcate problems about what the social impacts to be identified by SIA are;
- Comprehensible SIA requirements must be developed in the early stages of SIA so that SIA may no longer be regarded as the “orphan” of assessment;
- SIA’s should be undertaken by persons trained in a variety of social sciences and by persons with a comprehensive background in social sciences rather than a background in natural sciences;
- The size and focus of SIA should be made broader and practitioners should develop a clear, conceptual framework for SIA in South Africa;
- Developers should be trained in order to adequately understand the potential and scope of SIA in South Africa;
- Initiatives should be monitored in order to ensure the health and well-being of children in South Africa;

³⁴⁵ Chapter 5 of this study.

³⁴⁶ Chapter 5 of this study.

³⁴⁷ Chapter 5 of this study.

- Wherever significant social impacts are identified in an EIA, these should be assessed by a SIA specialist; and
- SIA specialists should be used to assess significant social impacts identified in EIA's.

6.1 Closing

Based on a literature review of SIA (as part of EIA) and rooted in the theoretical perspectives contained in different legal sources, this study has shown that children's rights need to be protected. It has been shown that the State needs to take part in an effective response to protecting children's socio-economic rights and to ensure that children live in an environment that is not harmful to their health and wellbeing. More clarity needs to be achieved as to how SIA can be optimally used as a tool for the protection of children's socio-economic rights, and this may require the performance of future research on the subject. There is, for example, not a great deal of case law that touches on the issues surrounding the research question, but perhaps, in due course, with growing developmental plans hitting closer to home, such may become a reality.

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