The legal protection of abandoned infants in South Africa and Namibia

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ABSTRACT

This dissertation examines South Africa's adherence to international principles concerning the protections established for infant abandonment. The advancement of children's rights has progressed significantly from the Geneva Declaration of 1924 to the establishment of binding international frameworks such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The four fundamental principles identified in international child law, under the above two treaties, are considered the guiding principles for the enforcement of children's rights. The four principles are non-discrimination, the best interests of the infant, the right to life, survival and development, and participation in decision-making.

South Africa and Namibia have both ratified these treaties, thereby binding themselves to align and interpret their national laws in accordance with these international principles.

Although South Africa has made significant progress, legislation concerning infant abandonment remains mainly reactive rather than preventative and proactive. Namibia, in contrast, has established a legislative framework that incorporates safe haven provisions, serving both as a proactive and protective measure for vulnerable infants. The Namibian legislation decriminalizes the safe abandonment of infants while simultaneously punishing unsafe abandonment and abusive treatment of infants.

Overall, Namibia demonstrates a greater adherence to international principles, whereas South Africa remains in a reactive stance, concentrating on the effects following abuse.

This study demonstrates that, despite South Africa possessing a comprehensive legislative framework concerning children's rights, some aspects remain only partially addressed. Deficiencies persist in clearly distinguishing between safe and

unsafe abandonment of children. Furthermore, South Africa remains in the legislative stance of criminalising all instances of abandonment.

Keywords

Infant abandonment/ Children's Act/ Convention on the Rights of the Child/ African Charter on the Rights and Welfare of the Child / South Africa / Baby drop box / Child protection / Safe Havens / Safe haven laws / Infants

LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
AU	African Union
Charter	African Charter on the Rights and Welfare of the Child
Charter Committee	African Committee of Experts on the Rights and Welfare of the Child
CILSA	Comparative and International Law Journal of Southern Africa
Convention	Convention on the Rights of the Child
Convention Committee	United Nations Committee on the Rights of the Child
CPA	Criminal Procedure Act 51 of 1977
CRC	Committee on the Rights of the Child
Declaration	Declaration of the Rights of the Child (1959)
DSD	Gauteng Department of Social Development
Fordham Int Law J	Fordham International Law Journal
Geneva Declaration	Declaration of the Rights of the Child (1924)
JPMH	Journal of Psychiatry and Mental Health
NGOs	non-governmental organisations
NPO Act	Nonprofit Organisations Act 71 of 1997
NYLSLR	New York Law School of Law Review
Sacha J Hum Rights	Sacha Journal of Human Rights
SALRC	South African Law Reform Commission
SAPL	South African Public Law

UN	United Nations

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Chapter 1: Introduction to the research

1.1 Introduction

According to the *Oxford English Dictionary*, to abandon (an obsolete term) means "to leave a person or thing completely".[1] The Collins English dictionary describes abandonment using terms such as "deserted" or "forsaken".[2] An infant is defined as a "baby or a very young child" and "a child in the earliest stages of life, baby".[3] The word safe is described as "affording security or protection from harm", and "unsafe" means "not safe, perilous".[4] Given the above definitions, it is safe to say that unsafe infant abandonment refers to the act of leaving behind a baby or very young child in a manner that does not afford security or protection from harm with the intention of deserting that child, thereby placing the infant in a dangerous situation.

Protecting children's rights in South Africa is a crucial part of the nation's human rights framework based on national and international legal instruments. In the aftermath of apartheid, South Africa has made substantial progress in placing great importance on the welfare and safeguarding of children.[5] The *Constitution* enshrines special children's rights of care and protection and socio-economic rights such as education and health.[6] In addition, South Africa has signed and ratified both the *United Nations Convention on the Rights of the Child* (*Convention*) and the *African Charter on the Rights and Welfare of the Child* (*Charter*).[7] Notwithstanding these legal frameworks, numerous children in South Africa continue to encounter difficulties such as poverty, insufficient access to school and healthcare, abuse, and, what is relevant to the present discussion, abandonment.

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1 Louw, Mantzel and Pheiffer *School Dictionary* 1.
2 Sinclair *Concise Dictionary* 1.
3 Louw, Mantzel and Pheiffer *School Dictionary* 310; Sinclair *Concise Dictionary* 745.
4 Sinclair *Concise Dictionary* 1322, 1649.
5 See below Chap 3.
6 *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*).
7 See below Chap 2.

1.2 Background

Dipa has remarked that "A child born in South Africa is at the highest risk of being killed during its first six days of life."[8]

Unsafe infant abandonment, which is the act of leaving behind an infant[9] or young child in an unsafe location with the intention of deserting that infant or child, is a global problem and can lead to severe injuries or the death of babies.[10]

The concept of an "abandoned child" is defined in the *Children's Act*[11] as a child who has obviously been deserted by his/her parent, guardian or caretaker, or who has had no contact with a parent, guardian or caretaker for a period of three months. The *Children's Act* sets out the possible sentence for a person convicted of child abandonment as a fine of R… or imprisonment not exceeding twenty years.[12]

The above approach differs from that taken in certain other jurisdictions, for example, Namibia. Section 227 of the Namibian *Child Care and Protection Act*[13] provides that a person shall not be prosecuted if a child is abandoned in a place of safety and the child shows no signs of abuse or neglect.[14]

An alternative to unsafe infant abandonment is the safe relinquishment of infants at institutions that have established baby savers or baby safe havens.[15] Baby savers and baby safe havens can be referred to as secure, protective, or safe places where parents may leave their babies instead of abandoning them in dangerous settings likely to cause the children harm.[16]

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8 Dipa 2019 *Study finds 65% of abandoned infants are newborns*.
9 Infant in this study will refer to a baby or very young child.
10 Rosenberg 2021 *AHRLJ* 939.
11 Section 1(1) of the *Children's Act* 38 of 2005 (hereinafter the *Children's Act*).
12 Section 305(7) of the *Children's Act*. Section 305 does not set out the precise amount of the fine.
13 *Child Care and Protection Act* 3 of 2015 (hereinafter the *Child Care and Protection Act)*.
14 Section 227(1) of the *Child Care and Protection Act*.
15 Rosenberg 2021 *AHRLJ* 939.
16 Oosthuizen-Erasmus *Caring for abandoned infants* 3.

1.3 Operation of safe infant relinquishment mechanisms

Over the past two decades, numerous organisations in South Africa have implemented "baby saver" facilities to protect infants against abandonment and the risks of infanticide and neonaticide.[17] A baby saver is also known as a baby safe or a baby box and can be described as a wall-mounted box structure, usually found in non-governmental organisations (NGOs) or childcare centres registered as places of safety, where mothers can safely place their infants and activate an alarm to notify the staff that a baby has been left.[18]

Once an infant has been placed in a baby saver, the facility's staff will retrieve and care for the child, without any questions being asked as to the circumstances as to the decision to abandon the infant.[19] The staff will take care of the child to ensure his/her ongoing health and safety.[20] Baby savers can also be independent of childcare centres when the box is linked to free-standing units or crisis pregnancy centres, such as the Helderberg baby saver in the Western Cape.[21]

Door of Hope, a childcare centre located in Johannesburg[22], explains the operation of their baby saver facility as follows: when the staff collects a baby from the baby saver, a health check is performed, which includes weight measurements, vital signs and temperature checks, as well as noting and photographing bruises and scars.[23] If they detect a problem they will transport the infant to the emergency room at the Johannesburg hospital. If the infant is healthy, they will bathe and feed him/her.[24]

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17 Govender *Ethico-legal case for baby hatches* 1. Infanticide is defined as the killing of a child under the age of one, while neonaticide is defined as the killing of a new-born.
18 Rosenberg 2021 *AHRLJ* 939.
19 Rosenberg 2021 *AHRLJ* 939.
20 Rosenberg 2021 *AHRLJ* 939.
21 Rosenberg 2021 *AHRLJ* 939.
22 In this context Door of Hope is used as an illustrative example to demonstrate the typical process of how baby savers work. However, this may not be representative of all organisations with baby saver facilities.
23 Rosenberg *Legal regulation of infant abandonment* 83.
24 Rosenberg *Legal regulation of infant abandonment* 83.

The case will be referred to the relevant child protection agency within twenty-four hours.[25] Child protection agencies such as Abba, Impilo and Child Welfare are registered NGOs which place children in temporary safe care, while providing social and child protection services. This agency will then take the necessary steps for the infant to be placed in permanent care or a family setting.[26]

The child protection agency will approach the relevant children's court to have an entity such as Door of Hope, for example, or another child and youth care centre[27] appointed as the child's registered legal guardian.[28] Door of Hope will place an advertisement, to run for three months, in the local newspaper and a case of abandonment will be initiated at the local police station. If no answer or information is obtained, the police will close the investigation, and the infant will be lawfully eligible for adoption.[29]

As indicated, baby savers in South Africa are operated by NGOs which are subject to state regulation in terms of the *Nonprofit Organisations Act*.[30] This entails amongst other things that the organisation must comply with several requirements such as registration in order to qualify for certain benefits, including financial support from the state.[31] While the organisation may therefore be operating within the general legal framework prescribed for nonprofit organisations, there may be a legislative gap in respect of baby saver facilities which could entail that these facilities are not specifically subject to state monitoring and other regulatory measures.

In contrast to baby savers, safe havens involve the physical handover of an infant by a parent at a designated safe location, typically an institution such as a hospital.[32]

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25 Rosenberg *Legal regulation of infant abandonment* 83.
26 Impilo Child Protection and Adoption Services 2021 *Impilo [Zulu] – to give life*.
27 The definition of a Child and Youth Care Centre is a facility that provides residential care, which includes a therapeutic programme for more than six children outside of their families – see s 191 of the *Children's Act*.
28 Rosenberg *Legal regulation of infant abandonment* 484.
29 Rosenberg *Legal regulation of infant abandonment* 485.
30 *Nonprofit Organisations Act* 71 of 1997 (hereinafter the *NPO Act*)
31 Sections 11, 12 and 13 of the *NPO Act*.
32 Considering Adoption 2025 *Baby Safe Haven Guide*.

This process, which requires direct interaction with staff, typifies baby safe havens.[33] They are distinct from baby savers as the mother's anonymity is not safeguarded when she makes use of a baby safe haven, given that the process requires the personal handover of a baby to a staff member at a registered place of safety, such as a hospital or police station.[34]

1.4 Outline

This study starts with a concise introduction to the pertinent international legal instruments regulating child abandonment. Those examined in this study include the *United Nations Convention on the Rights of the Child*[35] and the *African Charter on the Rights and Welfare of the Child*.[36] Important provisions of the international framework relating to child abandonment will be discussed. These include the so-called four basic principles of the *Convention* and the corresponding provisions of the *Charter.* Crucial provisions to guide the analysis will be discussed by focusing on the best interest principle and the right to survival and development, as these two principles directly link to infant abandonment.[37]

Further to this, South Africa's international obligation to safeguard children against abuse, neglect and maltreatment while in their parents' or any other person's care is explored.[38] As with the *Convention*,[39] the *Charter*[40] prioritises children's best interests in matters concerning them.[41]

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33 Considering Adoption 2025 *Baby Safe Haven Guide*.
34 Rosenberg 2021 *AHRLJ* 939.
35 *Convention on the Rights of the Child* (1989) (hereinafter the *Convention*).
36 *African Charter on the Rights of the* Child (1990) (hereinafter the *Charter*).
37 Articles 2, 3, 6 and 12 of the *Convention*; arts 3, 4 and 5 of the *Charter.*
38 Article 19 of the *Convention.*
39 The *Convention* was ratified by Namibia in 1990 and South Africa in 1995. See United Nations Treaty Collection 2024 *Chapter IV Human Rights*.
40 The *Charter* was ratified by South Africa in 2000 and Namibia in 2004. See African Union 2024 *Ratifications Table*.
41 Article 4 of the *Charter*.

Article 19 of the *Convention* emphasises the importance of adequate protective measures and the required assistance for children in this context.[42] Article 16 of the Charter provides for the protection of children from all forms of abuse, neglect, maltreatment and inhuman or degrading treatment. The *Charter* expressly includes the phrases "torture" and "physical or mental injury or abuse", which are not expressly included in the *Convention*.[43]

The *Convention* recognises the right of a child to a name and nationality but goes further and states that a child will have the right as far as possible to know and be cared for by their parents.[44] The *Charter* likewise emphasises the significance of a child's having a name and nationality and of his/her birth being registered.[45]

Article 20 of the *Convention* affirms the principle that a child is entitled to special protection when deprived of his or her family environment, or where it is determined that remaining in such an environment would not be in the child's best interests.[46] Similarly, article 25 of the *Charter* explicitly mentions children who are separated from their parents and states that these children are entitled to specific protection and care.[47]

Articles 6–9 as well as article 19 of the *Convention* are discussed below, the discussion includes an analysis of the interpretative guidance on the subject

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42 Article 19(1) of the *Convention* states: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

43 Article 16(1) of the *Charter* states: "Parties to the present *Charter* shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child."

44 Article 7 of the *Convention* states: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

45 Article 6 of the *Charter* states: "The right to a name and nationality is integral to a child's identity, legal recognition, and access to rights. Infant abandonment disrupts these fundamental rights, leaving children stateless and vulnerable."

46 Article 20 of the *Convention*.

47 Article 25 of the *Charter.*

provided by the *United Nations Committee on the Rights of the Child* (hereinafter the *Convention Committee*) in its concluding observations in respect of the periodical reports of States Parties.[48] The *African Committee of Experts on the Rights and Welfare of the Child* (hereinafter the *Charter Committee*) has not expressly dealt with safe haven laws in its concluding observations. However, it has addressed related issues such as neglect and abuse, which will be discussed in general.[49]

After the relevant international law has been discussed, the applicable national legislation will be scrutinised. The legal position regarding infant abandonment in South Africa is examined in the third chapter. The discussion will focus on articles 10, 11, 12, 14, and 28 of the *Constitution*, section 305 of the *Children's Act* as read with section 113 of the *General Law Amendment Act*,[50] and sections 239, 258 and 259 of the *Criminal Procedure Act*.[51]

This study will also take a look at some recent developments relating to child abandonment and safe relinquishment in South Africa.[52] These developments, which include proposed amendments to the *Children's Act* and ongoing litigation concerning the legality of baby saver facilities, indicate that this area of law is currently evolving.[53] However, as these processes remain ongoing and no final legal position has been established, the discussion will be limited to a general overview only.[54]

This study then examines the current law in Namibia regulating infant abandonment. Section 227 of the Namibian *Child Care and Protection Act* is

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48 See e.g. CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014).

49 See African Union (AU) African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Concluding Recommendations on the Kenya 1st Periodic Report on the Status of Implementation of the *African Charter on the Rights and Welfare of the Child* (2022).

50 46 of 1935.

51 51 of 1977.

52 See Chap 3 below.

53 See Chap 3 below.

54 See Chap 3 below.

discussed as it provides that a person shall not be prosecuted if a child is abandoned in a place of safety and the child shows no signs of abuse or neglect.[55]

The Namibian Constitution specifically makes provision for the protection of children's rights.[56] In terms of article 15 children have the right to a name and nationality, and to be protected from exploitation, unlawful labour and detention under the age of 16.[57]

This Chapter concludes by examining the degree to which South Africa is adhering to its international human rights and constitutional responsibilities regarding infant abandonment, in comparison to Namibia.

1.5 Problem statement

Infant abandonment is a pressing societal problem in South Africa, influenced by several causes such as poverty, social stigma, the birth of infants with disabilities, shame or pregnancy resulting from rape, and inadequate assistance for vulnerable women.[58] The legal framework governing the process of giving up a child is complex and lacks a clear structure. In South African law, there is no differentiation between the safe and unsafe abandonment of children.[59]

In November 2022 it was reported that over 10,000 infants are abandoned annually in South Africa, with the majority of these infants being found deceased.[60] In 2020 it was reported that the estimate is that only one-third of abandoned children survive.[61] Over the past two decades numerous organisations in South Africa have

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55 Section 227(1) of the *Child Care and Protection Act*.
56 *Constitution of the Republic of Namibia*, 1990 (hereinafter the *Namibian Constitution*).
57 Article 15 of the *Namibian Constitution.*
58 See below para 3.5.
59 See below para 3.4.
60 Moodley 2022 *Over 10 000 Babies are Abandoned*.
61 Vorster 2020 "The truth behind SA's shocking child abandonment statistics".

implemented "baby saver" facilities to protect infants against unsafe abandonment and the risks of infanticide or neonaticide.[62]

Various measures have been adopted in other jurisdictions to provide safer alternatives to unsafe infant abandonment.[63] The legal regulation of baby savers and baby safe havens aims to end the unsafe abandonment of children and infants.[64] As indicated, baby savers in South Africa are operated by NGOs, such NGOs being subject to state regulation in terms of the *NPO Act*. This entails, amongst other things, that the organisation must comply with several requirements, such as registration, to qualify for certain benefits, including financial support from the state.[65] While the organisation may therefore be operating within the general legal framework prescribed for nonprofit organisations, there may be a legislative gap regarding baby saver facilities, which could entail that these facilities are not specifically subject to state monitoring and other regulatory measures.

Due to the lack of legislation around abandonment or safe relinquishment, infants are frequently left behind in unsafe environments. This encompasses instances where infants are abandoned in hazardous locations such as streets, fields or rubbish dumps, exposing them to a significant likelihood of fatality.[66]

Situations in which a child is dangerously abandoned impact specifically on two of the four guiding principles to the *Convention*, namely, that children's best interests are to be a primary consideration in matters affecting them and the child's right to survival and development.[67] The obligations resting on the State to safeguard children against abuse, neglect and maltreatment emphasise the importance of

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62 Govender *Ethico-legal case for baby hatches* 1. Infanticide is defined as the killing of a child under the age of one, while neonaticide is defined as the killing of a new-born.

63 See Chap 4 below for the discussion on how Namibia has implemented measures to provide alternative safe measures.

64 Moodley 2022 *Over 10 000 Babies are Abandoned*.

65 Sections 11, 12 and 13 of the *NPO Act*.

66 See below para 3.2.

67 Articles 3 and 6 of the *Convention*. The other two of the four guiding principles refer to the right to non-discrimination and the child's to have his/her views respected. See arts 2 and 12 of the *Convention*.

providing adequate protective measures and assistance for children.[68] Similarly the *Charter* makes provision for these rights and protections by affirming in article 4(1) that children's best interests shall be the primary consideration in any matter affecting them and in article 5 that every child has the right to life, survival and development.[69]

Unsafe infant abandonment, or the lack of its regulation, in not in the best interest of a child. The *Constitution* stipulates that the child's best interest should take precedence in all matters concerning the child.[70] Furthermore, rights affected under the *Constitution* include a child's right to life, right to dignity, and right to be protected from maltreatment, neglect, or abuse.[71] Section 305 of the *Children's Act* states that a mother[72] shall be guilty of an offence if she abandons her child.[73] As far as this offence is concerned, there is no distinction between safe[74] and unsafe abandonment.[75]

Despite the implementation of safeguards such as "baby safes"[76] in South Africa, two legal challenges persist in connection with the subject of child abandonment. Firstly, unlike Namibia's, the South African legislation does not make specific provision for the legal regulation of facilities that present safe alternatives to the unsafe abandonment of infants. Secondly, without a legal distinction between safe and unsafe abandonment, there is no defence or indemnity against prosecution for mothers who relinquish their infants under safe circumstances.

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68 Article 19 of the *Convention.*
69 Articles 4(1) and 5 of the *Charter.*
70 Section 28(2) of the *Constitution.*
71 Sections 10, 11 and 28 of the *Constitution*.
72 The *Children's Act* does not specifically stipulate "mother"; it refers to "a person", indicating that the offence of abandoning a child can be attributed to any individual, not exclusively mothers.
73 Section 305(3)(b) of the *Children's Act*.
74 Safe/unsafe abandonment could possibly be a factor that would be considered during sentencing.
75 Section 305(3) of the *Children's Act*.
76 A baby safe is a tern equivalent to a baby box or a baby saver.

1.6 Research question

To which extent is South Africa complying with its international human rights and constitutional obligations in respect of infant abandonment when compared to Namibia?

1.7 Research aim and objectives

This study aims to explore the state's legal duties regarding establishing and supporting baby savers and baby safe havens in terms of the *Constitution* and international children's rights and to establish to what extent South Africa's legal framework is complying with these obligations.

The objectives of the study will be –

5.1 To give an overview of the history of infant abandonment in South Africa, along with an explanation of how the absence of safe haven laws impacts on the rights of particular members of society. Additionally, the objectives of baby-saving programmes such as baby savers and safe havens will be explored. Legal regulations surrounding these programmes and their history, operation and significance will be investigated. Furthermore, the cultural and social elements that lead to the need to establish safe haven laws will also be addressed.

5.2 To discuss international human rights law applicable to infant abandonment, baby savers and safe havens. This will include principles from the *Convention* and the *Charter* and how they are relevant to the two jurisdictions.

5.3 To explore the South African legal position, including in terms of the *Constitution*, the *Children's Act*, the *General Law Amendment Act*[77] and the *CPA*.[78] To assess South African legal positions against international law. Furthermore, previous recommendations for law reform in South Africa will be

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77 *General Law Amendment Act* 46 of 1935.
78 *Criminal Procedure Act* 51 of 1977 (hereinafter the *CPA*).

critically analysed to establish whether additional statutory or other measures are essential in South Africa.

5.4 To examine the legal position regarding safe infant abandonment in Namibia, including under its Constitution and relevant legislation (and if there is/has been any law reform in this context), and to compare this with the legal position in South Africa. The South African legal position will also be assessed against international provisions.

5.5 A comparative method will be used in this study in the form of a comparison between the relevant legislation in Namibia and South Africa respectively. Not only will the constitutions of both countries be discussed, but the Namibian *Child Care and Protection Act* will be contrasted with the South African *Children's Act*. The reasons for focussing specifically on Namibia include the fact that these jurisdictions share similarities in relation to legal principles. Furthermore, the two countries have similar Constitutions, including a Bill of Rights. Upon attaining independence Namibia inherited the South African *Children's Act* 33 of 1960, which functioned as a fundamental legislative instrument pertaining to the rights of children. Since 1990 the Namibian Government has worked to strengthen children's rights, with the *Child Care Act* taking effect in 2015, replacing the *Children's Act*.

1.8 Research methods

This study will make use of doctrinal legal research, which will consist of examining international and regional African human rights instruments, the constitutions of South Africa and Namibia, and legislation and the case law of both countries. In addition, secondary sources such as journal articles will be utilised in the analysis of the primary sources.

1.9 Relevance to the Research Unit Law, Justice and Sustainability: Vulnerable societies

Abandoned infants are considered vulnerable due to their lack of critical care and protection, which significantly threatens their health and development. They lack the ability to take care of themselves and are highly prone to experiencing significant health hazards or even mortality when left without care. Moreover, the experience of being abandoned could give rise to enduring emotional and psychological problems. Exploring safe haven laws in South Africa is crucial. Legislation is essential to control protective measures and address the serious implications of infant abandonment.

Chapter 2: International law applicable to the abandonment of children in South Africa

2.1 Introduction

The evolution of acknowledging children's rights began in 1924 when the League of Nations[79] adopted the *Declaration of the Rights of the Child (Geneva Declaration)*,[80] which imposed certain duties on parents and aimed at safeguarding and promoting children's rights.[81]

In 1959, then, the United Nations adopted "its" *Declaration of the Rights of the Child*[82] when it became evident that the care for children stretched beyond their protection as envisaged in the *Geneva Declaration*, which regarded children in need of protection rather than as having rights.[83]

Children's civil, political, economic, social, and cultural rights were given hard law status in 1989 when the *Convention* was adopted.[84] The *Convention* encompasses a complete set of rights for children, including rights to self-determination and protective rights.[85] This *Convention* acknowledges and aims to guarantee substantial and procedural rights, making it perhaps the most extensive human rights instrument in effect under the United Nations.[86]

Several African nations have expressed dissatisfaction with the *Convention* in that it does not adequately address the particular needs of Africa.[87] The concerns

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79 The League of Nations later "became" the United Nations. See Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 47.

80 *Declaration of the Rights of the Child* (1924) (hereinafter the *Geneva Declaration*). See Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 47.

81 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 47; Mkandawire *The balance between child autonomy and parental autonomy* 20.

82 *Declaration of the Rights of the Child* (1959) (hereinafter the *Declaration*).

83 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 47.

84 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 48.

85 Gal *Victims to Partners* 11.

86 Levesque 1995 *Fordham International Law Journal* 832.

87 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 50. Notably, just four Northern African States participated in the first drafting process of the *Convention*. Consequently, African states had challenges expressing their concerns and situations. See Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 50.

encompassed issues such as the dire circumstances of children living under apartheid, the challenges faced by African girls, the responsibilities and obligations of the community, and the significance of the extended family in the development of children.[88]

In response to the aforementioned discontent, the African Union adopted the Charter in 1990. It became effective in 1999.[89] The proactive functions of the *Charter Committee* are highlighted in article 42 of the *Charter*, which requires it to monitor state compliance and guarantee effective implementation in addition to promoting rights.

Following South Africa's signing and ratification of the *Convention*[90] and the *Charter*[91], the government was obliged to meticulously analyse its laws and administrative procedures to guarantee adherence to the stipulations specified in both instruments.[92] This chapter will examine South Africa's responsibility to implement international standards into national legislation in order to ensure the protection of children against neglect, abuse and abandonment.

Additionally, this chapter will analyse other important aspects related to family life and the protection of children as specified in the *Convention* and *Charter*. Furthermore, when discussing the child's best interest, the focus will be on *General Comment* No 14 of 2013 and its principles regarding child abandonment. Finally, this chapter will examine the *Convention Committee's* perspective on "baby-hatches" and what they mean in the context of children's rights. Although the *Charter Committee* has not specifically addressed the use of safe haven laws, the *Charter Committee's* view regarding child neglect will also be discussed.

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88 Kaime 2009 *AJLS* 131.
89 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 50.
90 South Africa signed the *Convention* in 1993 and ratified it on 16th June 1995.
91 South Africa signed the *Charter* in 1997 and ratified it on the 7th of January 2000.
92 Memzur 2008 *SAPL* 15.

2.2 Basic principles

The *Convention* has been interpreted as highlighting four articles as guiding principles, which are to serve as a blueprint for its implementation.[93] The right to non-discrimination,[94] the right to life, survival, and development, [95] the best interest of the child,[96] and meaningfully engaging with children and respecting their views[97] are the four guiding principles highlighted in the *Convention*.[98] The Charter also highlights the above-mentioned rights as the four principles which act as pillars of the Charter.[99]

2.2.1 Non-discrimination principle

Article 2 of the *Convention* establishes the right to equal treatment and the primary principle of non-discrimination.[100] It guarantees that all children are entitled to their rights, as outlined in the *Convention*, without discrimination, and that all groups of children should be treated equally.[101] Equitable treatment does not always imply that all children should receive the same care, freedom or support.[102] As stated by Gal:" To achieve substantive equality, a legal system has to be sensitive to the

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93 Gal *Victims to Partners* 29.

94 Article 2(1) of the *Convention* states: "States Parties shall respect and ensure the rights set forth in the present *Convention* to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

95 Article 6(1) of the *Convention* states: "States Parties recognize that every child has the inherent right to life."

96 Article 3(1) of the *Convention* states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

97 Article 12(1) of the *Convention* states: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child 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."

98 Articles 2, 3, 6 and 12 of the *Convention*.

99 Articles 3, 4(1), 4(2), 5 of the *Charter*.

100 Article 2 of the *Convention*.

101 Article 2 of the *Convention*.

102 Gal *Victims to Partners* 30.

inequalities of children, and provide them with the required means to overcome these inequalities as much as possible, in order to provide all children equal opportunities."[103]

The *Convention* upholds fair and meaningful equality, ensuring that children are treated similarly while considering their unique circumstances, needs and skills.[104] Article 2 also obliges the state to ensure appropriate steps are taken to prevent discrimination against children.[105] Authors have proposed that the government address the issue of discrimination by examining legislation, promoting knowledge of children's rights, and implementing steps to mitigate inequality.[106]

Like the *Convention,* article 3 of the *Charter* states that all children are entitled to the rights outlined in the *Charter*, regardless of various listed grounds of distinction, including their parents' or legal guardians' status.[107] Article 3 does not expressly identify the state as the duty-bearer, indicating that duties may also apply to individuals.[108]

The key distinction between the *Convention* and the *Charter* is that the *Charter* explicitly incorporates the concept of non-discrimination based on "fortune".[109] This incorporation into the discussion of discrimination is considered highly pertinent given the significant socio-economic inequalities that the continent experiences.[110]

Based on the information provided, it is evident that all children, even those who have been abandoned, are entitled to all the rights outlined in the *Convention* and the *Charter* without any form of discrimination.

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103 Gal *Victims to Partners* 30.
104 Gal *Victims to Partners* 31.
105 Article 2 of the *Convention*.
106 Mkandawire *The balance between child autonomy and parental autonomy* 25–26.
107 Article 3 of the *Charter*.
108 Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights* 50.
109 Article 3 of the *Charter*.
110 Sloth-Nielsen "The African *Charter* on the Rights and Welfare of the Child" 429.

2.2.2 Best interest principle

The second principle discussed is the best interest principle outlined in article 3 of the *Convention* and article 4 of the *Charter*.[111] The *Convention* assures us that a child's best interest should be considered as "a primary consideration" in all matters affecting a child.[112] The wording of the principle in the *Convention* does not entail that the best interests are to be the only factor to be considered, but it does view the best interests as a paramount factor.[113] In contrast, the *Charter* uses somewhat different language, stating that the child's best interests will be "the primary consideration" instead of "a primary consideration".[114] This demonstrates the *Charter*'s heightened focus on advocating children's rights.[115]

What the child's best interest are, are not fixed in its content but remains a flexible and adaptable process.[116] It must therefore be concretely established in each individual case, with the consideration given to the child's personal context, particular circumstances and specific needs.[117]

The *Convention Committee* confirms that the determination of a child's best interests is not a fixed process and can be a "flexible and adaptable" concept.[118] A child's best interest must therefore be evaluated and established through an extensive analysis of each instance, and while assessing what is best for a child individually, careful consideration should be given to the child's unique circumstances.[119] Conversely, in the case of collective decision-making, the specific circumstances of a particular group of children will be considered.[120] *General Comment* No 14 of the *Convention Committee* provides a comprehensive legal

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111 Article 3 of the *Convention*; art 4 of the *Charter*.
112 Article 3 of the *Convention.*
113 Article 3 of the *Convention;* Mkandawire *The balance between child autonomy and parental autonomy* 27.
114 Memzur 2008 *SAPL* 15.
115 Memzur 2008 *SAPL* 15.
116 Skelton A 2019 De Jure 564.
117 Skelton A 2019 De Jure 564.
118 CRC *General Comment* No 14 para 32.
119 CRC *General Comment* No 14 para 32.
120 CRC *General Comment* No 14 para 32. Assessment is conducted in both scenarios, considering the rights specified in the *Convention* and its Optional Protocols.

interpretation of article 3. The *Convention's* formulation indicates that the concept of "primary consideration" involves considering a child's best interest in a distinct manner compared to other considerations.[121]

To fully recognise the *Convention* as a whole, all rights and underlying principles should be realised.[122] This entails that the other three basic principles should also be considered to determine the best interest of a child in a certain situation or the best interest of children in a group.[123] *General Comment* 14 also links the other three general principles with the best interest principle.[124]

It states that the right to non-discrimination links to the best interest principle by requiring states to take proactive measures, which will require positive measures to promote and strengthen real inequality.[125] The child's entitlement to life, survival, and growth is closely linked to the child's best interest, as the former imposes a duty on states to create an environment that respects human dignity and ensures holistic development while prioritising the best interests of each child and acknowledging the right to life, survival and development.[126] It is crucial to consider that the principle of the child's right to be heard must also be applied to ascertain the child's best interests.[127] Article 3 strengthens the effectiveness of article 12 as the two articles have complementary roles.[128] Article 3 requires realising a child's best interest, and article 12 provides for hearing children's views to determine their best interests.[129]

The above reflects how the best interest principal links with other principles under the *Convention*, but there can also be a conflict between the rights. It is stated that when there is a conflict between a child's best interests and other rights, and it is

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121 CRC *General Comment* No 14 para 37.
122 Mkandawire *The balance between child autonomy and parental autonomy* 27.
123 Mkandawire *The balance between child autonomy and parental autonomy* 27.
124 CRC *General Comment* No 14 paras 41–43.
125 CRC *General Comment* No 14 para 41.
126 CRC *General Comment* No 14 para 42.
127 CRC *General Comment* No 14 para 43.
128 CRC *General Comment* No 14 para 43.
129 CRC *General Comment* No 14 para 43.

impossible to find a balance between all rights, decision-makers will evaluate the many rights involved while simultaneously prioritising and assigning significant importance to the child's best interests.[130]

It is clear that the best interest principle not only addresses the well-being of children but also obliges state parties to prioritise the child's best interests consistently.[131] *General Comment* 14 suggests that while making decisions, those in authority should examine certain factors relevant to evaluating what is in the best interests of a child.[132] Considering the elements set out, it is evident that a few directly apply to the abandonment of children.[133] The factors encompassed in this context are: the preservation of the family environment and maintaining relations; the care, protection, and safety of the child; the child's situation and vulnerability and the child's right to health.[134]

The act of abandoning a child in an unsafe manner frequently leads to substantial injury to the child's physical and mental health. It is crucial to recognise the significant connection between the best interests of a child and unsafe abandonment. In all situations determining the best interest of children, the State has a duty to ensure protection and care, which are essential to a child's well-being, and to interpret this principle broadly and without any limitations.[135] *General Comment* 14 states in this sense that:

> The terms 'protection and care' must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as 'to protect the child from harm'), but rather in relation to the comprehensive ideal of ensuring the child's 'well-being' and development. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.[136]

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130 CRC *General Comment* No 14 para 9.
131 Gal *Victims to Partners* 32.
132 CRC *General Comment* No 14 para 52.
133 CRC *General Comment* No 14 paras 49–51.
134 CRC *General Comment* No 14 paras 53–78.
135 CRC *General Comment* No 14 para 71.
136 CRC *General Comment* No 14 para 71.

Addressing the imprecise and limiting laws on child abandonment in South Africa should establish a regulatory structure for childcare organisations to expand the use of baby safes throughout the country.

2.2.3 Right to life, survival and development

Article 6 of the *Convention* and article 5 of the *Charter* guarantee a child's right to life and impose on the state the duty to ensure the child's survival and development to the greatest possible degree.[137] The right to life is mostly consistent across the two international treaties, with the *Charter* including an additional provision on the death sentence.[138] The *Charter* explicitly acknowledges a child's entitlement to be exempt from receiving the death penalty as a punishment.[139] Article 5 of the *Charter* in effect requires a range of measures to fight illness and death in infants and children and actions during the early years to maximise the child's potential for growth and progress.[140] Certain types of child victimisation can have severe consequences for children, particularly when the perpetrator is a parent.[141] Article 14 of the *Charter* on the right to health clearly requires the state to take measures to decrease the rate of infant and child mortality.[142]

The act of unsafely abandoning an infant jeopardises the child's fundamental right to survival and development. Hence, both the family and society bear obligations and duties towards a vulnerable child who is at risk of being abandoned. Article 5[143] of the *Convention* outlines the relationship between the state, the family and the child by requiring states to uphold the obligations, entitlements and responsibilities of parents or the designated carer to provide guidance to their children in the

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137 Article 6 of the *Convention*; art 5 of the *Charter*.
138 Article 6 of the *Convention*; art 5 of the *Charter*.
139 Article 5(3) of the *Charter.*
140 Sloth-Nielsen "The African *Charter* on the Rights and Welfare of the Child" 430.
141 Gal *Victims to Partners* 35.
142 Article 14 of the *Charter*.
143 Article 5 of the *Charter* states: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present *Convention*."

exercise of their rights in a manner that aligns with their developing abilities.[144] This article is closely linked with the survival and development principle in article 6.[145] The *Convention* encompasses three key principles in this context: the central importance of the family, the recognition of children as independent rights holders rather than passive recipients of protection, and the responsibility of both the family and society at large to support children in gradually exercising their rights as they develop.[146]

As per Sloth Nielsen, children are regarded as part of a family unit, and the primary responsibility is for parents to ensure their welfare and well-being.[147] Article 18(1) of the *Convention* regards this as essentially the responsibility of parents.[148] Under article 18(2),[149] it is held that states have a duty to assist parents in this regard, but the primary responsibility to secure the conditions of living rests on the parents or other responsible individuals for the child according to article 27(2).[150] According to article 20 of the *Charter*, parents have a duty to ensure the upbringing and growth of their children, which includes parental responsibility.[151] This encompasses safeguarding children's welfare, assuring the provision of necessary living circumstances for their growth and development, and maintaining appropriate household discipline consistent with dignity and humanity.[152] Parental responsibility encompasses two interrelated functions: firstly, parental authority is derived from

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144 Article 5 of the *Convention*.
145 Gal *Victims to Partners* 36.
146 Gal *Victims to Partners* 36.
147 Magumise *The integration of orphans and vulnerable children* 16.
148 Article 18(1) of the *Convention* states: "States Parties shall do their best to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."
149 Article 18(2) of the *Convention* states: "For the purpose of guaranteeing and promoting the rights set forth in the present *Convention*, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."
150 Article 27(2) of the *Convention* states: "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development."
151 Article 20(1) of the *Charter*.
152 Article 20(1) of the *Charter*.

responsibilities to the child rather than from rights held over the child; and secondly, the primary obligation to care for and safeguard the child's well-being rests with the parents rather than the state.[153]

2.2.4 Right of a child to participate and to express its views

The last guiding principle of the *Convention* is the right to participate. The *Convention* outlines multiple principles regarding children's freedom to express themselves and make decisions for themselves. Article 13 grants children the right to freedom of expression, including their right to seek, receive and share information.[154] Article 14 extends the right to freedom of "thought, conscience and religion".[155] Article 17 strengthens the right of children to form their own view and express themselves by holding that a child shall have access to information to be provided by mass media.[156]

However, article 12[157] specifically establishes the fundamental premise of children's right to express their opinions freely.[158] The participation principle is a new notion that was highly debated due to its extension of rights terminology beyond the promotion of children's protection and welfare.[159]

According to article 12, children who are able to voice their opinions are allowed to (and should) do so without any restrictions in every area that concerns them. The

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153 Mkandawire *The balance between child autonomy and parental autonomy* 33.

154 Article 13 of the *Convention* states: "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."

155 Article 14(1) of the *Convention* states: "States Parties shall respect the right of the child to freedom of thought, conscience and religion."

156 Article 17 of the *Convention* states: "States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."

157 Article 12 of the *Convention* states: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

158 Article 12 of the *Convention.*

159 Gal *Victims to Partners* 37.

child's opinions should be considered and given appropriate weight, considering their age and level of maturity.

Article 7[160] of the *Charter* establishes the fourth pillar, which guarantees the right of children to voice their opinions.[161] This right is further supported by articles 4(2) and 12.[162] According to article 7 of the *Charter*, individuals are entitled to freedom of expression.[163] Moreover, the Article stipulates that every child capable of expressing his or her views should be granted the freedom to do so without limitations.[164] As to article 4(2) of the *Charter*, children are entitled to voice their opinions in any judicial or administrative proceedings that pertain to them.[165] Article 12 pertains to the right to participation, allowing children to partake in cultural, artistic, recreational and leisure activities.[166] Article 9 of the *Charter* corresponds with the *Convention* as it protects a child's right to "freedom of thought, conscience and religion".[167]

2.3 Provisions directly linking to child abandonment

Beyond the four guiding principles of the *Convention* and the *Charter*, there are several provisions that address the abandonment of children, which not only refer to the dangers that are faced by abandoned children but also their identity and the importance of family care.

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160 Article 7 of the *Charter* states: "Every child who is capable of communicating his or her own views shall be assured of the rights to express his or her opinions freely in all matters and to disseminate his or her opinions subject to such restrictions as are prescribed by laws."

161 Article 7 of the *Charter*.

162 Articles 4(2) and 12 of the *Charter*.

163 Article 7 of the *Charter*.

164 Article 7 of the *Charter*.

165 Article 4(2) of the *Charter* states: "In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

166 Article 12(2) of the *Charter* states: "States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."

167 Article 9(1) of the *Charter* states: "Every child shall have the right to freedom of thought, conscience and religion."

2.3.1 Right of a child to a name and nationality

Article 7 of the *Convention*[168] as well as article 6 of the *Charter* require states to ensure that every child is registered immediately after birth, has a right to a name, and enjoys the right to a nationality.[169] Article 8 of the *Convention* further obliges states to preserve the child's identity, including his or her nationality, name and family relations; where this right has been illegally taken away, assistance and protection should be afforded.[170] Abandoned infants, therefore, fall directly within the protective scope of these provisions, obligating states to implement mechanisms to assist with the preservation of a child's identity as abounded children are likely not to know their origin.[171]

2.3.2 Right of a child to not be separated from his or her parents

The right to not be separated from one's parents is also addressed in both international instruments. Article 9 of the *Convention* stipulates that children should not be separated from their parents against their will, except when such a separation is necessary in their best interests.[172] Determining whether it is in the child's best interest will take into consideration factors such as abuse or neglect.[173]

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168 Article 7 of the *Convention* states: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

169 Article 6 of the *Charter*. 1 state: "Every child shall have the right from his birth to a name. 2. Every child shall be registered immediately after birth. 3. Every child has the right to acquire a nationality. 4. States Parties to the present *Charter* shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws."

170 Article 8(1) of the *Convention* states: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

171 Article 8(2) of the *Convention* states: "Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

172 Article 9(1) of the *Convention* states: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

173 Article 9(1) of the *Convention.*

Similarly, article 25 of the *Charter* provides special care to children who are separated from their parents.[174] There is a duty to ensure that such child receive alternative family care, which includes foster homes or appropriate child care institutions.

2.3.3 Right of a child to be protected against neglect, abuse and maltreatment

Abandonment, specifically referring to unsafe abandonment, directly implicates provisions protecting children against neglect, abuse and maltreatment. Article 19 of the *Convention* requires state parties to protect children from all forms of physical or mental violence, injury, abuse, neglect or negligent treatment.[175] Article 16 of the *Charter* corresponds with this protection, obligating states to establish legislative and administrative measures to shield children from neglect and abandonment.[176] The protection against neglect furthermore is linked to the child's best interest principle as noted above, as neglect directly affects the well-being of a child and cannot be treated as a standalone issue.[177]

2.3.4 Right of a child to a family environment

A child's right to a family environment is mentioned in both international instruments and there is a special obligation imposed on the state in instances where a child is deprived of such a right.[178] Article 20 of the *Convention* explicitly provides that children temporarily or permanently deprived of their family environment are

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174 Article 25 of the *Charter* states: "Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance."

175 Article 19(1) of the *Convention* states: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

176 Article 16(1) of the *Charter* states: "States Parties to the present *Charter* shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child."

177 See above para 2.2.2.

178 Article 20 of the *Convention* and arts 19 and 20 of the *Charter.*

entitled to special protection and assistance.[179] There are equivalent provisions found in articles 19 and 20 of the *Charter.*[180] Article 19 emphasises the importance of children enjoying parental care and protection and not being separated from their parents.[181] Article 20 holds that the primary responsibility for the upbringing and development rests on parents and that the parents have the duty to ensure a child's best interest at all times.[182] Furthermore, it is noted that state parties should take considerable measures to assist parents in this regard.[183]

2.4 Committee on the Rights of the Child's views on baby hatches

Both the *Convention* and the *Charter* emphasise the significance of the family unit. According to article 9 of the *Convention*, children should not be removed from their parents unless that is deemed to be in the child's best interest.[184] All relevant parties will be allowed to express their opinions in such an instance.[185] If a child is separated from his or her parents, the state will honour the minor's right to maintain contact with the separated parents unless it is determined to be in the child's best interest to do otherwise.[186] The *Charter* also grants children the right to receive parental care and protection.[187] It specifies that children should not be separated from their

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179 Article 20(1) of the *Convention* states: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

180 Articles 19 and 20 of the *Charter.*

181 Article 19 of the *Charter* states: "Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child."

182 Article 20(1)(a) of the *Charter* states: "Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty: (a) to ensure that the best interests of the child are their basic concern at all times."

183 Article 20(2)(a) of the *Charter* states: "States Parties to the present *Charter* shall in accordance with their means and national conditions take all appropriate measures; (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing."

184 Article 9(1) of the *Convention*.

185 Article 9(2) of the *Convention*.

186 Article 9(3) of the *Convention*.

187 Article 19(1) of the *Charter*.

parents against their will unless it has been proven that doing so is in their best interest.[188]

Article 19(1) of the *Convention* confirms that the state shall have a duty to take appropriate steps to ensure that children are protected from abuse.[189] Article 20 adds to this as it states that children who are abused should be removed from the family environment and that these children, under national law, should be placed in alternative care.[190]

The *Convention Committee* made remarks about using and establishing baby hatches in its reports on India and the Netherlands.[191] The *Convention Committee* voiced greater apprehension than admiration for these organisations since they had violated a child's right to identification.

The *Convention Committee* raised grave concern over the functioning of the Cradle Baby Reception Centres in India and their policy of allowing the anonymous abandoning of children.[192] They asserted that this practice breaches articles 6 to 9 and 19 of the *Convention*.[193] As mentioned among the fundamental principles outlined before, article 6 guarantees the right to life.[194] Moreover, the *Convention Committee* expressed alarm over the failure to respect of children's entitlement to official documentation following their birth and their entitlement to personal identification, including their country, name, and familial connections. The *Convention Committee*'s concern is based on articles 7 and 8 of the *Convention* protecting these rights.[195] The *Convention Committee* further believes that the

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188 Article 19(1) of the *Charter*.
189 Article 19(1) of the *Convention*.
190 Articles 20(1) and (2) of the *Convention*.
191 CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014); CRC Committee *Concluding Observations on the Fourth Periodic Report of the Netherlands* (CRC/C/NDL/CO/4) (2015).
192 CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) para 41–42.
193 CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) paras 41–42.
194 See above para 2.2.
195 CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) paras 42(ii)–(iii).

child's right not to be separated from their parents under article 9 is violated.[196] Additionally, article 9 holds children's entitlement to maintain relationships with their parents.[197] The *Convention Committee* believes that using baby hatches facilitates children's separation from their parents.[198] The *Convention Committee* also emphasises the significant issues regarding a child's entitlement to be safeguarded against any abuse and neglect, which includes physical, emotional and sexual abuse.[199] In articles 6 and 16 respectively the *Charter* also outlines a child's right to a name and nationality and the importance of safeguarding a child against abuse.[200]

In 2015 the *Convention Committee* reiterated its concerns over the baby boxes in its reaction to the report of the Netherlands.[201] It urged state parties to implement more measures to enhance and promote alternative options to prevent unplanned pregnancies and abandonment.[202] In addition, the *Convention Committee* concluded that state parties should only offer concealed hospital deliveries as a last resort.[203]

For the purposes of this dissertation, these comments are important and persuasive, but they do not on their own decide the question. The *Convention Committee*'s concerns are that anonymous relinquishment impermissibly compromises the child's identity rights, risks undermining family unity and ongoing contact and may normalise abandonment rather than strengthening prevention and protection duties.

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196 CRC *Committee Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) para 42(iv).

197 CRC *Committee Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) paras 41–42.

198 Govender *Ethico-legal case for baby hatches* 17.

199 CRC *Committee Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014) para 52.

200 Articles 6 and 16 of the *Charter*.

201 CRC *Committee Concluding Observations on the Fourth Periodic Report of the Netherlands* (CRC/C/NDL/CO/4) (2015) para 34.

202 CRC Committee *Concluding Observations on the Fourth Periodic Report of the Netherlands* (CRC/C/NDL/CO/4) (2015) paras 34–35.

203 CRC Committee *Concluding Observations on the Fourth Periodic Report of the Netherlands* (CRC/C/NDL/CO/4) (2015) para 35.

In the South African context, where unsafe abandonment continues and no legal framework exists on the existence or regulation for the safe relinquishment of children it is important to take into consideration the *Convention Committee*'s concerns, but also to be reminded that unsafe infant abandonment poses a greater risk to a child's right to life, and that an appreciation of (South) African realities requires a safe option for relinquishing a child in circumstances that may be extremely difficult for a mother (and father).

2.5 African Committee on the Rights and Welfare of the Child's views on baby hatches

While the *African Committee of Experts on the Rights and Welfare of the Child* ("the *African Committee*") has not specifically expressed their view on baby hatches, its first periodic report on Kenya addresses several issues that intersect with child welfare, safe custody and abandonment.[204]

The *African Committee* begins with the general principles, emphasising non-discrimination and the importance of addressing the situation of children without birth certificates.[205] It highlights the child's rights to a name, nationality and birth registration, noting that at the time of writing only about 60% of children in Kenya were registered at birth.[206] The *African Committee's* clear comments and attention to birth registration highlight the importance of creating awareness of identity rights.[207]

The *African Committee* acknowledges that the best interests of the child are recognised as a constitutional right in Kenya.[208] In discussing survival and

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204 African Committee of Experts *Concluding Recommendations on the Kenya 1st Periodic Report* (2022).

205 African Committee of Experts *Concluding Recommendations on the Kenya 1st Periodic Report* (2022) para 15.

206 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 18.

207 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 22.

208 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 16.

development, it addresses infant mortality and appreciates that Kenya has introduced legislation providing free childbirth services.[209] It goes on and notes the need for adequately equipped hospitals to ensure that the health care received is of sufficient quality.[210]

While addressing the right of protection from abuse and torture, the *African Committee* expresses its concern that parents and teachers are frequently identified as perpetrators of the abuse or neglect of children.[211] It urges Kenya to adopt and implement legislative measures to protect children, to introduce mechanisms for proper prosecution, and to create awareness of child abuse.[212]

The *African Committee* further notes the large numbers of abandoned children and orphans.[213] It encourages Kenya to promote awareness of the importance of family life, to the increase budgetary allocations for family support, and to prevent family breakdown through mediation and by addressing underlying causes of the problem.[214] The *African Committee* adds to this by placing importance on preventing the unnecessary separation of children from their parents and recommends the reunification of street children with their families.[215] It links such reunification with the optimal growth and development of a child.[216]

Although the *African Committee* has not taken a position on baby hatches, it is clear through the observations mentioned above that their view is similar to the

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209 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 17.
210 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 17.
211 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 28.
212 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 29.
213 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 31.
214 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 31.
215 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 35.
216 African Committee of Experts *Concluding Recommendations On The Kenya 1st Periodic Report* (2022) para 35.

Convention Committee's view. It prioritises protection measures that preserve identity and highlights the importance of a family unit and the prevention of unnecessary separation from parents.

Chapter 3: The development of children's rights against abandonment in South Africa

3.1 Introduction

Chapter Two provided an overview of various international legal instruments to determine the international and regional standards pertaining to the state's obligation to protect children from abandonment. In this chapter we will look at the position in South Africa under the constitution and national legislation.

Addressing the topic of child abandonment, Browne holds that the primary causes of infant abandonment include:

> [P]overty or financial hardship, being a single parent, post-natal depression, a lack of sexual health education, poor knowledge regarding family planning, restrictions regarding access to abortion, the child having some form of disability, pregnancy as a result of rape, abuse or force by partner, and a lack of services and resources to support parents who have children with disabilities.[217]

Many problems in this regard predate the *Constitution* in South Africa, including the prevalence of extreme poverty among millions of children and their families.[218] According to estimates from 2005, over 39% of the nation's population then consisted of children.[219] Of the 18 million children, 13.5 million were being brought up in homes with a low income of R2500 per month, thus depriving them of fully enjoying their socio-economic rights.[220]

This chapter will examine how South Africa has complied with its international duty to adopt international norms into national legislation to protect children against child abandonment. According to article 4 of the *Convention*, South Africa must pass laws, make administrative decisions, and take other necessary actions to implement the rights established in the *Convention*.[221] This chapter concludes by asserting the

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217 Browne *Child Abandonment and its Prevention* 3.
218 September 2008 *Social Work* 143.
219 September 2008 *Social Work* 143.
220 September 2008 *Social Work* 143.
221 Article 4 of the *CRC*; Mkandawire *The balance between child autonomy and parental autonomy* 19.

necessity of enacting legislation that describes the differences between safe and unsafe abandonment and ensures the safe relinquishment of children. Such legislation is crucial not only for the protection of the child but also for safeguarding the well-being of mothers who find themselves pressured to abandon their child, and to assure them of non-prosecution in the case of safe abandonments.

3.2 Constitutional rights in South Africa

3.2.1 Background

South Africa reached an historical milestone during the 1990s when the interim *Constitution* and the final Constitution were drafted and adopted, as they recognised children's rights for the first time in a clear and unequivocal manner.[222] Given the fact that at that time no country had officially established a constitution that acknowledged children as a distinct group of individuals with clear rights distinct from those granted to adults, this meant that elsewhere children's rights were often treated and restricted in the same manner as those of adults.[223]

The 1924 *Declaration of the Rights of the Child*, the first international instrument to recognise children's rights on a global scale, received South Africa's support from its inception.[224] While South Africa decided to acknowledge children's rights on a global scale in theory, the period of apartheid resulted in a lack of the acknowledgement of children's rights in the country.[225] Apartheid South Africa implemented racially discriminatory legislation, which reflected unequal practices against black children.[226] By persistently disregarding human and children's rights, South Africa isolated itself from the international community.[227]

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222 Binford 2015 *NYLSLR* 334.
223 Binford 2015 *NYLSLR* 334.
224 The Union of South Africa played a key role in the establishment of the League of Nations and actively supported the adoption of the first significant global declaration acknowledging the rights of children. See Binford 2015 *NYLSLR* 334.
225 Binford 2015 *NYLSLR* 336.
226 September 2008 *Social Work* 143.
227 Binford 2015 *NYLSLR* 336.

South Africa's first step towards constitutional revolution started in 1993 with the enactment of the interim Constitution,[228] which abolished the concept of parliamentary supremacy and introduced a supreme and justiciable *Constitution*.[229] Along with South Africa having its own Bill of Rights, this allows all individuals in South Africa to actively participate in shaping the governance of the country and setting limits on state authority.[230]

3.2.2 Important constitutional provisions

South African newspapers have reported several instances over the previous five years where infants have been abandoned in an unsafe manner.[231] These include their being deposited in sewage lines, on the open veld, in pit latrines, in waste dumps, in shallow graves, in buckets, on the street, and even in dustbins.[232] In 2020 a baby was discovered abandoned during the Covid-Lockdown on a freezing night in May.[233] The infant was wrapped in a soft blanket and found in a large hole next to the highway in Johannesburg.[234]

Upon the approval of the Constitution in 1996, it became the paramount law of the Republic, requiring all other laws to align with its provisions.[235] Like international law, the *Constitution* contains several important provisions relevant to unsafe child abandonment.[236] Adhering to international law, South Africa protects in section 9 of the *Constitution* the principle of equality, stating that everybody is equal before the law and has the right to enjoy the equal protection and benefit of the law.[237]

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228 Dube *Judicial oversight and the Constitution* 26.
229 Dube *Judicial oversight and the Constitution* 26.
230 Dube *Judicial oversight and the Constitution* 26.
231 Rosenberg 2021 "South African women needing to abandon their babies"; Vorster 2020 "The truth behind SA's shocking child abandonment statistics".
232 Vorster 2020 "The truth behind SA's shocking child abandonment statistics".
233 Vorster 2020 "The truth behind SA's shocking child abandonment statistics".
234 Vorster 2020 "The truth behind SA's shocking child abandonment statistics".
235 Section 2 of the *Constitution.*
236 Sections 10, 11 and 12 of the *Constitution*.
237 Section 9(1) of the *Constitution.* "9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

Like the international instruments mentioned above, South Africa's commitment to safeguarding children's rights is demonstrated by enacting legislation that provides enhanced care and protection.[238] It is noted that South Africa has established the best interest principle in section 28 of the Constitution, as discussed above.[239]

Section 28 of the Constitution provides as follows:

1) Every child has the right—
   (a) to a name and a nationality from birth;
   (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
   (c) to basic nutrition, shelter, basic health care services and social services;
   (d) to be protected from maltreatment, neglect, abuse or degradation;
   (e) to be protected from exploitative labour practices;
   (f) not to be required or permitted to perform work or provide services that—
      (i) are inappropriate for a person of that child's age; or
      (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
   (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
      (i) kept separately from detained persons over the age of 18 years; and
      (ii) treated in a manner, and kept in conditions, that take account of the child's age;
   (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

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238 Bernard and Buthelezi *Obiter* 345.

239 Section 28 of the *Constitution;* art 3 of the *Convention*; art 4 of the *Charter*.

South Africa has thus implemented rights directly linked to child abandonment through section 28. A child shall have a right to a name and nationality,[240] to not be separated from his or her parents, shall have a right to a family environment[241] and a right to be protected against neglect, abuse and maltreatment.[242]

Children are recognised as vulnerable to rights violations and have special and unique interests.[243] This principle was recently confirmed in *RMD v KD* which held that: "[T]he importance of protecting the best interests of minor children lies partly in the fact that they are a vulnerable group of people that make up a large constituent part of our society, but they lack the means to act in their own interests."[244]

Adhering to international instruments, section 28(2) of the *Constitution* specifically emphasises that a child's best interest has paramount importance in all matters concerning him or her.[245]

Prior to the inclusion of the best interests concept in the Bill of Rights of the *Constitution*, it was considered only a principle and did not have the status of a right.[246] The roots of the best interest concept in South Africa may be traced back to the 1900s.[247] In the early years of its development through various case law decisions, South Africa courts viewed the best interests principle merely as a guiding principle rather than a legally enforceable right. It attained the status of a right only when it was incorporated in the Bill of Rights.[248]

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240 Section 28(1)(a) *Constitution;* art 7 of the *Convention;* art 6 of the *Charter*.
241 Section 28(1)(b) *Constitution;* arts 9 and 20 of the *Convention;* arts 19 and 25 of the *Charter*.
242 Section 28(1)(d) *Constitution;* art 19 of the *Convention;* art 16 of the *Charter*.
243 *S v Williams* (CCT20/94) [1995] ZACC 6; 1995 3 SA 632; 1995 7 BCLR 861 (CC) (9 June 1995) para 18.
244 In *RMD v KD* (16995/22P) [2023] ZAKZPHC 2 (13 January 2023) para 24.
245 Section 28(2) of the *Constitution*.
246 Skelton 2019 *De Jure* 558.
247 Skelton 2019 *De Jure* 558.
248 Skelton refers to various case law such as *Cronje v Cronje* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033; *Ramsay v Ramsay* 1935 SR 84; *Mathews v Haswari* 1937 WLD 110; *Christian v Christian* 1945 TPD; *Fletcher v Fletcher* 1948 1 SA 130 (A). See Skelton 2019 *De Jure* 558.

In section 28 it is evident that the state recognises that children are not just miniature adults; they are vulnerable members of society, and they have specific interests.[249] In *S v M,* section 28 was interpreted to afford an "expansive guarantee" and to constitute a guiding principle and a right.[250]

Abandoning a child in an unsafe manner as described in the scenario above is a violation of the rights guaranteed to children.[251] Firstly, when an abandoned infant is discovered, his or her identity and country of origin are unknown, which links to sections 28(1)(a) and 18 of the *Constitution* as well as international principles.[252] Section 18 also safeguards individuals' entitlement to the knowledge of their origins by affirming their right to freedom of association, as it applies to family relations.[253] This is another right that is at risk as in many instances of infant abandonment the mother's name is undisclosed, resulting in the child's identity also remaining undisclosed.[254] A child can be psychologically impacted by not knowing its origins.[255]

An abandoned infant is often placed in an unsafe environment where it receives no parental care, nourishment, basic necessities or healthcare.[256] At this point they are abandoned and vulnerable to mistreatment, abuse, and neglect.[257] A child's international right to protection from neglect, abuse and maltreatment protected in article 19 of the *Convention* and article 16 of the *Charter* is at risk at this time.[258] It is important to note that the right to be protected from abuse is also implied in other rights of the Constitution, such as section 12.[259] Section 12 ensures a person's right

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249 Songca 2011 *CILSA* 345.
250 *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 3 SA 232 (CC) para 22.
251 Sections 18 and 28(1)(a) of the of the *Constitution*; arts 7 and 8 of the *Convention;* art 6 of the *Charter.*
252 Sections 18 and 28(1)(a) of the of the *Constitution*; arts 7 and 8 of the *Convention;* art 6 of the *Charter.*
253 Rosenberg 2021 *AHRLJ* 943; s 18 of the *Children's Act*.
254 Rosenberg 2021 *AHRLJ* 942–943.
255 Rosenberg 2021 *AHRLJ* 943.
256 Sections 28(1)(b) and (c) of the *Constitution*.
257 Section 28(1)(d) of the *Constitution*.
258 Article 19 of the *Convention;* art 16 of the *Charter.*
259 Section 12(1)(c) of the *Constitution*.

to be free from all forms of violence.[260] Section 12 also stipulates that all individuals have the right not to be treated in a cruel, inhumane, or dehumanising manner.[261] This right may also be said to be infringed by the abandonment of a baby.

Abandoning a child in this manner is also not in the child's best interest, as it often leads to severe health problems and even death.[262] There are also two other crucial rights which are infringed in the above-mentioned scenarios. A child's rights to life and to human dignity as protected by sections 11 and 10 of the *Constitution* and affirmed internationally by article 6 of the *Convention* and article 5 of the *Charter*, are also infringed.[263]

3.3 Children's Act

3.3.1 Development of the Children's Act

In 1995 the government and the broad children's sector recognised that the *Child Care Act*[264] enacted under the apartheid government entrenched racial discrimination and inequality.[265] As the *Child Care Act's* came into existence before the ratification of international documents like the *Convention* and the *Charter* or the establishment of the *Constitution*, it was considered to have several flaws.[266] It was perceived to be inconsistent with a child's constitutional right to parental or alternative care, as outlined in the *Constitution* and other international documents.[267]

In 1997 the South African Law Commission[268] was tasked with studying the *Child Care Act* and offering proposals for its transformation to address fundamental

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260 Section 12(1)(c) of the *Constitution*.
261 Section 12(1)(e) of the *Constitution*.
262 Section 28(2) of the *Constitution*.
263 Sections 10 and 11 of the *Constitution*; art 6 of the *Convention;* art 5 of the *Charter.*
264 *Child Care Act* 74 of 1983 (hereinafter the *Child Care Act*).
265 SALRC *Project 110 Review of the Child Care Act* (December 2002) 1; September 2008 *Social Work* 143.
266 Vadivalu *Legally defining parental abandonment of a child* 11.
267 Vadivalu *Legally defining parental abandonment of a child* 11.
268 The South African Law Commission is now known as the South African Law Reform Commission (SALRC). See s 8 of of the *Judicial Matters Amendment Act* 55 of 2002.

values such as non-discrimination and equality.[269] It took South Africa over a decade before the new *Children's Act* became effective.[270] In April 2010[271] the *Children's Act* came into full operation and the Child Care Act was finally repealed.[272] The preamble to this piece of children's legislation explicitly states that its purpose is to support and strengthen the rights outlined in section 28 of the *Constitution*.[273]

The Act is considered an essential instrument for fulfilling children's fundamental rights.[274] It provides comprehensive protection of children's rights. This legislation addresses several aspects related to the well-being and safeguarding of children, including parental duties, legal proceedings involving children, financial support orders, adoption procedures, surrogate pregnancy, child offences and related topics.[275] The Children's Act acknowledges the importance of children being raised in a familial setting characterised by affection and love.[276] As noted above, with the *Children's Act* replacing the *Child Care Act*, the focus was shifted more towards children and their protection.[277]

Boezaart notes that the primary emphasis on parent-child relations replaced the previous emphasis on parental authority and rights.[278] Now the focus was more on parents' duties and responsibilities and children's interests and rights.[279] The *Children's Act* strongly asserts parents' responsibilities and rights towards a child.[280] Section 18 of the *Children's Act* delineates parents parental rights and obligations

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269 September 2008 *Social Work* 144.
270 Songca 2011 *CILSA* 344.
271 The operation of the first part of the *Children's Act* started in July 2007, when some provisions such as the best interest, access to court and child participation were enacted. See Proc R13 in GG 30030 of 29 June 2007; Songca 2011 *CILSA* 344.
272 GN R261 in GG 33076 of 1 April 2010.
273 See the Preamble of the *Children's Act*; s 28 of the *Constitution*.
274 September 2008 *Social Work* 144.
275 Preamble of the *Children's Act*.
276 Section 2(b)(i) of the *Children's Act*; s 7(1)(k) of the *Children's Act*.
277 See above para 3.3.
278 Boezaart *et al Child Law in South Africa* 77.
279 Boezaart *et al Child Law in South Africa* 77.
280 Boezaart *et al Child Law in South Africa* 77.

towards their children.[281] Prioritising "responsibilities" above "rights" suggests that their responsibilities towards children carry more weight than their rights.[282]

3.3.2 Children in need of care and protection

Parental desertion of an infant not only constitutes a severe form of child neglect but also creates an environment where the child needs care and protection.[283] Child neglect constitutes a breach of a child's right to receive parental care, as stipulated in international law and the Constitution, as well as the obligations of parents as outlined in section 18(2) of the *Children's Act*.[284] According to section 18(2), parents must provide care, maintain communication, serve as guardians, and contribute to the child's financial support.[285]

The *Children's Act* addresses abandonment in two distinct ways. Initially the offence of abandonment is established by combining the definition of abandonment in section 1 with section 305(3)(b).[286] Section 1 says that an abandoned child includes a child that "has been deserted by a parent, guardian or caregiver."[287] Section 305 stipulates that a person who has parental rights and responsibilities toward a child, as well as a person who does not have rights and responsibilities towards a child but voluntarily cares for the child, is guilty of an offence if s/he abandons the child.[288] Secondly the *Children's Act* does not explicitly address child abandonment within its own provision. Instead it is dealt with under the provision dealing with children in need of care and protection.[289] Section 150 provides grounds on which the Children's Court can decide that a child is in need of care and protection.[290] The first subsection states that: "(1) A child is in need of care and protection if, the

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281 Section 18 of the *Children's Act*.
282 Boezaart *et al Child Law in South Africa* 77.
283 Govender *Ethico-legal case for baby hatches* 16; s 150 of the *Children's Act*.
284 Section 28(1) of the *Constitution*; s 18(2) of the *Children's Act*.
285 Section 18(2) of the *Children's Act*.
286 Sections 1 and 305 of the *Children's Act*.
287 Section 1 of the *Children's Act*.
288 Section 305(2)(b) of the *Children's Act*.
289 Section 150 of the *Children's Act*.
290 Section 150 of the *Children's Act*.

child– (a) has been abandoned or orphaned and is without any visible means of support…"[291]

The judgment in *SS v Presiding Officer* established that the inclusion of the word "and" in the aforementioned section was deliberate.[292] Therefore, it is clear that to ascertain the need for care and protection of abandoned children, it is essential to establish both the fact that the child has been abandoned and the absence of any apparent means of support for the child.[293]

The formulation of the wording in section 150 also serves to underline the importance of the need to address abandonment by itself.[294] One may realise while reflecting on the wording of section 150 that the *Children's Act* unites the concepts of abandonment and being orphaned.[295] The definitions of the two situations clearly distinguish each from the other in section 1*,* where it is stated that an orphaned child is "a child who has no surviving parent caring for him or her",[296] and an abandoned child is identified as a child who has:

(a) has obviously been deserted by the parent, guardian or care-giver; or

(b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months;

(c) has, if applicable, no knowledge as to the whereabouts of the parent, guardian or care-giver and such information cannot be ascertained by the relevant authorities.[297]

While there may be a resemblance between the two situations, their underlying effects are distinct.[298] Orphaned children are deprived of their parents as a result of their death.[299] In contrast, abandoned children under the Act have been deserted by parents who have neglected their legal duty to offer care and safeguard their

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291 Section 150 of the *Children's Act*.
292 *SS v Presiding Officer of the Children Court: District of Krugersdorp* (14/1/4-206/10, A3056/11) [2012] ZAGPJHC 149; 2012 6 SA 45 (GSJ) (29 August 2012) para 6.
293 Section 150(1)(a) of the *Children's Act*
294 Vadivalu *Legally defining parental abandonment of a child* 13.
295 Section 150 of the *Children's Act*.
296 Section 1 of the *Children's Act*.
297 Section 1 of the *Children's Act*.
298 Vadivalu *Legally defining parental abandonment of a child* 13.
299 Vadivalu *Legally defining parental abandonment of a child* 13.

children.[300] The underlying meaning of abandonment contributes to the importance of viewing abandonment as a standalone issue and that there is a need for additional provisions protecting children from such abuse, neglect and maltreatment, as in section 12 of the *Constitution*.[301]

3.3.3 Determining abandoned children in need of care and protection

According to section 155, when a child is abandoned a social worker will be designated to the case prior to the child's being brought before the children's court to determine whether the child requires care and protection.[302] During the social worker's investigation, as is stated in section 56 of the General *Regulations Regarding Children*, if the social worker believes a child has been abandoned and might thus require care and protection, s/he must first publish an advertisement in the local newspaper of the region where the child was found, calling upon any person to claim responsibility for the child.[303] After the social worker has determined that the child requires care and protection, the children's court will consider the matter.[304]

Section 56 of the General *Regulations Regarding Children* further specifies the requirements that must be met in order for the presiding officer to establish that a child has been abandoned in terms of section 150 of the *Children's Act*.[305] This includes that the presiding officer must be satisfied that one month has passed since the above mentioned advertisement was published and that no person has claimed responsibility for the child.[306] Additionally, there must be an affidavit detailing the efforts made to locate the child's parents or guardians and, potentially, another

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300 Vadivalu *Legally defining parental abandonment of a child* 13.
301 Sections 12(1)(c) and (e) of the *Constitution*; Vadivalu *Legally defining parental abandonment of a child* 13.
302 Section 155(2) of the *Children's Act*.
303 Section 56(1) of *Regulation 261*.
304 Sections 155(6) and 155(7) of the *Children's Act*.
305 Section 56(2) of the *General Regulations Regarding Children Regulation 261* 2010 (hereinafter *Regulation 261*).
306 Section 56(2) of *Regulation 261*.

affidavit confirming that there has been no contact between the child and his or her parents or guardians for at least three months.[307]

When a child in South Africa is determined to require care and protection according to section 150 of the *Children's Act*, the action taken is to make any order which is in the best interest of the child.[308]

Corresponding to section 28(2) of the *Constitution*, section 9 of the *Children's Act* holds the best interest clause and confirms that the child's best interest shall be of the paramount importance in all matters pertaining to the care, protection and well-being of the child.[309]

When determining a child's best interest, the factors to be considered are outlined in section 7 of the *Children's Act*.[310] Relevant provisions in respect of unsafe abandonment include the nature of the relationship between the child and the parents, the attitude of the parents towards the child as well as the capacity of the parents to provide for the needs of the child.[311] Furthermore, section 7 mentions as a criterion the child's need to be protected from any harm, either psychological or physical.[312]

The *Children's Act* provides for reactive provisions to provide care and stability to a child. However, it is problematic if the provisions address only the situation where the child has already been abandoned, when it can be too late to remedy the circumstances.[313] Including proactive provisions in the *Children's Act* combating the issue of child abandonment could be an alternative route to addressing the issue.

The second issue that arises is that the *Children's Act* as well as the regulations fail to make a distinction based on the age of the abandoned person or whether the act

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307 Section 56(2) of *Regulation 261*.
308 Sections 150(1)(a) and 156 of the *Children's Act*.
309 Section 28(2) of the *Constitution*; s 9 of the *Children's Act*.
310 Section 7 of the *Children's Act*.
311 Section 7 of the *Children's Act*.
312 Section 7(l) of the *Children's Act*.
313 Govender *Ethico-legal case for baby hatches* 17.

of abandonment was safe or unsafe.[314] Varying conditions of abandonment, distinct disparities in children's physiological vulnerability across different age groups, and the capacity of children to endure different levels of neglect all contribute to the fact that the impact of abandonment will not be similar across all children.[315]

3.4 Prosecutions following the abandonment of a child

While the abandonment of an infant can lead to death, it is essential to understand the act of infanticide and neonaticide. Infanticide refers to the intentional death of a baby who is less than one year old, generally brought about by the mother.[316] Neonaticide, on the other hand, refers to the deliberate killing of a newborn within the first 28 days of its birth.[317]

Furthermore, it is crucial that the national provision dealing with the concealment of birth is also discussed, as a mother who abandons her child could be charged with a crime.[318] The concealment of a birth is relevant to the unsafe abandonment of infants, as the requirements of the crime do not require one to prove that the infant died before it was disposed of.[319]

Section 113 of the *General Law Amendment Act*, dealing with concealment of birth, was amended in 2008 by section 1 of the *Judicial Matters Amendment Act*[320] to read as follows:

> 113 (1) Any person who, without a lawful burial order, disposes of the body of any newly born child with the intention to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

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314 Govender *Ethico-legal case for baby hatches* 17.
315 Govender *Ethico-legal case for baby hatches* 17.
316 Bergh 2019 *JPMH* 2.
317 Bergh 2019 *JPMH* 3.
318 Section 113 of the *General Law Amendment Act*.
319 Section 113 of the *General Law Amendment Act*; Rosenberg 2020 *Legal regulation of infant abandonment* 54.
320 Section 1 of the *Judicial Matters Amendment Act* 66 of 2008 (hereinafter the *Judicial Matters Amendment Act).*

(2) A person may be convicted under subsection (1) although it had not been proven that the child in question died before its body was disposed of.[321]

The elements of concealment of birth are that "the accused has (i) disposed of (ii) the dead body of (iii) a child, and (iv) intention."[322] From section 113 of the General Law Amendment Act it is clear that reference is made only to the concealment of a birth which leads to the death of a child and that no reference is made to when a mother conceals the birth of a child in a safe manner, where the child is likely to survive.

Section 239 of the *CPA* delineates the prerequisites for accusing an individual of infanticide or concealing the birth of a child.[323] According to this section, a child is considered to be born alive if there is evidence that the child has breathed.[324] It is not required to establish the exact time of the child's death.[325]

It bears emphasis that the common law crime of exposing an infant is also discussed, as it differs from the crime of concealment of birth.[326] When a child is found alive after being abandoned, the individual who has abandoned the child may also face alternative prosecutions in respect of exposing an infant. Hoctor describes the crime of exposing an infant as "[T]he intentional exposure and abandonment of an infant in such a place or in such circumstances that its death from exposure is like to result."[327]

The crime of exposing an infant can lead to the guilty verdict for murder, attempted murder or culpable homicide, if the offence is proved, in terms of sections 258 and 259 of the *CPA* respectively.[328]

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321 Section 1 of the *Judicial Matters Amendment Act*.
322 Hoctor and Carnelley 2012 *Obiter* 735; s 113 of the *General Law Amendment Act.*
323 Section 239 of the *CPA*.
324 Section 239(1) of the *CPA*.
325 Section 239(2) of the *CPA*.
326 Hoctor and Snyman *Snyman's Criminal Law* 382.
327 Hoctor and Snyman *Snyman's Criminal Law* 393.
328 Sections 258 and 259 of the *CPA*.

Hoctor further states that although the prosecution for this offence is uncommon, this does not mean the crime does not exist.[329] The first reason why the offence is uncommon is because in the event where the abandonment has led to the death of an infant or child the individual would most likely be charged with murder.[330] The second reason is because the offence of exposing an infant frequently overlaps with the offence of attempted murder in the event that the infant or child is found alive.[331]

3.5 Recent ongoing developments

The recent developments dealing with the issues of child abandonment and the use of safe alternatives South Africa will be discussed during this section. It is important to keep in mind that these developments are pending issues.

As noted above South Africa has legislation in place for the protection of children's rights as well as the procedure for dealing with abandonment of children.[332] The problem persists even though these mechanisms are in place because instead of providing a regulatory framework for the operation of safe alternatives to abandonment, South Africa legislation does not define the difference between safe and unsafe abandonment within legislation and still criminalises abandonment regardless of the circumstances.[333]

In a response to the increase of child abandonment in South Africa, non-government organisations, such as Door of Hope, began implementing baby savers.[334] These baby saver facilities allow for the anonymous and safe relinquishment of infants and aim to protect.[335]

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329 Hoctor and Snyman *Snyman's Criminal Law* 393.
330 Hoctor and Snyman *Snyman's Criminal Law* 393.
331 Hoctor and Snyman *Snyman's Criminal Law* 393.
332 See above Chap 3.
333 Govender *Ethico-legal case for baby hatches* 17.
334 See above Chap 1.3.
335 See above Chap 1.3.

During 2023 the Gauteng Department of Social Development (hereinafter the *DSD*) issued a directive to all Child and Youth Care Centre and Private Temporary Safe Care Homes with the firm position against the operation of baby saver facilities.[336] The directive indicated that such facilities were not authorised under existing legislation and that organisations facilitating them were acting unlawfully.[337] The directive concluded that all baby saver facilities should immediately stop all operation and indicated that legal action will follow if facilities fail to comply with the correspondence of the directive.[338]

The directive issued was primarily based on three legal concerns.[339] Firstly, it was argued that the use of such baby saver facilities undermines the responsibilities and rights of parents as set out in Chapter 3 of the Children's Act.[340] In particular, baby saver facilities allow biological mothers to relinquish their responsibility to care for a child while simultaneously disregarding the rights and responsibilities of the biological father.[341]

Secondly, there was relied on the statutory definition of an "abandoned child" and argued that the use of baby saver facilities falls within this definition, as the identity and whereabouts of the parent are usually unknown and cannot be ascertained by the relevant authorities.[342] This second legal concerned related to the fact that a

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336 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

337 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

338 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

339 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

340 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

341 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

342 *Department of Social Development South Africa 2023 Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

child is denied their right to a name, family and identity as the whereabouts of the parents are unknown.[343]

Thirdly, it was highlighted that abandonment constitutes a criminal offence under section 305 of the Children's Act.[344] On this basis, it was concluded that the use of baby saver facilities amounts to facilitating an act of abandonment and may therefore constitute a criminal offence.[345]

Shortly after the directive was published, the political party, the Democratic Alliance Shadow Deputy Minister of Social Development, Alexandra Abrahams MP, issued a statement concerning the decision made by the *DSD*.[346] Alexandra commented on the directive with the following,

> The directive shows that DSD has little understanding of the meticulous protocols baby savers, as a mechanism of safe relinquishment, ascribe too. DSD also fails to provide any viable alternatives, which further highlights DSD's utter detachment from the reality faced by desperate and vulnerable mothers struggling to survive South Africa's harsh socio-economic climate shaped by 30 years of failed ANC policies.
> DSD's premise for the directive could not be further from the truth.[347]

As a result of this position, litigation was initiated by affected organisations, including Baby Savers South Africa, Door of Hope along with other organisations.[348] The matter which is still ongoing was first brought before the Gauteng High Court by the affected organisations.[349] The court granted interim relief permitting the continued operation of baby saver facilities pending the final determination of the

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343 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

344 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

345 Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes.*

346 Alexandra Abrahams MP 2023 *Gauteng's Social Development MEC condemns abandoned babies to their death.*

347 Alexandra Abrahams MP 2023 *Gauteng's Social Development MEC condemns abandoned babies to their death.*

348 Venter Z 2025 "Gauteng High Court extends lifeline to Baby Savers SA and Door of Hope".

349 Venter Z 2025 "Gauteng High Court extends lifeline to Baby Savers SA and Door of Hope".

matter.[350] This interim order confirms that the legal status of such facilities remains unresolved and subject to the outcome of the final decision.[351]

Alongside the rise of litigation, recent legislative developments have added further complexity to the legal landscape. In 2025, proposed amendments to the Children's Act were introduced by the DSD through the Children's Amendment Bill, 2025.[352] In relation to its treatment of child abandonment and safe relinquishment, the proposed amendments appear to reinforce a strict interpretation of abandonment, by proposing to include, under the definition of abandonment, "a child relinquished or placed in a baby box".[353] The proposed Bill also fails to distinguish between unsafe abandonment and the safe relinquishment of infants through mechanisms such as baby savers.[354]

Alexandra Abrahams MP also expressed the standing of the Democratic Alliance after the publishing of the proposed Bill and stated the following:

> Making safe relinquishment and the work of baby savers illegal will lead to far greater infant abandonment and needless deaths across South Africa. The Democratic Alliance (DA) is repulsed that the Department of Social Development (DSD) wants to criminalise baby savers. The DA will oppose this proposed amendment to the Children's Act in every way possible.[355]

The Bill has not only received criticism from political policies but also from the public. Gittins Attorneys posted their opinion during September 2025 and stated that:

> Babies are not just being abandoned by their mothers—they are being abandoned by the very system meant to protect them. The Departments of Social Development, Home Affairs, and SAPS operate within a fractured framework that offers neither efficiency nor compassion. Hospitals, meant to heal, are being forced into roles as holding facilities for children with no identity, no plan, and no parent. This is not a policy issue. It is a moral failure.[356]

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350 Pillay C *Deneys secures High Court protection for Door of Hope's Baby Saver Boxes.*
351 Pillay C *Deneys secures High Court protection for Door of Hope's Baby Saver Boxes.*
352 GN 6677 in GG 53426 of 26 September 2025 (hereinafter the *Children's Amendment Bill*, 2025)
353 *Children's Amendment Bill, 2025.*
354 *Children's Amendment Bill, 2025.*
355 Alexandra Abrahams MP 2025 *Criminalising baby savers will lead to hundreds of baby deaths.*
356 Gittins Attorneys Law Firm 2025 *Left Behind: The Crisis Of Hospital-Abandoned Babies In South Africa*

As of today, litigation is still ongoing and the proposed Bill has not yet been accepted into legislation.

3.6 Conclusion

While South Africa has gone a long way in enacting legislation that provides for the protection of children, many children are still relinquished in an unsafe environment.

Through this chapter we have seen how unsafe infant abandonment can lead to serious rights violations under national law.[357] We have observed that the crime of abandonment arises where parents leave their children, resulting in abandonment, whether safe or unsafe.[358] There is a lack of differentiation in national legislation between unsafe abandonment and safe abandonment, which would be crucial for the creation of safe havens.[359]

We have observed above that the offence in section 305 of the *Children's Act* does not have an exemption or defence.[360] This implies that a mother who abandons her child under either safe or unsafe circumstances is still liable for prosecution under the *Children's Act*.

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357 See above paras 3.2 and 3.3.
358 See above para 3.4.
359 See below Chap 4 for the discussion of safe havens.
360 See above para 3.3.2.

Chapter 4: The development of children's rights against abandonment in Namibia and comparison with the South African legal framework

4.1 Introduction

Namibia's legal framework has seen considerable change, influenced by its colonial history and the necessity to amend outdated laws focussing on children rights.[361] This chapter is about how Namibia has addressed the issue of infant abandonment and the protection of children's rights. Infant abandonment in Namibia has been linked to traditional perspectives on pre-marital sex and childbirth outside of marriage, the challenges of caring for children, prostitutes believing that having a child may jeopardise their lifestyle or income, adolescent pregnancies, insufficient knowledge, and the apprehension of a child's contracting HIV.[362]

The discussion in this chapter starts with the history of Namibia's legal framework and how the shortcomings of the South African *Children's Act* of 1960 (which preceded the *Child Care Act* of 1983) contributed to the law reform. The *Children's Act* of 1960 addressed aspects applicable to child protection, including abandonment, but was regarded as inadequate for the complex nature of African society.[363]

This chapter will examine how early legislation addressed abandonment and the concealment of birth while failing to implement proactive measures for infant protection. Additionally, it will examine how this legislative vacuum created a critical momentum for change, culminating in the establishment of safe haven laws intended to offer legal protection for parents who securely surrendered infants, without their incurring criminal liability.

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361 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 9.
362 Rosenberg 2021 *AHRLJ* 941.
363 Guide to Namibia's *Child Care and Protection Act* 6.

4.2 Namibian law background

Like South Africa, Namibia is also a signatory to various international legal instruments aimed at protecting children's rights. Namibia ratified the *Convention* in 1990 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict in 2002.[364] As a member state, the country is obliged to incorporate international norms, as discussed in Chapter 2, into its legislation.[365]

The legislation regarding children in Namibia was based on the South African model, as South Africa administered Namibia's territory after WWI.[366] Namibia (then South West Africa) was administered by South Africa under the UN mandate system before Namibian independence in 1990. The UN Security Council Resolution 435 of 1978 facilitated the country's transition towards independence,[367] which was U.N. supervised, and Namibia finally became independent in 1990.[368]

The *Constitution* of Namibia constitutes the supreme law and is considered by some to be one of the most liberal and democratic constitutions globally.[369] It affords its first protection to children in the preamble by stating that inherent dignity will apply to all persons.[370] The right to life is also protected in the preamble and should be read with article 6, which contains the protection of life clause.[371] It states that the right to life shall be protected and prohibits the death penalty.[372] Article 10 of the *Constitution* of Namibia enshrines the international principle of the right to equality and freedom from discrimination.[373]

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364 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 8.
365 Article 4 of the *Convention*.
366 Rosenberg 2021 *AHRLJ* 944.
367 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 9.
368 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 9.
369 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 8.
370 Preamble of the *Namibian Constitution*.
371 Preamble of the *Namibian Constitution*; art 6 of the *Namibian Constitution*.
372 Article 6 of the *Namibian Constitution.*
373 Article 10 of the *Namibian Constitution* states: "(1) All persons shall be equal before the law. (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

When a child is abandoned at an unsafe location and left without any support, this is a direct violation of a child's right to life.[374] Children are also protected under article 8 from degrading or inhumane treatment or punishment.[375] Through articles 6 and 8 it may be seen that Namibia grants bold protection in respect of a child's life and how children are to be treated.[376] It is clear through the legislation that the international principle pertaining to the right to life, survival and development contained in article 6 of the *Convention* and article 5 of the *Charter* is addressed.

The international principle contained in article 20 of the *Convention* and articles 19 and 20 of the *Charter*, a child's right to a family environment, is set out in article 14, which recognises that families are society's natural and fundamental group and should be offered special protection.[377]

Article 15 of the Namibian *Constitution* safeguards the rights of children.[378] Like South Africa's section 28, article 15 explicitly addresses children's rights, protecting their entitlement to a name and nationality, protecting their best interests, and assuring parental care and knowledge.[379] Although article 15 provides a transparent protection system for children, most children are unaware of what the *Constitution* guarantees and how their rights are protected.[380] Interestingly the international principle of a child's best interest being regarded as of paramount importance in matters concerning them is not held within the article 15 but rather under section 3 of the of the *Child Care and Protection Act*.[381]

During Namibia's pre-independence processes in 1973, the Children's Amendment Act 74 of 1973 extended the applicability of the South African *Children's Act* to

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374 Rosenberg 2020 *Legal regulation of infant abandonment* 216.
375 Article 8 of the *Namibian Constitution.*
376 Articles 6, 7 and 8 of the *Namibian Constitution.*
377 Section 14 of the *Namibian Constitution*.
378 Article 15 of the *Namibian Constitution.*
379 Article 15 of the *Namibia Constitution*.
380 Ambunda and Mugadza "The protection of Children's Rights in Namibia" 12.
381 This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration

"South West Africa", leading to the adoption and implementation of the South African *Children's Act* 33 of 1960 in Namibia in 1977.[382] The *Children's Act* 33 of 1960 was the principal legislative framework applicable to children in Namibia and also the primary legislation dealing with the position of infant abandonment.[383]

In terms of the *Children's Act* 33 of 1960, the ill-treatment, neglect, or abandonment of an infant was considered a crime, and parents were accountable for the care of their children.[384] Section 18 assigned the obligation to both parents to ensure that an infant received proper care.[385] Subsection 1 assigned the responsibility of care to the custodial parent, while subsection 4 elaborated that this duty encompassed the need to take all reasonable measures to pursue support from an absent parent or relevant authorities.[386] A legally accountable individual who neglected to care for a child would be deemed guilty of an offence, signifying that the obligation also extended to the absent parent.[387] Further to this, section 7 of the *General Law Amendment Ordinance* also held that it is a crime to conceal the birth of a child.[388]

Section 1 of the *Children's Act* 33 of 1960 defined a child in need of care as a child abandoned or left without apparent means of support.[389] The child would be sent to a temporary safe place on the advice of a social worker, while awaiting a decision by the children's court.[390] Following court processes the child would be sent to a more permanent residence, and a medical examination might be conducted if necessary.[391] If the biological parents were untraceable, the child would be made available for adoption.[392]

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382 *Guide to Namibia's Child Care and Protection Act* 3 of 2015 6.
383 *Children's Act* 33 of 1960.
384 Section 18 of the *Children's Act* 33 of 1960.
385 Section 18 of the *Children's Act* 33 of 1960.
386 Sections 18(1)– (4) of the *Children's Act* 33 of 1960.
387 Section 18(2) of the *Children's Act* 33 of 1960.
388 Section 7 of the *General Law Amendment Ordinance* 13 of 1962.
389 Section 1 of the *Children's Act* 33 of 1960.
390 Sections 26–29 of the *Children's Act* 33 of 1960.
391 Section 31 *Children's Act* 33 of 1960.
392 Section 31 *Children's Act* 33 of 1960.

The moment Namibia became independent it was clear that the *Children's Act* of 1960 needed to be amended.[393] The outdated *Act* led to the development of the *Child Care and Protection Act*.[394]

During the drafting of the *Child Care and Protection Act* the implementation of safe haven provisions was proposed.[395] It was indicated that safe haven laws may impose restrictions on certain rights, such as acknowledging the rights of the biological father, the abandoned child's lack of knowledge of his or her origins, and mothers giving birth under hazardous conditions.[396] It was also observed that safe haven laws offered benefits, including a reduction in infanticide, the mitigation of dangerous abortion situations, and the opportunity for the biological father to acknowledge and care for a child he believes to be his.[397] In 2019, when the *Child Care and Protection Act* commenced, the new safe haven laws were introduced through section 227.

4.3 Safe Haven Laws of Namibia

Namibia initiated the establishment of baby safe haven legislation due to the alarming rise in baby-dumping incidents each year.[398] In 2008 it was reported that thirteen infants were abandoned or discarded in toilets per month.[399] The alarming incidence of birth concealment indicated a rise in infanticide and infant abandonment annually.[400] Namibia addressed the issue of teenage pregnancies resulting in infant abandonment by creating adolescent-friendly health care, wherein medical professionals approached teenage pregnancies with greater empathy and counselling was provided.[401]

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393 *Guide to Namibia's Child Care and Protection Act* 3 of 2015 6.
394 Rosenberg 2021 *AHRLJ* 945.
395 Caplan *The Draft Child Care and Protection Act.*
396 Caplan *The Draft Child Care and Protection Act.*
397 Caplan *The Draft Child Care and Protection Act.*
398 Rosenberg 2020 *Legal regulation of infant abandonment* 467.
399 Rosenberg 2021 *AHRLJ* 940.
400 Rosenberg 2021 *AHRLJ* 940.
401 Rosenberg *Legal regulation of infant abandonment* 469.

Section 254[402] of the Act delineates the offences of the abuse, neglect, abandonment, and neglect of maintenance of a child.[403] According to section 254, if a parent abuses, neglects, or abandons a child, they shall be subject to a fine of N$50,000.00, imprisonment for a term no longer than 10 years, or both penalties.[404] It is also important to note that section 254 applies not only to parents of a child but rather to "a person who is legally liable to maintain a child", indicating that any person who is legally obliged to provide for a child but neglects to fulfil that duty is similarly accountable.[405]

Section 254 is subject to section 227, which lays down the rules and procedures for addressing the situation where children have been left or abandoned safely and handed to the relevant entities.[406] This section sets out that a person may not be prosecuted under section 254 for abandonment if the child: "(a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children's home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition."[407]

Section 227 outlines the procedure when finding an abandoned child.[408] The individual who discovers the abandoned child must promptly notify the police or an

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402 *Child Care and Protection Act* reads as follows: "(1) Subject to the provisions of section 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person – (a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment."

403 Section 254 of the *Child Care and Protection Act*.

404 Section 254(1) of the *Child Care and Protection Act*.

405 Section 254(2) of the *Child Care and Protection Act*.

406 Section 227 of the *Child Care and Protection Act*.

407 Section 227(1) of the *Child Care and Protection Act*.

408 Sections 227(2) to (7) of the *Child Care and Protection Act* states: "A person who finds an abandoned child must immediately report that fact to a member of the police or a designated social worker. (3) A member of the police to whom a report is made in terms of subsection (2) must immediately inform a designated social worker. (4) A designated social worker to whom a report is made under subsection (2) or (3) must place the child in question in a place of safety

appointed social worker.[409] If a designated social worker has not been informed, the police officer receiving the report about an abandoned child should inform the social worker, who will then arrange for the child to be placed in a secure location for an inquiry or investigation to begin.[410]

The appointed social worker must publish an advertisement in at least one local newspaper and cause a radio announcement to be made nearby to where the abandoned child was discovered to possibly identify the individual accountable for the child.[411]

Section 139 highlights the protocol for investigating whether a child requires protective services.[412] The social worker designated to the case must prepare a report for the Children's Court within 45 days.[413] The designated social worker can question relevant persons, evaluate the child's family and environmental circumstances, identify sources to verify neglect or abuse, assess the level of risk and protective factors for the child, assess the child's needs, request, enter and search premises to gather information, be accompanied by police and recommend protective measures.[414] Throughout the investigation the social worker should consider the child participation principles as set out in section 4.[415]

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and start an investigation in terms of section 139. (5) A designated social worker who has been notified of the abandonment of a child under subsection (2) or (3) must cause – (a) an advertisement to be published in at least one national newspaper circulating in Namibia and at least one local or additional national newspaper circulating in the area where the child has been found, calling upon any person to claim responsibility for the child; and (b) a radio announcement to be broadcast on at least one national radio station, calling upon any person to claim responsibility for the child. (6) If the person who abandoned a child as contemplated in subsection (1) seeks to reclaim the child within 60 days of the date on which such child was abandoned, the child must be treated as a child who is in need of protective services in terms of section 131(1) and is subject to an investigation in terms of section 139. (7) An abandoned child may not be made available for adoption unless a period of 60 days has expired since the date of publication, of the advertisement or announcement whichever is the latest, referred to in subsection (5) during which period a person has not claimed responsibility for the child."

409 Section 227(2) of the *Child Care and Protection Act*.
410 Sections 227(3)– (4) of the *Child Care and Protection Act*.
411 Section 227(2) of the *Child Care and Protection Act*.
412 Section 139 of the *Child Care and Protection Act*.
413 Section 139(1) of the *Child Care and Protection Act*.
414 Section 139(3) of the *Child Care and Protection Act*.
415 Section 139(4) of the *Child Care and Protection Act*.

Like article 12 of the *Convention*, section 4 holds that a child's age, maturity and stage of development should be considered in determining whether the child can participate in matters involving him/herself.[416] It is crucial to acknowledge that a baby will probably be unable to participate due to its age and maturity, yet it is equally essential to recognise that the principles apply to older abandoned children who are capable of participation.

The principle that a child may participate is applied whether or not the child chooses to exercise the right.[417] Firstly, the child should be educated about the process, the potential influence of his or her opinions on decisions, and the resources accessible.[418] All steps must be implemented to prevent the child from facing punishment or victimisation for articulating his or her views.[419] The child should be aware of decisions made about him or her.[420] The children should be allowed to express their perspective if they believe their right to participate is being disregarded.[421] The last concept stipulates that child engagement should be encouraged, particularly for children encountering obstacles such as disability, language challenges or prejudice.[422] In terms of the abandonment of an infant, it is clear that an infant cannot participate or express its views. It remains essential to recognise that older and more developed children capable of participation possess.

Upon concluding the inquiry, the social worker must specify in the report to be made if the child will need protective services.[423] If the social worker suspects that an offence related to abuse, maltreatment, neglect, or trafficking has occurred, this must be reported to the police for further investigation.[424]

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416 Section 4 of the *Child Care and Protection Act*; art 4 of the *Convention.*
417 Section 4(3) of the *Child Care and Protection Act*.
418 Section 4(3)(a) of the *Child Care and Protection Act*.
419 Section 4(3)(b) of the *Child Care and Protection Act*.
420 Section 4(3)(c) of the *Child Care and Protection Act*.
421 Section 4(3)(d) of the *Child Care and Protection Act*.
422 Section 4(3)(e) of the *Child Care and Protection Act*.
423 Section 139(5) of the *Child Care and Protection Act*.
424 Section 139(8) of the *Child Care and Protection Act*.

Moreover, section 227 stipulates that if the individual accountable for the child attempts to recover him or her within 60 days of abandonment, the child should be regarded as one that may be in need of protective services under section 131 and should also be subject to the investigation mentioned above.[425] As per section 131, a child who is abandoned or orphaned and is left with insufficient care and support is a child in need of protection.[426]

Section 227 also sets out that an abandoned child may not be placed up for adoption unless the 60-day period has expired since the advertisement or announcement inviting the person responsible for the child to reclaim the child.[427]

4.4 South Africa learning from mistakes

It is evident that Namibia has made significant efforts to combat infant and child abandonment, and the enactment of the *Child Care and Protection Act* has resulted in several unique provisions addressing this issue. When comparing the Namibian safe haven laws to South Africa's, it is clear that Namibia is a step closer to combatting or reducing unsafe infant abandonment. Furthermore, it is important to note that Namibia and South Africa share many similarities in the reasons for infant abandonment.[428] Blackie has identified South Africa's restrictive legislation as one of the causes of abandonment.[429]

South Africa has previously faced criticism from writers for addressing abandonment not as an independent issue but rather under section 150 of the *Children's Act* in conjunction with orphaned children.[430] Namibia has instead dealt with abandonment together with similar offences, namely abuse, neglect and maltreatment. Given the clear distinction between an orphaned child and an abandoned child, South Africa

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425 Section 227(6) of the *Child Care and Protection Act*.
426 Section 131(1) of the *Child Care and Protection Act*.
427 Section 227(7) of the *Child Care and Protection Act*.
428 Rosenberg 2021 *AHRLJ* 941.
429 Blackie *Child abandonment and adoption*.
430 Vadivalu *Legally defining parental abandonment of a child* 65.

must address abandonment as a separate issue or adopt Namibia's strategy of including abandonment with other factors affecting childcare.[431]

Moreover, Vadivalu contends that the interpretation of section 150, as reflected in *SS v Presiding Officer*, presents a challenging aspect at the second stage due to South Africa's shortcomings in the law concerning child abandonment.[432] While the state is mandated to uphold parental rights, it is important to acknowledge that parents also have obligations and responsibilities towards their children.[433] The responsibility also rests on the state to act in the child's best interest, to oversee parental care and to ensure that a child is protected.[434] Therefore the state should achieve a balance of rights.[435]

Vadivalu finds the second stage problematic as she argues that the extent of parental care should be taken into consideration rather that the financial circumstances of the child.[436]

In this regard the facts of each case will be important, and the conduct of the parents in relation to their children becomes the decisive factor, not the financial resources of the child.[437]

According to Vadivalu, this approach makes legislation even more confusing for the court and officers determining whether a child has been abandoned.[438]

South Africa could learn from Namibia's mistakes. Rosenberg believes that while appropriate legislation in Namibia concerning child abandonment aims to mitigate the issue, it still lacks some critical provisions.[439]

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431 Vadivalu *Legally defining parental abandonment of a child* 65.
432 Vadivalu *Legally defining parental abandonment of a child* 66.
433 Vadivalu *Legally defining parental abandonment of a child* 66.
434 Vadivalu *Legally defining parental abandonment of a child* 66.
435 Vadivalu *Legally defining parental abandonment of a child* 66.
436 Vadivalu *Legally defining parental abandonment of a child* 66–67.
437 Vadivalu *Legally defining parental abandonment of a child* 67.
438 Vadivalu *Legally defining parental abandonment of a child* 67.
439 Rosenberg 2021 *AHRLJ* 947.

The first concern she raises is that Namibian legislation does not mention the maximum age at which a child may be abandoned under safe haven regulations, which could result in older children being abandoned by their parents.[440] The law is also not clear on what to do if a child is found to show signs of abuse, neglect or malnutrition as section 27 provides only for persons who have handed a child over to the relevant authorities where the child does not show signs of abuse or neglect.[441] Namibian law mandates that children must be placed in the personal control of an individual in a secure location, hence precluding the use of baby safes or boxes, which may be an issue when a woman who abandoned her child opts to remain anonymous.[442]

Rosenberg asserts that no provision allows the mother or anybody who relinquishes the child to provide information regarding the child's origins.[443] Conversely, there is no protection safeguarding maternal confidentiality and anonymity, which, if outlined in legislation, could result in women holding more trust in safe havens.[444]

Moreover, Rosenberg proposes that while the procedure outlined in section 139 of the Child Care Act allows for an investigation, it would be beneficial for individuals who abandon a child to be assigned a unique identification number, which they could subsequently use to reclaim the child.[445]

4.5 Conclusion

Namibia's legislative framework regarding children's rights is indicative of overcoming its colonial history and the progressive integration of international norms.[446] As a party to several international agreements, including the Convention

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440 Rosenberg 2021 *AHRLJ* 947.
441 Rosenberg 2021 *AHRLJ* 947; s 227(7) of the *Child Care and Protection Act*.
442 Rosenberg 2021 *AHRLJ* 947–948.
443 Rosenberg 2021 *AHRLJ* 948.
444 Rosenberg 2021 *AHRLJ* 948.
445 Rosenberg 2021 *AHRLJ* 948.
446 See above para 4.2.

and its Optional Protocols, Namibia is obliged to safeguard children's rights through its domestic legislation.[447]

The Namibian Constitution strongly emphasises the protection of children's rights. Articles 6 and 8 protect a child's right to life and freedom from degrading treatment, while article 15 explicitly guarantees children's rights.[448] The nation adopted South Africa's legislative framework, including the *Children's Act* of 1960, which deemed child abandonment unlawful.[449] However, with the recognition that the statute was outdated, the creation of the *Child Care and Protection Act* of 2015 commenced, encompassing elements such as the newly instituted safe haven regulations.[450]

These laws, introduced in 2019 under section 227 of the *Child Care and Protection Act*, were enacted to address the alarming increase in cases of infant abandonment.[451] Namibia has made legal provision for the inquiries and procedures dealing with child abandonment insofar that it does not view the safe abandonment of an infant as unlawful but rather affords protection to the mothers.[452]

These statutes permit parents to surrender their infants to authorities such as hospitals or police stations without the risk of prosecution, as long as the child exhibits no indications of neglect or abuse.[453] The legislation seeks to mitigate dangerous abandonment and infanticide.[454]

Despite the progress made, Namibia's safe haven laws are not without flaws. While they offer a legal pathway for parents to relinquish unwanted infants safely, there are concerns regarding the maximum age and the exclusion of actual baby safes or safe havens.[455] A lack of knowledge can also impact on the effectiveness of the laws as numerous parents, particularly in rural regions, may lack a comprehensive

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447 See above para 4.2.
448 See above para 4.2.
449 See above para 4.2.
450 See above para 4.2.
451 See above para 4.3.
452 See above para 4.3.
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454 See above para 4.3.
455 See above para 4.4.

understanding or awareness of the rules, hindering the law's efficacy in achieving its intended purpose.[456] Additionally, while Namibia has made notable progress, there are still lessons to be learned from South Africa's experience with similar issues, particularly in refining the legislative approach to infant abandonment.[457]

In conclusion, Namibia's Safe Haven laws represent a remarkable step forward in child protection and the abandonment of children. There is a balance between punishment and prevention. An effort is made to align the domestic legal framework with international standards aimed at safeguarding vulnerable children. These provisions demonstrate how Namibia is taking a preventative approach to protecting the most fundamental right of every child, the right to life.

[456] See above para 4.4.
[457] See above para 4.4.

Chapter 5: Conclusion

Infant abandonment remains an extreme and persisting issue for South Africa, with thousands of children abandoned each year, leading to severe risks of injury or even death.[458] In response, both the *Convention* and the *Charter* reflect international protective principles aimed at addressing such problems.[459]

5.1 International principles

The *Convention* and *Convention Committee's* basic principles, namely, non-discrimination; the best interest of the child; the right to life, survival and development; as well as the child's participation, are considered basic or general principles to guide the development of protective measures for children under international law.[460]

The non-discrimination principle, set out in article 2 of the *Convention* and article 3 of the *Charter*, guarantees that all children enjoy its rights without discrimination and are treated equally.[461] True equality within a legal system, as Gal notes, requires sensitivity to the inequalities of children.[462] The different needs and circumstances of children need to be taken into consideration to achieve fair and meaningful equality, as protected by the *Convention* and the *Charter*.[463] Both South Africa and Namibia give effect to these international principles in their constitutions to ensure that all children have a right to all laws and to be equally treated.[464]

The principle of the best interests of children enjoying primacy in all matters concerning children has been enacted in both jurisdictions.[465] The principle is flexible

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458 See above 3.2.2; Rosenberg 2021 "South African women needing to abandon their babies"; Vorster 2020 "The truth behind SA's shocking child abandonment statistics".
459 See above Chap 2.
460 See above Chap 2.
461 Article 2 of the *Convention*; art 3 of the *Charter*.
462 See above Chap 2.2.1; Gal *Victims to Partners* 30.
463 See above Chap 2.2.1.
464 See above Chap 3.2.2 and 4; s 9 of the *Constitution*; art 10 of the *Namibian Constitution*.
465 Article 3 of the *Convention*; art 4 of the *Charter.*

and requires a case-by-case evaluation of each child's unique circumstances and needs.[466]

The *General Comment* No 14 of the *Convention Committee* confirms that the best interest principle is joined with the other core principles of the *Convention*—non-discrimination*,* life, survival and development, and participation.[467] Where conflicts arise between competing rights, it is important that decision-makers balance the rights carefully while assigning weight to the child's best interests.[468]

Throughout these international documents there is the refrain that the children's rights to life, survival, and development are a particular instance of the right to the protection of the lives of all human kind of every age. And the sense of a relation between children and the adult world of which they are to be a part is reflected in the insistence that every child must have the opportunity to grow up in a caring family environment.[469] Both the Convention and the Charter state that the responsibility of a child's the right to life, survival, and development rests in the first instance with the parents, but that state parties should support the process.[470] In addition, children are recognised as active participants in decisions that shape their lives in articles 12 to 17 of the *Convention* and the corresponding provisions in the *Charter*.[471]

Both the *Convention* and the *Charter*, as interpreted by their respective Committees, cherish the family unit and a child's right to identity and protection.[472] The *Convention Committee* has expressed its strong concern regarding safe haven laws as being a threat to a child's other rights, such as identity and being a member of a family.[473] The *Charter Committee* has not directly addressed safe haven laws but

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466 See above Chap 2.3.
467 See above Chap 2.3.
468 See above Chap 2.3.
469 See above Chap 2.3.
470 See above Chap 2.3.
471 See above Chap 2.3.
472 See above Chap 2.4 and 2.5.
473 See above Chap 2.4.

similarly indicates the need to preserve a child's identity, prevent unnecessary family separation, and strengthen parental and state responsibilities for child welfare.[474]

5.2 National principles

5.2.1 South Africa

Section 28 asserts many of the international rights pertaining to infant abandonment, such as the infant's right to a name and a nationality, family care and protection against abuse, maltreatment, neglect, or degradation.[475] Most importantly, it constitutionalises the principle that a child's best interests are of "paramount importance in every matter concerning the child".[476]

This was a deliberate attempt to embody the transformative vision of the *Constitution* and shift the legal paradigm from parental authority to parental responsibility, and from the control of children to the protection and promotion of their inherent rights.

Section 18 of the *Children's Act* places the emphasis on parents' duties toward their children rather than on their entitlements over them.[477] Through the definitions in section 1 and the offences outlined in section 305, abandonment is recognised as a serious violation of parental duties and obligations.[478] Moreover, section 150(1)(a) establishes that an abandoned or orphaned child without visible means of support is deemed to be a child in need of care and protection.[479] It was noted in Chapter 3 that the *Children Act* fails to distinguish between safe and unsafe abandonment, creating a gap in the protection of children.[480] Without a clear distinction between safe and unsafe abandonment, all offenses are all treated with the same gravity.

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474 See above Chap 2.5.
475 Sections 28(1)(a), (b) and (d).
476 See above Chap 3.2.2.
477 Section 18 of the *Children's Act.*
478 Section 1 of the *Children's Act.*
479 Section 150 of the *Children's Act.*
480 See above Chap 3.

Although South Africa does have safeguards in place, the problem is that these provisions largely function after the harm has occurred. Infants, particularly newborns, face heightened physiological risks when abandoned unsafely.[481]

5.2.2 Namibia

The Namibian Constitution, which is regarded as one of the most liberal and democratic in Africa, embodies a strong human rights foundation and mirrors many of the protective principles found in section 28 of the *Constitution*.[482] The *Namibian Constitution* collectively safeguards the rights of all persons, especially children, such as the right to life, dignity, family care, and protection from neglect and inhumane treatment.[483]

Article 15 of the *Nambian Constitution* does not, like the South African *Constitution* in section 28, make special provision for children's best interests to be of paramount importance in matters concerning them. Instead, their best interests are protected in article 3 of the *Child Care and Protection Act*.

The inclusion of safe haven provisions was proposed during the deliberations leading to Namibia's independence.[484] Consideration was given to both sides of the introduction of safe haven provisions, being the restriction of biological parental rights and the child's possible loss of identity but also to the reduction of unsafe abandonment, the prevention of infanticide, and the provision of lawful alternatives to mothers in crisis.[485]

Through the introduction of safe haven laws Namibia has established a legislative framework of accountability and protection. Section 254 criminalises child abuse,

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481 Sections 155 and 56 of *Regulation 261*.
482 See above Chap 4.2.
483 The preamble and arts 6, 8, 14, and 15 of the *Namibian Constitution.*
484 See above Chap 4.
485 See above Chap 4.

neglect, and abandonment, while section 227 creates an exception for parents who relinquish a child safely to the relevant authorities without signs of abuse.[486]

By coupling accountability in section 254 with compassion in section 227, Namibia has introduced a humane, non-punitive system consistent with constitutional and international obligations. The safe haven provisions shift the state's role from reactive to proactive, transforming infant abandonment from a criminal issue into one of child-rights protection.[487]

5.3 Recommendations

South Africa's constitutional framework also provides a strong and comprehensive legal foundation for the protection of children, consistent with international obligations under the *Convention* and the *Charter*. Unfortunately, as Dipa observes, a child born in South Africa remains at the highest risk of being killed within the first six days of life, revealing both the vulnerability of children and the shortcomings of existing protective systems.[488] The continued unsafe infant abandonment in South Africa demonstrates how these constitutional rights are frequently violated in real life.

Notwithstanding ongoing debates and proposed amendments to the *Children's Act*, it is essential that a clear legal framework be established to provide vulnerable mothers with safe alternatives to abandonment, rather than criminalising baby saver facilities.[489] In this regard, effective regulation should include a distinct legal recognition of safe relinquishment, separate from the concept of abandonment, in order to ensure both legal certainty and the protection of children.[490]

Abandonment, whether in public spaces, waste sites, or unsafe enclosures, reflects not only an extreme tragedy but also a direct breach of multiple rights contained in

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486 See above Chap 4.
487 See above Chap 4.
488 See above Chap 1.1.
489 See above Chap 3.
490 See above Chap 3.

international law and the Constitution, such as the right to life, dignity, freedom, and the security of the person, and the specific protections enumerated under section 28.[491] Moreover, such abandonment infringes on the best-interest principle by exposing infants to an environment and denying them the basic conditions necessary for survival and development.[492]

Legislative compliance is not enough to close this gap.[493] There is a need for the implementation of proactive measures and policies to be put in place which give real effect to the rights accorded to children.[494] Only through such measures can South Africa truly honour its constitutional and international obligation that all children's best interests shall be of paramount importance in every matter concerning them.

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491 Sections 10, 11, 12 and 28 of the *Constitution*.
492 Sections 28(2) of the *Constitution*.
493 See above Chap 3.2.
494 See above Chap 3.2.

BIBLIOGRAPHY

Literature

Adu-Gyamfi and Keating 2013 *Sacha J Hum Rights*

Adu-Gyamfi J and Keating F "Convergence and Divergence between the UN Convention on the Rights of the Children and the African Charter on the Rights and Welfare of the Child" 2013 *Sacha Journal of Human Rights* 47-58

Ambunda and Mugadza "The protection of Children's Rights in Namibia"

Ambunda LN and Mugadza WT "The protection of Children's Rights in Namibia: Law and Policy" in Ruppel OC *Children's Rights in Namibia* (Macmillan Namibia 2009) 5-51

Bergh 2019 *JPMH*

Bergh LB "Case Study on Infanticide in South Africa" 2019 *Journal of Psychiatry and Mental Health* 1-4

Bernard and Buthelezi 2014*Obiter*

Bernard RB and Buthelezi MC "A Criticial Reflection on the South African Law of the Child" 2014 *Obiter* 345-356

Binford 2015 *NYLSLR*

Binford W "The Constitutionalization of Children's Rights in South Africa" 2015 *New York Law School Law Review* 333-363

Boezaart (ed) *Child Law in South Africa*

Boezaart T (ed) *Child Law in South Africa* 2nd ed (Juta Cape Town 2017)

Dube *Judicial oversight and the Constitution*

Dube F *Judicial oversight and the Constitution: Is the South African judiciary overstepping its jurisdiction?* (LLM-dissertation North-West University Mafikeng 2016)

Gal *Victims to partners*

Gal T *Victims to partners: Child victims and restorative justice* (PhD-thesis The Australian National University Canberra 2006)

Govender *Ethico-legal case for baby hatches*

Govender K *An ethico-legal case for baby hatches in South Africa* (MSc (Med)-dissertation University of the Witwatersrand Johannesburg 2021)

Hoctor and Carnelley 2012 *Obiter*

Hoctor S and Carnelley M "The Purpose and Ambit of the Offence of Concealment of Birth" 2012 *Obiter* 732-744

Hoctor and Snyman *Snyman's Criminal Law*

Hoctor SV and Snyman K *Snyman's Criminal Law* 7th ed (LexisNexis Durban 2020)

Kaime 2009 *AJLS*

Kaime T "The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account" 2009 *African Journal of Legal Studies* 119-136

Levesque 1995 *Fordham Int Law J*

Levesque RJR "Geraldine van Bueren, the international law on the rights of the child" 1995 *Fordham International Law Journal* 832-839

Louw, Mantzel and Pheiffer *School Dictionary*

Louw P, Mantzel D and Pheiffer F *Oxford South African School Dictionary* 3rd ed (Oxford University Press Cape Town 2006)

Magumise *The integration of orphans and vulnerable children*

Magumise B *The integration of orphans and vulnerable children into society. A case study of St Monica Children's Home, Bluff* (LLM-thesis University of KwaZulu-Natal 2022)

Memzur 2008 *SAPL*

Memzur BD "The African Children's Charter versus the UN Convention on the Rights of the Child : a zero-sum game?" 2008 *South African Public Law* 1-29

Mkandawire *The balance between child autonomy and parental autonomy*

Mkandawire LT *The balance between child autonomy and parental autonomy in Malawi: An analysis of the Child Care, Protection and Justice Act* (LLM-dissertation University of Cape Town 2017)

Oosthuizen-Erasmus *Caring for abandoned infants*

Oosthuizen-Erasmus L *Caring for abandoned infants and toddlers in institutional care: views, perceptions and experiences of caregivers* (LLM-dissertation University of South Africa Pretoria 2021)

Rosenberg *Legal regulation of infant abandonment*

Rosenberg WN *The legal regulation of infant abandonment in South Africa* (LLD-thesis University of Johannesburg 2020)

Rosenberg 2021 *AHRLJ*

Rosenberg W "Mechanisms adopted in curbing unsafe infant abandonment: A comparison between Namibia and South Africa" 2021 *African Human Rights Law Journal* 938-953

September 2008 *Social Work*

September R "A new Children's Act for South Africa: Making it work for children and families" 2008 *Social Work* 143-158

Sinclair *Concise Dictionary*

Sinclair JM *Concise Dictionary 21st Century Edition* 5th ed (Harper Collins Publishers Great Britain 2004)

Skelton A 2019 *De Jure*

Skelton A "Too much of a good thing? Best interests of the child in South African jurisprudence" 2019 *De Jure Law Journal* 557-579

Sloth-Nielsen "The African Charter on the Rights and Welfare of the Child"

Sloth-Nielsen J "The African Charter on the Rights and Welfare of the Child" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2017) 424-445

Songca 2011 *CILSA*

Songca R "Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?" 2011 *Comparative and International Law Journal of Southern Africa* 340-359

Vadivalu *Legally defining parental abandonment of a child*

Vadivalu GY *Legally defining parental abandonment of a child: A comparison between South African and Californian law* (LLM-dissertstion University of KwaZulu-Natal 2014)

Case law

Christian v Christian 1945 TPD

Cronje v Cronje 1907 TS 871

Fletcher v Fletcher 1948 1 SA 130 (A)

Mathews v Haswari 1937 WLD 110

Ramsay v Ramsay 1935 SR 84

RMD v KD (16995/22P) [2023] ZAKZPHC 2 (13 January 2023)

S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 3 SA 232 (CC)

S v Williams (CCT20/94) [1995] ZACC 6; 1995 3 SA 632; 1995 7 BCLR 861 (CC) (9 June 1995)

SS v Presiding Officer of the Children's Court: *District of Krugersdorp* (14/1/4-206/10, A3056/11) [2012] ZAGPJHC 149; 2012 6 SA 45 (GSJ) (29 August 2012)

Tabb v Tabb 1909 TS 1033

Legislation

Namibia

Child Care and Protection Act 3 of 2015

Constitution of the Republic of Namibia, 1990

General Law Amendment Act 46 of 1935

General Regulations Regarding Children, 2010

Judicial Matters Amendment Act 66 of 2008

South Africa

Child Care Act 74 of 1983

Children's Act 38 of 2005

Children's Act 33 of 1960

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

General Law Amendment Act 46 of 1935

General Regulations Regarding Children, 2010

Nonprofit Organisations Act 71 of 1997

Government publications

GN R261 in GG 33076 of 1 April 2010 (General Regulations Regarding Children)

Proc R13 in GG 30030 of 29 June 2007 (*Children's Act* 38 of 2005)

GN 6677 in GG 53426 of 26 September 2025 (Children's Amendment Bill, 2025)

International instruments

African Charter on the Rights and Welfare of the Child (1990)

Convention on the Rights of the Child (1989)

CRC (UN Committee on the Rights of the Child) *Combined 4th to 6th periodic reports submitted by Namibia under article 44 of the Convention, due in 2017* (CRC/C/NAM/4-6) (2020)

CRC (UN Committee on the Rights of the Child) *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art 3, para 1) (CRC/C/GC/14) (2013)

CRC Committee *Concluding Observations on the Consolidated Third and Fourth Periodic Reports of India* (CRC/C/IND/CO/3-4) (2014)

CRC Committee *Concluding Observations on the Fourth Periodic Report of the Netherlands* (CRC/C/NDL/CO/4) (2015)

Declaration of the Rights of the Child (1924)

Declaration of the Rights of the Child (1959)

South African Law Reform Commission (SALRC) *Project 110 Review of the Child Care Act* December 2002

Other literature resources on the Internet

African Union 2024 *Ratifications Table*

African Union 2024 *Ratifications Table* https://www.acerwc.africa/en/member-states/ ratifications accessed 30 July 2024

Alexandra Abrahams MP 2023 *Gauteng's Social Development MEC condemns abandoned babies to their death*

Alexandra Abrahams MP 17 October 2023 *Gauteng's Social Development MEC condemns abandoned babies to their death* https://www.da.org.za/2023/10/gautengs-social-development-mec-condemns-abandoned-babies-to-their-death accessed 1 April 2026

Alexandra Abrahams MP 2025 *Criminalising baby savers will lead to hundreds of baby deaths*

Alexandra Abrahams MP 1 October 2025 *Criminalising baby savers will lead to hundreds of baby deaths* https://www.da.org.za/2025/10/criminalising-baby-savers-will-lead-to-hundreds-of-baby-deaths accessed 2 April 2026

Blackie *Child abandonment and adoption*

Blackie D *Child abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa* (20 May 2014) https://bettercarenetwork.org/sites/default/files/Fact%20Sheet%20Research%20on%20Child%20Abandonment%20in%20South%20Africa.pdf accessed 10 July 2024

Browne *Child Abandonment and its Prevention*

Browne K *Child Abandonment and its Prevention* availible at https://bettercarenetwork.org/sites/default/files/attachments/Child%20Abandonment%20and%20Its%20Prevention.pdf 7 September 2024

Caplan *The Draft Child Care and Protection Act*

Caplan P *The Draft Child Care and Protection Act: Issues for Public Debate Booklet 2* available at http://www.lac.org.na/projects/grap/Pdf/ccpa-nwsppr-insert2.pdf accessed 1 August 2024

Considering Adoption 2025 *Baby Safe Haven Guide*

Considering Adoption 2025 *Baby Safe Haven Guide* https://consideringadoption.com/pregnant/emergency-options/baby-safe-haven-guide/ accessed 10 July 2024

Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes*

Department of Social Development South Africa 2023 *Illegal Baby Baskets Services – Services Offered by CYCCS and Private Temporary Safe Care Homes* https://press-admin.voteda.org/wp-content/uploads/2023/10/Notification-Regarding-illegal-Baby-Basket-Structures-Services.pdf accessed 1 April 2026

Dipa 2019 *Study finds 65% of abandoned infants are newborns*

Dipa K 2019 *Study finds 65% of abandoned infants are newborns* https://www.iol.co.za/news/south-africa/gauteng/study-finds-65-of-abandoned-infants-are-newborns-28766384 accessed 7 September 2024

Gittins Attorneys Law Firm 2025 *Left Behind: The Crisis Of Hospital-Abandoned Babies In South Africa*

Gittins Attorneys Law Firm 12 August 2025 *Left Behind: The Crisis Of Hospital-Abandoned Babies In South Africa https://www.gittins.co.za/post/left-behind-the-crisis-of-hospital-abandoned-babies-in-south-africa* accessed 2 April 2026.

Guide to Namibia's Child Care and Protection Act 3 of 2015

Guide to Namibia's Child Care and Protection Act 3 of 2015 (2021) available at http://www.lac.org.na/projects/grap/Pdf/0-cover_imprint.pdf accessed 20 August 2024

Impilo Child Protection and Adoption Services 2021 *Impilo [Zulu] – to give life*

Impilo Child Protection and Adoption Services 2021 *Impilo [Zulu] – to give life* https://impilo.org.za accessed 21 August 2024

Moodley 2022 *Over 10 000 Babies are Abandoned*

Moodley P *Over 10 000 Babies are Abandoned in South Africa Every Year: Baby Savers SA* (*SABC News*, 8 November 2022) https://www.sabcnews.com/sabcnews/over-10-000-babies-are-abandoned-in-south-africa-every-year-baby-savers-sa/ accessed 10 July 2023

Pillay C *Deneys secures High Court protection for Door of Hope's Baby Saver Boxes*

Pillay C *Deneys secures High Court protection for Door of Hope's Baby Saver Boxes* https://www.deneys.co.za/thinking/news/deneys-secures-high-court-protection-door-hopes-baby-saver-boxes accessed 2 April 2026.

Rosenberg 2021 "South African women needing to abandon their babies"

Rosenberg W "South African women needing to abandon their babies don't have safe options: this must change" *The Conversation* (20 July 2021) https://theconversation.com/south-african-women-needing-to-abandon-their-babies-dont-have-safe-options-this-must-change-163992 accessed 20 July 2024

United Nations Treaty Collection 2024 *Chapter IV Human Rights*

United Nations Treaty Collection 2024 *Chapter IV Human Rights* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en accessed 29 July 2024

Venter Z 2025 "Gauteng High Court extends lifeline to Baby Savers SA and Door of Hope"

Venter Z "Gauteng High Court extends lifeline to Baby Savers SA and Door of Hope" *Independent Online* 2025 https://iol.co.za/news/crime-and-courts/2025-08-25-gauteng-high-court-extends-lifeline-to-baby-savers-sa-and-door-of-hope/?utm_source=chatgpt.com accessed 1 April 2025.

Vorster 2020 "The truth behind SA's shocking child abandonment statistics"

Vorster RW "The truth behind SA's shocking child abandonment statistics" *Daily Maverick* (21 October 2020) https://www.dailymaverick.co.za/opinionista/2020-10-21-the-truth-behind-sas-shocking-child-abandonment-statistics/ accessed 20 July 2024