An appraisal of the efficiency of implementation mechanisms with regards to international children’s rights law

by

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DECLARATION

I, MAROPENG NORMAN MPYA, declare that my dissertation entitled AN APPRIASAL OF THE EFFICACY OF IMPLEMENTATION MECHANISMS WITH REGARD TO INTERNATIONAL CHILDREN’S RIGHTS LAW is my own work and that all the sources that I have cited has been indicated and acknowledged by means of full references.

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Acknowledgements

I give all the glory to Jehovah, my Lord and Saviour Jesus Christ and the Holy Spirit.

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For my little brother, Tlou Mpya and adopted son, John Mokwele I know you will follow and exceed my achievements.

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Abstract
The law governing children’s rights is part of international human rights law and therefore plays an important role in the protection of human rights. However, the effectiveness of the protection of children’s rights depends on a State’s compliance with children’s rights instruments and the implementation mechanisms within a given State.

There are implementation mechanisms for the protection of children’s rights at the national, regional and international levels. The protection of children’s rights at these three levels is provided for by children’s rights instruments. The monitoring of particular implementation mechanisms with regard to children’s rights is effected by reporting processes through State Parties to domestic institutions, regional, and international organisations. The reports provided by States Parties must contain relevant information with regard to measures that States Parties have taken to implement children’s rights instruments.

Inadequate implementation mechanisms for the protection of children’s rights have emerged as the greatest threat to the realisation of children’s rights. This means that the adoption of children’s rights instruments may yield results only when effective implementation steps are taken by the respective States Parties.

There are four “cornerstone” principles that underpin the protection of children’s rights. These are: non-discrimination; the best interest of the child; the right to life, survival and development; and respect for the views of the child. This study will evaluate the right to education and the best interests of the child principle as covered in children’s rights instruments at regional and international levels.

Education is a powerful tool in ensuring the protection and enjoyment of children’s rights. Therefore, ineffective implementation of the right to education may have adverse consequences for society. The best interest of the child principle is the guiding principle in all matters concerning children’s rights. Therefore, the application and effectiveness

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2 Manful E The Developing of Children’s Rights in Africa and Europe, Comparing Legislation in Ghana and Northern Ireland (2010) at 74, “the four underlining principles of the UNCRC are the non-discrimination (article 2), best interest of the child (article 3), the right to life, survival and development (article 6), and the views of the child (article 12), the underlining principles take consideration of the increased maturity of the child, thus it acknowledges that the view of the child must be respected. However this acknowledgment is within the context of ensuring the best interest and not the recognition of rationality, the same as adults, with autonomy to a choice of what is in their own interest.”

of the best interests of the child principle will ensure adequate protection of children’s
civil rights. Further, the study will examine the right to education and the best interest of the
child in order to demonstrate how the United Nations (UN) and regional human rights
instruments have provided for their implementation.

Ratification of children’s rights instruments is a symbolic gesture on the part of States
Parties to the recognition and significance of protection of children’s rights. The
compliance with children rights instruments or treaty obligations is crucial to ensure
adequate protection of children’s rights. Thus, non-compliance with treaty obligations
will have a negative impact on the protection of children’s rights.

The evaluation of the right to education and the best interests of the child principle will
be undertaken against the backdrop of children’s rights instruments. The children’s
rights instruments are provided for by the United Nations (UN) and regional human
rights systems. The dissertation will evaluate the right to education and the best
interests of the child principle within three regional systems, namely, the European
Union (EU), the Organisation of American States (OAS), and the African Union (AU).
It will also examine pertinent case law within the three regional systems. Finally, the
efficacy of implementation mechanisms for the enforcement of children’s rights will be
assessed.
Keywords

**List of abbreviations**

<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People’s Rights</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AU</td>
<td>African Union</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<td>ADRDM</td>
<td>The American Declaration of the Rights and Duties of Man</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Rights</td>
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<td>ECECR</td>
<td>European Convention on the Exercise of Children’s Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ESC</td>
<td>European Social Charter</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UN Doc</td>
<td>United Nations Documents</td>
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<td>UNCHR</td>
<td>United Nations Commission on Human Rights</td>
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<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>UNDCR</td>
<td>United Nations Declaration the Rights of the Child</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<tr>
<td>OAS</td>
<td>Organisation of American States</td>
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<tr>
<td>DRC</td>
<td>The Geneva Declaration of the Rights of the Child</td>
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CHAPTER 1: INTRODUCTION

1.1 The protection of children’s rights

There are approximately 275 million children in the world who are denied basic children’s rights.¹ Amongst these children, some 10 million witness domestic violence and 10 million die from malnutrition.² Furthermore, approximately 15 million children are orphaned by the HIV/AIDS illness, and more than 2 million are themselves infected with HIV/AIDS.³

All human beings are born free and equal with inherent dignity.⁴ They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.⁵ Children occupy an especially vulnerable position in society.⁶ Thus, children’s basic needs and fundamental rights must be protected.⁷ In many instances children are unable to articulate their grievances with regard to violations of their fundamental human rights due, in the main, to the inability of a child to have his grievance heard. The law must therefore put in place mechanisms respecting and protecting the vulnerable position of children.

The interest in providing welfare services and protection of children’s rights started after the First World War by the League of Nations. The League of Nations showed an interest in protecting children and providing welfare services to protect children’s rights after the First World War.⁸ In 1919, a Committee for the Protection of Children was set up by the League of Nations.⁹ The British “Save the Children Fund” (NGO) and the “Save the Children International Union” in Geneva (NGO), were early

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² Ibid.
³ Ibid.
⁵ Id art 1.
⁸ Ibid.
⁹ Ibid.
campaigners for children’s rights.\textsuperscript{10} These two NGOs and other stakeholders succeeded in getting the League of Nations to adopt a Declaration of the Rights of the Child in 1924.\textsuperscript{11}

The United Nations human rights system provides for human rights protection through treaties and declarations, including international instruments aimed specifically for the protection of children’s rights. Treaties and declarations which form the basis for the protection of children’s rights are collectively known as the “International Bill of Human Rights”. The “International Bill of Human Rights” consists of the Universal Declaration of Human Rights (UDHR),\textsuperscript{12} the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{13} and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{14}

The Charter of the UN is the foundational instrument of the UN. Following the UN Charter is the UDHR which provides for protection of human rights. Further, the UDHR protects children’s rights.\textsuperscript{15} The UDHR specifically states that special care and assistance must be provided for children.\textsuperscript{16} 147 States have ratified the ICCPR,\textsuperscript{17} while 150 States have ratified the ICESCR.\textsuperscript{18}

Regional human rights systems also provide protection for children’s rights. The three major regional human rights systems, namely, the European Union (EU), the Organisation of American States (OAS), and the African Union (AU) will be the focus regions for this study.

\begin{itemize}
\item \textsuperscript{10} Article 6 of the UNCRC.
\item \textsuperscript{11} Ibid.
\item \textsuperscript{12} The Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 (1948) at 71.
\item \textsuperscript{13} The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).
\item \textsuperscript{14} The International Covenant on Economic, Social and Cultural Rights: GA res 2200A (XXI), 21 UN GAOR Supp (no 16) at 49, UN Doc A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).
\item \textsuperscript{15} Article 25(2) of the Universal Declaration of Human Rights, UN GA Res 217A (III), UN Doc A/810 (1948) at 71.
\item \textsuperscript{16} Ibid.
\item \textsuperscript{18} Ibid.
\end{itemize}
The United Nations (UN) concretised the protection of children’s rights through the adoption of the United Nations Convention on the Rights of the Child (UNCRC). To date, 193 States have ratified the UNCRC.\textsuperscript{19}

The protection of children’s rights provided through regional human rights systems is expressed by Member States to particular human rights instruments at the regional level. Member States of regional organisations give effect to the content of regional instruments through the incorporation of their provisions into their domestic legislation.\textsuperscript{20}

The protection of children’s rights exists on three levels; the international, the regional, and the domestic.\textsuperscript{21} Consequently, ensuring effective implementation of international and regional children’s rights within the domestic framework becomes pivotal in the protection of children’s rights. Further, implementation of children’s rights instruments entails an obligation upon States Parties, regardless of their political, economic and cultural values, to promote and protect all human rights.

Amongst the many children’s rights protected in the regional and international human rights instruments, are the protections granted to the right to education and the principle of the best interests of the child, which will be discussed in this study.

A selection of case law from the regional human rights systems will be discussed to illustrate legal principles pertinent to the right to education. The dissertation will identify commonalities and differences at the regional system human rights and UN levels, which seek to protect the right to education and the application of the best interests of the child principle. Finally, this study will evaluate the protection granted


\textsuperscript{20} Eide A “Economic, social and cultural rights as human rights” in Eide A and RosasA \textit{Economic, social and cultural rights: A universal challenge} (1995) at 11. “This was demonstrated when the representatives of 171 governments assembled in Vienna (1993) at the World Conference on Human Rights. At the Conference, all governments reiterated that all human rights are universal, indivisible, and interdependent and interrelated. While the significance of the national and regional instruments is critical, it is equally critical to take into account historical, cultural, and religious backgrounds which impact on the rights of children.”

\textsuperscript{21} Marks SP “From the ‘single confused page’ to the ‘decalogue for six billion persons’: The roots of the Universal Declaration of Human Rights in the French Revolution” (1998) 20 \textit{Hum Rts Q} at 459.
to children’s rights, taking into account case law and implementation mechanisms within the UN human rights system and the regional human rights systems.

1.2 Sequence of chapters

Chapter 1 provides a brief outline of the protection of children’s rights. Chapter 2 will address the UNCRC which forms the legal framework for international children’s rights law. Chapter 3 examines the right to education at the UN human rights level and within the three regional human rights systems, namely, the EU, the OAS and the AU. In Chapter 4 the best interests of the child principle is analysed both at the UN level and within the three regional human rights systems. Chapter 5 examines the implementation mechanisms provided at the UN level and Chapter 6 shall contain the conclusion of this dissertation.

1.3 Conclusion

This chapter introduced the legal framework for the protection of children’s rights. The next chapter will proceed to examine the UN human rights system governing the protection of children’s rights.
CHAPTER 2: THE UNITED NATIONS FRAMEWORK FOR THE PROTECTION OF CHILDREN’S RIGHTS

2.1 Introduction

The United Nations Convention on the Rights of the Child (UNCRC) provides the legal framework for the protection of children’s rights. This chapter will examine the provisions of the UNCRC in general and consider, in greater detail, those provisions specifically protecting the right to education.

2.2 The United Nations Convention on the Rights of the Child

The UNCRC came “at a time when it seemed that no country protects the rights of all its children or provides them with an adequate standard of health care, education, day care, housing and nutrition, or properly protects them from abuse, neglect and exploitation”.¹ In the words of Glenn Mower Jr, the UNCRC “appeared at a time when the need for improvement in the status of the world’s children was primarily apparent”.²

The UNCRC was adopted by the United Nations General Assembly (UNGA) on 20 November 1989, after ten years of preparatory negotiation.³ It was opened for ratification on 26 January 1990.⁴ The UNCRC had received the 20 ratifications required for its entry into force by 2 September 1990.⁵

By comparison with other international human rights treaties adopted by the UN, the UNCRC entered into force very rapidly after its adoption by the UNGA.⁶ A large number of States Parties ratified the UNCRC in a short period of time following its

² Ibid.
⁵ Ibid.
⁶ Ibid.
adoption.\textsuperscript{7} As of 19 December 2012, the UNCRC had been ratified by 193 States Parties.\textsuperscript{8}

The Preamble of the UNCRC provides that States Parties must give due recognition to the inherent dignity, equality and inalienable rights of all members of the human family.\textsuperscript{9} Children are an essential and integral component of the concept of the “human family” and so one may conclude that this provision embodies the recognition of the protection of children’s rights. The Preamble to the UNCRC further declares the UN’s affirmation of fundamental human rights and commitment to the promotion of a better standard of life for all human families.\textsuperscript{10} This means that in formulating and adopting the UNCRC, the UNGA recognised the need for appropriate protection for and the improvement of children’s rights.

The UNCRC states that childhood must be accorded special care and assistance.\textsuperscript{11} Although this special care and assistance is underpinned by the family which remains the core for the protection of children’s rights,\textsuperscript{12} care and assistance must also be given by the State Party concerned. The State is the upper guardian of all children. This means that when a child’s rights are not fulfilled, it falls to the State to ensure that these rights are upheld.

The UNCRC provides that States Parties must provide assistance to the family and to the society.\textsuperscript{13} The underlying rationale behind the special protection of the family is the recognition of the vulnerability of children both in the family and in the general society.

The UNCRC provides that child development and growth must take place in an environment of love, peace and happiness.\textsuperscript{14} These are the ideals that the UNCRC strives for in the improvement of and the enjoyment of children’s rights. The UNCRC provides that principles such as tolerance, freedom and equality must be taught to

\textsuperscript{8} Ibid, see also UNCRC’s Status of ratification as of the 18-12-2012 http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (accessed on 19/12/2012).
\textsuperscript{10} Id par 2.
\textsuperscript{11} Id par 4.
\textsuperscript{12} Ibid.
\textsuperscript{13} Id par 5.
\textsuperscript{14} Id par 6.
children in order to prepare them for life in society. The UNCRC also provides that the elements of the child's survival and its development are equally important, and States Parties should strive to protect them.

Traditions and cultural values play an important role in each society. This means that in the implementation of children’s rights, States Parties must take cognisance of different traditions and cultural values that exist within their jurisdictions. The same is applicable even in the regional human rights system.

The UNCRC also recognises the importance of international co-operation in improving children's rights protection, especially in developing countries. Children are the beneficiaries of best practices with regard to methods employed by different countries in the protection of their rights. For this reason, international co-operation becomes crucial in the implementation mechanisms used to enforce children’s rights.

2.3 Rights protected in the UNCRC

The UNCRC defines a child as a person below the age of 18, unless the laws of a particular country prescribe otherwise. This means that the UNCRC is applicable to persons who comply with the aforementioned provision. By implication, anyone who is over the age of 18 cannot claim rights under the UNCRC.

Article 43 of the UNCRC establishes a Committee on the Rights of the Child (hereinafter the Committee) to examine the progress made by States Parties in realising the obligations undertaken under the UNCRC. The Committee consists of ten experts of high moral standing and recognised competence in the field covered.

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15 Preamble of the UNCRC at par 7.
16 Ibid.
17 Ibid.
18 Id par 11.
19 Ibid.
20 Article 18 of the UNCRC. 1989. Entry into force 2 September 1990, in accordance with article 49 par 2.
21 Id art 43.
22 Ibid.
by the UNCRC. The Committee has encouraged states to review the age of majority to increase the level of protection for all children under 18.

The UNCRC applies to all children equally (e.g. prohibition of discrimination). The notion of non-discrimination is explicitly stated in the UNCRC, where it provides that States Parties shall respect and ensure the rights in the UNCRC to each child within their jurisdiction without discrimination of any kind.

The UNCRC provides that the best interests of the child principle must be the primary concern in all decisions affecting children’s rights. This means that States Parties have a responsibility to take all available measures to ensure that children’s rights are respected, protected, and fulfilled, including States Parties undertaking legislative reforms and societal programmes aimed at improving the efficacy of their implementation mechanisms.

The UNCRC points out that when States Parties has existing legal standards that are higher than those contained in the UNCRC, the higher standards should prevail. The UNCRC further provides that States Parties should respect the rights and responsibilities of families to direct and guide their children. The family unit provides a conducive environment where children grow and learn to exercise their rights appropriately. This implies that a limitation to a child’s right to be within the family unit may be warranted in situations where the family unit poses a threat to the well-being of the child.

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22 Article 43(2) of the UNCRC; see also the membership of the Committee on the Rights of the Child as of 1st March 2011 is: Ms Agnes Akosua AIDOO (Rapporteur), Ms Hadeel AL-ASMAR, Ms Aseil AL-SHEHAIL, Mr Jorge CARDONA LLORENS, Mr Bernard GASTAUD, Mr Peter GURÁN, Ms Maria HÉRÇZOG, Mr Sanphasis KOOMPRAHANT, Mr Hatem KOTRANE (Vice-chairperson), Ms Yanghee LEE (Vice-chairperson), Mr Gehad MADI, Ms Marta MAURAS PEREZ (Vice-chairperson), Ms Pilar NORES DE GARCIA, Mr Awich POLLAR, Ms Kirsten SANDBERG, Ms Kamla Devi VARMAH (Vice-chairperson), Ms Hiranthi WIJEMANNE, Mr Jean ZERMATTEN (Chairperson), http://www2.ohchr.org/english/bodies/crc/members.htm (accessed 26/11/2012).
23 Ibid.
24 Id art 2.
25 Ibid.
26 Article 3 of the UNCRC.
27 Id art 4; see also art 13 of the International Convention Economic, Social, and Cultural Rights on progressive realisation.
29 Article 5 of the UNCRC.
30 Ibid.
The UNCRC provides for children’s right to life of which they can be no limitation. The right to life also includes, on the part of the States Parties, to ensure an adequate standard of living for children. States Parties must protect to the maximum extent possible, the survival and development of the child.

The UNCRC protects children’s rights to a legally registered name and officially recognised by the State Party. Furthermore, children have the right to a nationality and an identity. The UNCRC also provides that States Parties should make provision for and respect every child’s right to a name, a nationality, and family ties.

Children have the right to live with their parents, provided that such an arrangement is in child’s best interests. Children whose parents do not live together have the right to maintain contact with both parents, unless this would impact adversely on the child’s rights. Families whose members live in different countries should be allowed to move between those countries, to ensure that parents and children maintain family ties. This provision will be exercised in compliance with State sovereignty of whichever States concerned.

States Parties to the UNCRC are obliged to take steps to stop children from being removed illegally from their country of nationality. In this regard, article 11 of the UNCRC is particularly concerned with parental abductions. Thus, States Parties shall take measures to combat the illicit transfer and non-return of children abroad. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

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31 Ibid; see also article 5 of the UNCRC.
32 Article 6 of the UNCRC.
33 Id art 7.
34 Ibid.
35 Id art 8.
36 Ibid.
37 Id art 9.
38 Ibid.
39 Ibid.
40 Id art 10.
41 Ibid.
42 Id art 11.
43 Article 11 UNCRC provides that “States Parties shall take measures to combat the illicit transfer and non-return of children abroad; to this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements”.
44 Ibid.
The UNCRC provides that children must be allowed to participate in decisions taken by adults that affect them so as to ensure that the views of children are considered.46 The provision of article 12 of the UNCRC’s aim is not to interfere with parental rights and responsibilities but to balance both the rights of the child and the parents.47

Children have the right to receive and share information, as long as that information is not damaging to them or others.48 In exercising the right to freedom of expression, children have the responsibility also to respect the rights, freedoms, and reputations of others.49 Realising this right of children to freedom of expression is central to building and sustaining peace, democracy and respect for human rights across the world.50

The protection of the rights of children extends to their right to think and believe what they wish and to practise their religion.51 The UNCRC further provides that children have the right to examine their beliefs, but it also stresses that their right to express their beliefs implies respect for the rights and freedoms of others.52 Children have the right to association.53 In exercising their rights, children have the responsibility to respect the rights, freedoms, and reputations of others.54 The UNCRC strikes a balance between the rights afforded to children and an obligation on the part of the children to respect other peoples’ rights.

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46 Article 12 of the UNCRC.
47 Article 12 of the UNCRC provides that: “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; 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.”
48 Id art 13.
49 Ibid.
51 Article 14 of the UNCRC.
52 Ibid.
53 Article 15 of the UNCRC.
54 Ibid.
Children have a right to privacy. The UNCRC also provides that children should have an individual right to privacy against their parents, while recognising that this right should be qualified according to the child’s age and evolving capacities. The UNCRC provides that States Parties’ laws should protect children from attacks against their way of life, their good name, their families and their homes.

Children have the right to have information that is important to their health and well-being. This speaks to the importance of the right to education, because without education it is impossible to claim and enjoy the various rights that are bestowed upon the protection of children. Moreover, States Parties should encourage mass media to provide information that children can understand and to protect children from harmful information.

The UNCRC provides that both parents share the responsibility for bringing up their children, and must always consider what is in the best interests of their children. Further, States Parties must respect the responsibility of parents to provide appropriate guidance to their children. The UNCRC states that children have the right to be protected from mistreatment either physically or mentally. States Parties are also obliged to ensure that children are properly cared for, and are protected from violence, abuse, and neglect by their parents, or anyone else in whose care they are.

The UNCRC provides that children who cannot be looked after by their own family have a right to special care by the States Parties. Further, children have the right to care and protection if they are adopted or in foster care. The best interests of the child must be the foremost consideration in the determination of placing a child under...

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55 Article 16 of the UNCRC.
57 Article 16 of the UNCRC.
58 Id art 17.
59 Ibid.
60 Id art 18; see also Freeman M Children’s Rights: Progress and Perspective, Essays from the International Journal of Children’s Rights (Martinus Nijhoff 2011) 397. The best interests of the child principle connotes the yardstick for measuring all actions, laws and policies of a state affecting children.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
adoption, foster care or custody of a State institution. After such a determination has been made, a child may be placed in foster care or adopted. Children with disability have the right to special care and support from the States Parties, so that they can live full and independent lives. Moreover, the UNCRC provides that children must have the right to good quality health care.

Children, who are under the care of their local authorities, rather than their parents, have the right to have their living arrangements regularly inspected to ensure optimal living conditions. The UNCRC provides that children’s care and treatment should always be based on what would be in their best interests. Children, either through their guardians or by themselves, have the right to assistance from the States Parties if they are poor or in need.

The UNCRC provides that children have the right to a standard of living that is sufficient to meet their physical and mental needs. Further, those decisions affecting the well-being of children must be considered in the best interest of the child. States Parties are also obliged to help families and guardians who cannot afford to provide for themselves or their children, particularly with regard to food, clothing and housing.

The UNCRC also provides that States Parties must ensure that children who belong to minority or indigenous groups have the right to learn and practise their own culture, language and religion. The right to practise one’s own culture, language, and religion applies to everyone.

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66 Id art 21.
67 Id art 22.
68 Id art 23.
69 Id art 24.
70 Id art 25.
71 Id; see also General Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44, par 1(a) of the Convention on the Rights of the Child: Adopted by the Committee on the Rights of the Child at its 22nd Meeting (1st Session) on 15 October 1991, par 21; see also article 3 of the United Nations Convention on the Rights of the Child.
72 Article 26 of the UNCRC.
73 Id art 27.
74 Ibid.
75 Article 30 of the UNCRC.
76 Id; see also art 2 of the UNCRC provides that “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”.
Children have the right to relax and play, and to join in a wide range of cultural, artistic and other recreational activities.\textsuperscript{77} The enjoyment of these rights is dependent on the capacity and resources of the States Parties. States Parties to the UNCRC must protect children from work that is dangerous or might harm their health or their education.\textsuperscript{78} The UNCRC further provides that if children help out in a family farms or business, the tasks they perform should be safe and suited to their level of development and comply with national labour laws.\textsuperscript{79}

The UNCRC provides that States Parties should use all means possible to protect children from the use of harmful drugs and from being used in the drug trade.\textsuperscript{80} Further, children should be protected from all forms of sexual exploitation and abuse.\textsuperscript{81} States Parties must take all measures possible to make sure that children are not abducted, sold or trafficked.\textsuperscript{82} These rights are aimed at protecting the child’s person and maintaining the well-being of children.

States Parties to the UNCRC must protect children from any activity that takes advantage of them or could harm their welfare and development.\textsuperscript{83} Moreover, no one is allowed to punish children in a cruel or harmful way.\textsuperscript{84} The UNCRC provides that children should not be detained in the same prison with adults.\textsuperscript{85} Further, States Parties must ensure that children are kept in contact with their families, and should not be sentenced to death or to life imprisonment without the possibility of release.\textsuperscript{86}

The UNCRC has obliged States Parties to protect and care for children affected by war.\textsuperscript{87} The UNCRC provides that children under the age 15 should not be forced or recruited to take part in a war or join the armed forces.\textsuperscript{88} In the wake of conflicts between the USA and Iraq, Palestine and Israel, Libya, Nigeria, and the Lord’s...
Resistance Army LRA in Uganda) the need to protect children in these situations has become increasingly important.\textsuperscript{89}

Children who have been neglected, abused or exploited must receive special help to recover physically and psychologically and be reintegrated into society.\textsuperscript{90} Particular attention must in this regard be paid to restoring the health, self-respect and dignity of the children.\textsuperscript{91}

The UNCRC provides that children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects children’s rights.\textsuperscript{92} States Parties are therefore required to set a minimum age below which children cannot be held criminally responsible.\textsuperscript{93}

The UNCRC provides that if the laws of a country provide better protection for children’s rights than the UNCRC, those former laws should apply.\textsuperscript{94} States Parties must make the UNCRC known to adults and children.\textsuperscript{95} Adults should help children learn about their rights.\textsuperscript{96} This provision emphasis the important role of children’s rights advocacy between States Parties and adults and between adults and children.

### 2.4 The Composition of the Committee on the Rights of the Child

At the heart of monitoring States Parties’ implementation of the UNCRC is the Committee on the UNCRC (the Committee).\textsuperscript{97} States Parties that ratify the UNCRC must submit to the Committee on a regular basis, detailed reports on the national situation regarding children’s rights.\textsuperscript{98} The purpose of these regular reports is that the Committee can carry out examination of the States Parties’ situation based on the submitted reports.\textsuperscript{99}

\textsuperscript{89} \url{http://www.globalissues.org/issue/83/conflicts-in-africa}; (accessed 7/08/2012) see also \url{http://www.warchild.org.uk/issues/the-lords-resistance-army} (accessed 7/08/2012).
\textsuperscript{90} \textit{Id} art 39.
\textsuperscript{91} Article 39 of the UNCRC.
\textsuperscript{92} \textit{Id} art 40.
\textsuperscript{93} \textit{Id} art 41.
\textsuperscript{94} \textit{Id} art 42.
\textsuperscript{95} \textit{Ibid}; see also art 4 of the UNCRC.
\textsuperscript{96} Article 43 UNCRC.
\textsuperscript{97} \url{http://www.unicef.org/crc/files/Committee_fact_sheet.pdf}; (accessed on 4/06/2012).
\textsuperscript{98} \textit{Ibid}. 

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The Committee is made up of 18 members from different countries and legal systems that are of “high moral standing” and experts in the field of human rights. Although they are nominated and elected by the governments that have ratified the UNCRC, the Committee members act in their personal capacity. The members do not represent their countries’ governments or any other organisation to which they might belong.

The Committee derives its mandate from the UNCRC itself and the Committee is “accountable solely to the children of the world”. The members of the Committee are elected by secret ballot. Members are elected for four years only. Further, the Committee establishes its own rules of procedure.

Apart from its main activity, which is the examination of States Parties’ reports, the Committee also undertakes activities aimed at promoting international co-operation among multilateral agencies, donor countries and developing countries. Every two years, the Committee reports on its activities to the UN General Assembly through the UN Economic and Social Council.

The Committee may invite the specialised agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the UNCRC. The Committee may also invite the same specialised agencies to submit reports on the implementation of the UNCRC in areas falling within the scope of their activities.

The Committee shall transmit, as it may consider appropriate, to the specialised agencies, any reports from States Parties that contain a request or indicate a need for technical advice or assistance.

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100 Id art 43(2).
101 Ibid.
102 Article 43(2) of the UNCRC.
104 Article 43(3) of the UNCRC.
105 Id art 43(6).
106 Id art 43(8).
107 Ibid.
108 Id art 45 of the UNCRC.
109 Id art 45(a).
110 Id art 45(b).
The Committee may recommend the UNGA to request the Secretary-General of the UN to undertake studies on specific issues relating to the rights of the child on its behalf. The Committee may also make suggestions and general recommendations based on information received pursuant to States Parties’ reports and specialised agencies of the UNCRC. The suggestions and general recommendations must be transmitted to the States Parties concerned and reported to the General Assembly, together with comments, if any, from States Parties.

States Parties to the UNCRC are requested to provide relevant information, including the principal legislative, judicial, administrative, or other measures in force within their jurisdiction. This will allow the Committee to monitor the implementation of the UNCRC properly. States Parties are also obliged to provide information with regard to the institutional infrastructure for implementing policies, particularly in monitoring strategies and implementation mechanisms. Moreover, States Parties must provide relevant information on factors that are aimed at the efficacy of children’s rights implementation.

2.5  The reporting mechanisms of the UNCRC

States Parties to the UNCRC undertake to submit to the Committee, through the Secretary-General of the UN, reports on the measures they have adopted which give effect to the rights in the UNCRC. States Parties will further provide progress reports on the implementation of the rights contained in the UNCRC.

Reports made under article 44 of the UNCRC must indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the UNCRC. Reports must also contain sufficient information to provide the Committee with a

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112 Id art 45(c).
113 Article 45(c) of the UNCRC.
114 Id art 45(d).
116 Ibid.
117 Ibid.
118 Article 44(1) of the UNCRC.
119 Ibid.
120 Id art 44(2).
comprehensive understanding of the implementation of the UNCRC in the States Parties concerned. Further, States Parties which submitted a comprehensive initial report to the Committee need not, in their subsequent reports submitted in accordance with article 44(1)(b) of the UNCRC, repeat basic information initially provided.

States Parties must make their reports widely available to the public in their own countries. The States Parties’ reports may be used as vehicles for effective monitoring as well as a dialogue on children’s rights between the States Parties and civil society. They also foster co-operation amongst civil society organisations. This ongoing monitoring provides a further impetus to the full protection of children’s rights.

States Parties are obliged to indicate factors, affecting the degree of fulfillment of their obligations under the UNCRC. Such reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the UNCRC in the State Party concerned.

The reports must indicate the difficulties encountered and progress achieved in implementation of the UNCRC, with particular emphasis on education, including vocational training, and guidance and aims of education.

In addition to the information provided under article 44(1)(a) on the implementation of the UNCRC, States Parties are requested to specify the nature and extent of co-

121 Ibid.
122 Article 44(1)(b) UNCRC provides: “States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights; within two years of the entry into force of the Convention for the State Party concerned; Thereafter every five years.”
123 Id art 44(4).
124 Id art 44(6).
125 Clarhäll E “Monitoring implementation of the UN Convention on the Rights of the Child: To strengthen follow up by civil society on concluding observation and recommendations made by the UN Committee on the Rights of the Child” CNN Consulting September 2011, Save the Children. http://mena.savethechildren.se/PageFiles/2867/monitoring%20implementation%20of%20CRC-civil%20society%20follow%20up.pdf (accessed 13/06/2012).
127 Id art 44(2).
128 Ibid.
operation with local and national organisation of a governmental or non-
governmental nature.\textsuperscript{130} Institutions such as social welfare services must be utilised
in the implementation of the UNCRC.\textsuperscript{131} Moreover, States Parties are encouraged to
provide additional relevant statistical information and indicators relating to children’s
rights enshrined in the UNCRC.\textsuperscript{132}

\subsection*{2.6 The right to education under the UNCRC}

The UNCRC provides the international framework for the protection of children’s
right to education. The UNCRC provides that all children have the right to free
primary education.\textsuperscript{133} This provision highlights the importance of basic education
with regard to the full development of children. The UNCRC also provides that
children’s education should be aimed at developing each child’s personality, talents
and abilities to the fullest.\textsuperscript{134} Further, the right to education’s aim is to encourage
children to respect human rights.\textsuperscript{135}

The need to protect children’s right was stated in the Declaration of the Rights of the
Child\textsuperscript{136} adopted by the UNGA on 20 November 1959 and is further recognised in
the UDHR, the ICCPR,\textsuperscript{137} the ICESCR,\textsuperscript{138} the UNCRC, and relevant instruments of

\begin{enumerate}
\item \textsuperscript{130} \textit{Ibid.}
\item \textsuperscript{131} General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States
Parties Under Article 44, Paragraph 1(a) of the Convention on the Rights of the Child: Adopted by
the Committee on the Rights of the Child at its 22\textsuperscript{nd} Meeting (1\textsuperscript{st} Session) on 15 October 1991 at
par 21.
\item \textsuperscript{132} \textit{Ibid.}
\item \textsuperscript{133} Article 28 UNCRC.
\item \textsuperscript{134} \textit{Id art 29.}
\item \textsuperscript{135} \textit{Ibid.}
\item \textsuperscript{136} Principle 7 Declaration of the Rights of the Child, 1959; see also Article 26 of the Universal
Declaration of Human Rights provides
(1) “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental
stages. Elementary education shall be compulsory. Technical and professional education shall be made
generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of
respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and
friendship among all nations, racial or religious groups, and shall further the activities of the United
Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.”
\item \textsuperscript{137} Article 23 of the International Covenant on Civil and Political Rights provides that
(1) “The family is the natural and fundamental group unit of society and is entitled to protection by society and
the State.
(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.
(3) No marriage shall be entered into without the free and full consent of the intending spouses.
(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and
responsibilities of spouses as to marriage, during marriage and at its dissolution.”
\end{enumerate}
specialised agencies and international organisations concerned, with the welfare of children. The comprehensive nature of the UNCRC’s provisions on education, and the focus on the enhancement of opportunities for the child’s full development, are powerful tools for children’s rights protection from abuse and exploitation.

The realisation of children’s right to education may arise, in particular, when States Parties make free primary education compulsory and available to all. This duty has evolved over time to extend beyond primary education in the majority of countries in the world. However, this is less encouraging if enforcement and implementation are threatened by other factors such as socio-economic problems.

There are also some implementation problems in relation to the realisation of States Parties’ obligation under the UNCRC to ensure that education is free and compulsory at primary school level. First, the UNCRC does not mention enforcement mechanisms as regards the right to education. Secondly, compulsory education must not be an obligation for States Parties alone, but also for parents and

Article 24 of the ICCPR provides that in the case of dissolution, provision shall be made for the necessary protection of any children; provides that
(1) “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
(2) Every child shall be registered immediately after birth and shall have a name.
(3) Every child has the right to acquire a nationality.”

Article 10 of the International Covenant on Economic, Social and Cultural Rights provides that The States Parties to the present Covenant recognize that:
(1) “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
(3) Special measures of protection and assistance should be taken on behalf of all children and young people without any discrimination for reasons of parentage or other conditions. Children and young people should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

Preamble to the UNCRC.

Ibid.

Ibid.

Ibid.

Ibid; see also the “Right to Education Project: promoting mobilising and legal accountability” http://www.right-to-education.org/node/54 (10/04/2012).

Ibid.
children. This means that in order for States Parties to properly realise the right to education for children they must eradicate the above mentioned obstacles.

It is also important to factor in, the parents and children’s views on the relevance of education for them, in order to assess challenges to the effective implementation of compulsory education. Compulsory education can also be seen as a key factor in combating discrimination. This reinforces the need to protect children from practices that appear to perpetuate the discrimination of children.

The UNCRC does not mention a specific minimum age for the completion of compulsory education, nor does the UNCRC recommend a specific compulsory duration of education. Notwithstanding, the Committee has indicated that States Parties should establish clear limits on the completion of compulsory education and specific compulsory duration of education.

States Parties are required to indicate the particular measures adopted to make primary education compulsory. There must be periodic reports which provide information on whether compulsory education is freely available to everyone, particularly children, indicating the minimum age for enrolment in primary school, and the minimum and maximum ages for compulsory education.

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146 Ibid.
148 Article 2(1) of the UNCRC provides that “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; “Right to Education Project: promoting mobilising and legal accountability” http://www.right-to-education.org/node/54 (accessed 10/03/2012); on any grounds but in particular on gender and in ensuring that the child is at the centre of educational laws and policies (compelling attendance implies that education is in the best interest of the child), though further questions need to be raised here, as suggested throughout this report.”
150 Articles 1 and 28 UNCRC; see also Right to Education Project: promoting mobilising and legal accountability” http://www.right-to-education.org/node/54 (accessed 10/03/2012). “This is understandable given that the text of each article needed to be agreed by consensus and that the choice of particular ages had already raised debates and difficulties in the case of art 1 (definition of the child) and article 38 (children in armed conflicts). A more flexible formulation may have seemed more amenable to agreement.”
151 Ibid.
152 Articles 1 and 28 of the UNCRC.
153 Ibid.
The UNCRC provides that the development of different forms of secondary education, including general and vocational education, should be encouraged.\textsuperscript{154} This developmental education must be made available and accessible to all children.\textsuperscript{155} States Parties must provide appropriate measures such as the introduction of free education and financial assistance for persons who are unable to pay tuition fees.\textsuperscript{156} Higher education must also be made accessible to all by every appropriate means.\textsuperscript{157}

The UNCRC provides that educational, vocational information and guidance must be available and accessible to all children.\textsuperscript{158} States Parties to the UNCRC must also take measures to encourage regular attendance at schools and the reduction of drop-out rates.\textsuperscript{159} Parents or guardians bear the primary duty to ensure that their children attend school due to their legal obligation under domestic laws.

Therefore, the duty upon the States Parties to reduce drop-out rates must be exercised in co-operation with the parents or guardians of children. The extent to which States Parties comply with this requirement of reducing drop-out rates is not merely a question of statistics.\textsuperscript{160} Because, the information gathered will help in critically evaluating problem areas and in assisting States Parties to formulate policies and legislation that specifically deal with school drop-outs.

States Parties to the UNCRC must work towards promoting and encouraging international co-operation in matters relating to the right to education.\textsuperscript{161} International co-operation in matters relating to education shall be aimed at the elimination of ignorance and illiteracy throughout the world.\textsuperscript{162} The UNCRC also provides that the facilitation of access to scientific and technical knowledge and modern teaching methods must be developed through international co-operation.\textsuperscript{163} The facilitation of

\begin{footnotesize}
\begin{enumerate}
\item Article 28(1)(b) of the UNCRC.
\item Ibid.
\item Article 28(1)(b) of the UNCRC.
\item Id art 28(1)(c).
\item Id art 28(1)(d).
\item Id art 28 (1)(e).
\item Ibid.
\item Id art 28(3).
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotesize}
access to scientific knowledge must take cognisance of the needs of developing countries.\textsuperscript{164}

The UNCRC does not explicitly provide for the right to “quality” education. It does, however, state that education must be aimed at the full development of a child.\textsuperscript{165} From the wording of article 29(a), one may infer that without “quality” education, the full development of the child will not be realised.

2.7 Conclusion

The advent of the UNCRC has contributed immensely to the international legal framework governing children’s rights. The UNCRC has set a standard for regional and domestic law in improving the protection of children’s rights, and, in particular, the right to education. In so doing, the UNCRC has widened the scope and nature of the right to education.

This chapter has dealt with the primary aspects of the UNCRC relevant to this dissertation, with emphasis on the right to education. The following chapter will continue to examine the right to education in the regional and UN human rights systems.

\textsuperscript{164} Ibid.
\textsuperscript{165} Id art 29(a).
3 CHAPTER 3: THE RIGHT TO EDUCATION AT THE UNITED NATIONS LEVEL

Part 1

3.1 Introduction

Education is a fundamental human right.\textsuperscript{1} It is an enabling right that permits the exercise of other fundamental rights.\textsuperscript{2} The right to education enhances the fulfilment of all other rights and freedoms.\textsuperscript{3} Therefore, the focal point of this chapter will be the evaluation of the right to education.

The evaluation will be undertaken in two parts. Part 1 will be an analysis of the right to education as laid down at the UN human rights system. The analysis will be based on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Part 2 will examine the right to education in three regional human rights systems namely, the EU, the OAS and the AU.

3.2 THE UNITED NATIONS

(a) The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) makes it mandatory for its Member States to provide education for everyone.\textsuperscript{4} This means that education must be provided to children and all persons within the jurisdiction of the Member States.\textsuperscript{5} The UDHR does not create enforceable rights, because it is a declaration. However, the UDHR forms international customary law which is legally binding upon its Member States. The UDHR states that Member States must make provision for free education, at least at the elementary and fundamental stages.\textsuperscript{6} Consequently, the UDHR provides for free and compulsory elementary education to all. The use of

\textsuperscript{1} Sloth-Nielsen J Children’s rights in Africa: A legal perspective, Chapter 13 Implementing the Girl’s Right to Education in Selected Countries in Africa (2008) at 219.
\textsuperscript{2} Ibid.
\textsuperscript{3} Ibid; see also Sloth-Nielsen and Mezmur Free education is a right for me: A report on free and compulsory primary education (2007).
\textsuperscript{4} Article 26(1) of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid.
the word “compulsory” makes it clear that only persons under the age of 18 can be compelled to attend school. This is because children or persons under 18 are compelled to attend school by domestic law and various international instruments (e.g. UNCRC).

The UNCRC also provides for technical and professional education to be made generally available, and higher education shall be equally accessible to all. This provision is applicable to persons older than 18. However, the UDHR does not imply that its Member States are required to provide free technical, professional, and higher education.

The Member States to the UDHR agreed that education shall be directed to the full development of the human personality. Further, education is aimed at the strengthening of respect for human rights and fundamental freedoms. Education is also a vehicle for the promotion of understanding, tolerance and friendship among all nations, racial or religious groups. Moreover, in maintaining the UN human rights ethos, the UDHR states that educational activities shall be for the maintenance of peace. Thus education aimed at intolerance or for the disruption of peace may not be enforced by the international community.

Parents or guardians have a choice of which type of education their children should receive. This provision will apply in situations where a child is incapable of appreciating his or her choices in relation to what type of education he or she needs. The same may not be said about children who should be in special schools but are in mainstream schools.

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7 Article 26(1) of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
8 Article 28 of the UNCRC.
9 Article 26(1) of the UDHR.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has no specific provisions dealing with the right to education. This is because the ICCPR aims to protect certain specific rights such as those contained in article 25, which provides for the right to vote.

The ICCPR deals with civil and political rights. This is apparent from the Preamble to the ICCPR, which recognises that, in accordance with the UDHR, the ideal of free human beings enjoying civil and political freedom can be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as economic, social and cultural rights.16

The ICCPR does, however, cover children’s rights in so far as it states that “everyone” is entitled to enjoy civil and political rights.17 Thus, the ICCPR places an obligation upon a State Party to respect and ensure the rights of all individuals within its territory and subject to its jurisdiction.18 Thus, children’s rights are covered in so far as the ICCPR states that States Parties must ensure protection to all individuals.

The efficacy of implementation mechanism regarding children’s rights in the context of the ICCPR is underpinned by the States Parties. The States Parties must respect the liberty of parents and legal guardians to ensure the religious and moral education of their children.19 The above provision protects the right to education in relation to the parent who is the primary caregiver to the children.

In this regard, article 18 of the ICCPR provides that education does not only mean technical and professional training.20 Education is both a human right in itself and an

17 Ibid.
18 Article 2(1) of the International Covenant on Civil and Political Rights; see also Conte A, Davidson S and Burchill Defining civil and political rights, the jurisprudence of the United Nations Human Rights Committee (2004) at 23.
20 Ibid.
indispensable means of realising other human rights. However, the importance of education is not merely practical but also encompasses the development of a well-educated, enlightened and active mind, able to wander freely and widely, as one of the joys and rewards of human existence.

(c) The International Covenant on Economic, Social and Cultural Rights

The ICESCR recognises that in accordance with the UDHR, the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

The ICESCR makes provision for the right to education of children. The ICESCR states that the right to education may not be unjustly limited or disrupted. Thus unjustifiable disruption and limitation of the right to education for children will be a violation of article 5 of the ICESCR. The ICESCR states in general terms that there shall be no denial of any of the fundamental human rights existing in any State’s law, conventions, and regulations or custom.

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23 Preamble of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993 at 3; see also Article 25 of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999 at 171, provides that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

24 Id art 13.

25 Ibid.

26 Article 5(1) of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993 at 3 provides that “nothing in the ICESCR may be interpreted as implying for any state, group or person or any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised in the ICESCR, or at their limitation to a greater extent than is provided for in the ICESCR”.

27 Ibid.
The right to education is indispensable to the promotion of children’s rights, children’s growth, and survival. The ICESCR also provides that education shall be directed to the full development of the human personality.\textsuperscript{28} Moreover, the ICESCR provides that education must instil a sense of children’s dignity, and strengthen their respect for human rights and fundamental freedoms.\textsuperscript{29}

There are similarities between article 26(2) of the UDHR and article 13 of the ICESCR in so far as both provide that education shall enable all children to participate effectively in a free society.\textsuperscript{30} This provision empowers children through education to be active participants in politics, economics, civil society, and so on.

The ICESCR, like the UDHR, makes provision for free primary education.\textsuperscript{31} The ICESCR also provides for free primary education which should be compulsory.\textsuperscript{32} Further, such education must be made available to everyone.\textsuperscript{33} The implication of the use of the word “everyone” denotes that all children must be provided with free primary education. The ICESCR also provides that secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all children by every appropriate means.\textsuperscript{34}

The words “appropriate means” could mean that States Parties must progressively realise the right to different forms of education.\textsuperscript{35} This statement is echoed in article 13(2) (c) of the ICESCR, which obliges States Parties progressively to realise the

\textsuperscript{28} Id 13(1).
\textsuperscript{29} Article 13(1) of the ICESCR, provides that “the promotion of understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”.
\textsuperscript{30} Ibid, see also, article 26(2) of the Universal Declaration of Human Rights which provides that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”
\textsuperscript{31} Article 13(2) (a) of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993 at 3; see article 26(1) of the UDHR which “provides that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Id art 13(2)(b).
\textsuperscript{35} Id art 13(2)(b) and (c).
right to higher education. The realisation of the right to education at secondary and higher education can be achieved, particularly through progressive introduction of free education.\textsuperscript{36}

Higher education in terms of the ICESCR must be made equally accessible to all.\textsuperscript{37} The realisation of the right to education must be based on capacity and be achieved by every appropriate means.\textsuperscript{38} The ICESCR also states that fundamental education shall be encouraged as far as possible for those persons who have not received primary education.\textsuperscript{39} Thus, the above provision is aimed at children and older persons who have not completed their primary education.

The ICESCR provides that the development of school systems at all levels shall be actively pursued by States Parties.\textsuperscript{40} This entails that an adequate schooling system must be established and the material conditions of teaching staff must be continuously improved.\textsuperscript{41} These measures will provide growth and adaptability to the changing environment of the education sector to all children.

The ICESCR has been heavily influenced by the UDHR.\textsuperscript{42} This is apparent in that both instruments provide that States Parties must undertake to respect the liberty of parents with regard to the protection of children’s rights.\textsuperscript{43} Further, both instruments provide that States Parties must respect parents’ or legal guardians’ choice of their children’s school other than those established by the public authorities.\textsuperscript{44}

The ICESCR provides that no part of article 13(4) must be construed to interfere with the liberty of individuals and bodies to establish and direct educational institutions.\textsuperscript{45} The establishment of such institutions is subject to the observance of the principles set forth in article 13(1)\textsuperscript{46} and to the requirement that the education offered in such

\textsuperscript{36} Article 13(2)(b) and (c) of the ICESCR.
\textsuperscript{37} Id 13(2)(c).
\textsuperscript{38} Ibid.
\textsuperscript{39} Id 13(2)(d).
\textsuperscript{40} Id 13(1).
\textsuperscript{41} Ibid.
\textsuperscript{42} Article 26(3) of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948,217 A (III).
\textsuperscript{43} Article 13(1) of the ICESCR.
\textsuperscript{44} Ibid.
\textsuperscript{45} Id art 13(4).
\textsuperscript{46} Article 13(1) of the of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993 at 3 provides that
institutions must conform to such minimum standards as may be laid down by the State.\footnote{47} Thus, children are protected from receiving “inferior” education by article 13(1) of the ICESCR.

States Parties are responsible for the enforcement of the right to education, and the community also has a duty in ensuring that the right to education is realised.\footnote{48} Therefore, the widest possible protection and assistance should be accorded to the family, because it is responsible for the primary care and education of the dependent children.\footnote{49}

States Parties to the ICESCR must put into place implementation mechanisms which give effect to the right to education of children.\footnote{50} States Parties must progressively realise the right to education.\footnote{51} This means that the ICESCR takes cognisance of the fact that certain aspects which are crucial to realising the right to education may not be easily available to some States Parties at a particular period. Therefore, the ICESCR recognises the need for progressive realisation of the right to education.

\textbf{(d) Conclusion}

The international community, through the UN human rights system, provides for the right to education. The international community emphasises free primary education. Further, the ICESCR introduces the concept of progressive realisation within which the right to education can be achieved on an incremental basis. Finally, the international community is cognisant of the fact that the realisation of the right to education needs cooperation between States Parties and the society.

\footnotetext{(1)} The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.


\footnotetext{48} \textit{Id} art 10(1).

\footnotetext{49} \textit{Ibid}.

\footnotetext{50} \textit{Id} art 10.

\footnotetext{51} \textit{Ibid}.
Part 2

3.3 REGIONAL PROTECTION OF CHILDREN’S RIGHT TO EDUCATION

3.3.1 Introduction

The protection of children’s rights takes place both under UN human rights system and under regional human rights systems. Regional human rights systems play an integral role in the realisation of the protection of children’s rights. Therefore, this chapter will examine the right to education in three regional human rights systems: namely, the European Union (EU), the Organisation of American States (OAS), and the African Union (AU).

3.3.2 The European Union


(a) The European Union Charter of Fundamental Rights

The European Union Charter on Fundamental Rights (the Charter) provides that everyone has the right to education and should have access to vocational and continuing training. The Charter protects the right to education of children by the use of the word “everyone”. The right to education includes the possibility of receiving free compulsory education.

This is in line with the UNCRC, as it also provides for free compulsory education, especially at primary level. However, the major difference between the UNCRC and the Charter is that the Charter does not make the provision of the right to education

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55 Ibid.
mandatory for Member States. The implication of this is that States Parties are not obliged to provide free compulsory education. Thus, the discretion lies with the State Party concerned, as to whether it would be possible to provide free compulsory education.

States Parties have the freedom to establish educational institutions with due respect for democratic principles and the rights of parents to ensure the education and teaching of their children. This freedom must, however, have due regard and respect for the parents' religious, philosophical and pedagogical convictions. The freedom must be exercised in accordance with national laws governing the exercise of freedoms and rights.

Parents or guardians have the prerogative with regard to the type and manner of education their children should receive. One must consider balancing the best interests of the child against the prerogative of the parents, in cases where the child is of a different view with regard to what type education he or she wishes to receive.

(b) The European Convention for the Protection of Human Rights and Fundamental Freedoms Protocol 1

The right to education is covered in Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 1). Protocol 1 provides that no person shall be denied the right to education. The word “person” clearly includes children. Consequently, the provision requires that children must not be denied the right to education.

Protocol 1 obliges a States Parties to ensure that education provided to children is in conformity with the parents’ religious or philosophical convictions.

57 Id art 14(3).
58 Ibid.
59 Ibid.
60 Ibid.
62 Ibid.
The European Convention for the Protection of Human Rights and Fundamental Freedoms provides for two different, though interconnected, perspectives on the right to education.63 The first view is the right to education can be invoked by children.64 Secondly, the right to education can be invoked by parents representing their children.65

States Parties concerned must find a balance between the protection of this general interest of the community, and respect for the fundamental human rights of individuals while giving particular importance to the latter.66

In the Campbell and Cosans67 case, the parents complained, inter alia, that their children were denied the right to education as provided by Protocol 1.68 The parents claimed that the children did not receive a guarantee that no corporal punishment would be applied at their school.69 Cosans’ refusal to accept corporal punishment resulted in his suspension.70

The requirement that the children should submit to corporal punishment conflicted with the parents’ rights laid down in the second sentence of article 2 of Protocol 1.71 The Court held that there was no longer any question of a reasonable regulation of access to education.72 Consequently, it concluded that the right to education had been violated.73

64 Ibid.
65 Ibid.
66 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Campbell and Cosans v UK, judgment of 25 Feb 1982, Series A no 48, 4 EHRR 293, 40.
(c) The European Convention for the Protection of Human Rights

The European Convention for the Protection of Human Rights (ECHR) provides that no person shall be denied the right to education.\textsuperscript{74} Furthermore, the ECHR states that in the exercise of any functions related to education and to teaching, the States Parties shall respect the right of parents to ensure that education and teaching is in conformity with their religious and philosophical convictions.\textsuperscript{75}

The right to education in this instance is framed as a negative right, “no one shall be denied the right to education”.\textsuperscript{76} This means that States Parties do not have a positive obligation to provide or subsidise education. The provision of education or the subsiding thereof by a State Party must be available to all children.\textsuperscript{77} A violation of this right can therefore only occur as a result of restriction of access to education, and not, for example, as a result of the poor quality of education provided.\textsuperscript{78}

(d) The Composition and Function of the European Court of Human Rights

The European Court of Human Rights has the competence to accept individual complaints against all the 46 States that have ratified the ECHR.\textsuperscript{79} The European Court of Human Rights set up under the European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol 11) is composed of a number of independent judges equal to the number of States Parties.\textsuperscript{80}

\textsuperscript{74} Article 2 of the Additional Protocol 1: European Convention for the Protection of Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entered into force on 3 September 1953.
\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
\textsuperscript{80} Ibid.
The Court may receive applications from any person, NGO, or group of individuals claiming to be the victim of a violation by one of the States Parties of the rights set forth in the Convention or the Protocols thereto.81

(e) The European Court of Human Rights: Right to education case study

Timishev v Russia 55762/00 European Court of Human Rights.

The Procedure in the ECHR.

This case resulted from two applications92 against the Russian Federation lodged with the European Court of Human Rights under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Ilyas Yakubovich Timishev, on 25 February and 9 March 2000.83

The applicant alleged that he had not been permitted to enter Kabardino-Balkaria because of his Chechen ethnic origin.84 The impact of this denial of entry was that his children could not attend school. Thus, he alleged by denying him entry, his children’s right to education under article 2 of Protocol 1 had been violated.85

Facts of the case

The applicant originated from Chechen Republic where he had been living.86 He was born and lived in the town of Nalchik, in the Kabardino-Balkaria of Republic of the Russian Federation.87 The applicant, a lawyer, 88belonged to a Chechen ethnic group.89 On 31 December 1994 his property in the town of Grozny was destroyed.90

81 http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf (accessed 08/07/2012) "The government of any country that has ratified the Convention can be taken to the Court: it is not necessary for the government to have accepted the competence of the Court. Applications must be made within 6 months of the final domestic decision being taken."

82 Case of Timishev v Russia (Applications 55762/00 and 55974/00) at par 1.

83 Ibid.

84 Id par 3.

85 Ibid.

86 Id par 10.

87 Id par 9.

88 Ibid.

89 Ibid.
during a military operation. As a result of the destruction to his property, he had been living in Nalchik as a forced migrant, since 15 August 1996.

In 1997 the applicant applied for permanent residence registration in Nalchik. His application was refused in accordance with the local laws of Kabardino-Balkaria prohibiting former residents of the Chechen Republic from obtaining permanent residence in Kabardino-Balkaria. The refusal of the local authorities was upheld by the Nalchik Town Court and by the Supreme Court of the Kabardino-Balkarian Republic.

Refusal of access to school.

The applicant’s nine-year-old son and seven-year-old daughter attended School no 8 in the town of Nalchik in Kabardino-Balkaria. The applicant was awarded compensation for the property he had lost in the Chechen Republic. In exchange for the compensation, he had to hand in his migrant’s card, a local document confirming his residence in Nalchik and his status as a forced migrant from Chechnya.

The applicant’s son and daughter attended school, but were refused admission since the applicant could not produce his migrant’s card. The headmaster agreed to admit the children unofficially, but advised that they would be suspended instantaneously if the education department became aware of the arrangement.

The applicant proceeded to lodge a complaint with the Court that his children had been refused admission to school by the Nalchik Education and Science Department. The Department replied that, after 24 December 1999, the applicant had had no lawful grounds for remaining in Nalchik and that his requests amounted

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90 Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) at par 10.
91 Ibid.
92 Ibid par 11.
93 Ibid.
94 Ibid.
95 Ibid par 22.
96 Ibid par 23.
97 Ibid.
98 Ibid par 24.
99 Ibid.
100 Ibid par 25.
to a violation of the lawful rights of other children because School no 8 was extremely overcrowded even without his children.  

On 1 November 2000 the Nalchik Town Court dismissed the applicant’s proceedings on the ground that they were unsubstantiated. The Court found that the applicant and his family members resided in the town of Nalchik without proper registration of their residence. It further held that under these circumstances, the requests for admission of his children to School no 8 could not be supported.

According to a certificate produced by the headmaster of School no 8, on 11 October 2000 the school had 459 pupils, whereas it was designed to accommodate 230. On 21 November 2000, in an appeal by the applicant, the Supreme Court of the Kabardino-Balkaria Republic upheld the judgment of the court a quo.

Violation of article 2 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The applicant complained under article 2 of Protocol 1 about the domestic authorities’ refusal to secure his children’s right to education on the ground that he had no registered residence in Nalchik and did not have a migrant’s card. The part of article 2 of Protocol 1 which was alleged to have been violated reads as follows: “No person shall be denied the right to education.”

The parties’ submissions

The refusal to admit the applicant’s children to school after the summer break had been based on the fact that he had no registered residence and no “migrant’s card”, which only former Chechen residents were required to have. Thus, the argument

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101 Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) at par 25.
102 Id par 26.
103 Ibid.
104 Ibid.
105 Id par 27.
106 Ibid.
107 Article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights of freedoms and Fundamental Rights. See also Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) at par 60.
108 Id par 61.
relating to the overcrowding of the school, had only surfaced later once he had sought relief in court.\textsuperscript{109}

The respondent (the Russian Government) conceded that the right of the applicant's children to education had been unlawfully restricted.\textsuperscript{110} Under Russian law, rights and freedoms could not be restricted on account of a person's registered place of residence, and the Education Act guaranteed the right to education despite a person's place of residence.\textsuperscript{111}

**The European Court of Human Rights’ assessment**

The European Court of Human Rights held that, by binding themselves not to “deny the right to education” under article 2 of Protocol 1, the States Parties guarantee to anyone within their jurisdiction a right of access to existing educational institutions.\textsuperscript{112}

This article forbids arbitrary denial of the right to education.\textsuperscript{113} This provision has no expressed limitations and its structure is similar to that of articles 1, 2, 3, 4, and 7 of the Convention ("No one shall..."), which together enshrines the most fundamental values of the democratic societies making up the Council of Europe.\textsuperscript{114} The right to education is indispensable to the advancement of human rights, and plays a fundamental role. Thus, a restrictive interpretation of the first sentence of article 2 of Protocol 1 would not be consistent with the aims of the right to education.\textsuperscript{115}

The right to education is also to be found in similar terms in other international instruments such as the UDHR (article 26), the ICESCR (article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)(article 5(e)(v)), and the UNCRC (article 28).\textsuperscript{116} There is no doubt that the right to education

\footnotesize{\textsuperscript{109} Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) at par 61. \textsuperscript{110} Id par 62. \textsuperscript{111} Ibid. \textsuperscript{112} Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) par 63. See also Kjeldsen, Busk Madsen and Pedersen v Denmark, judgment of 7 December 1976, Series A no 23, 52; Belgian linguistic case (merits), judgment of 23 July 1968, Series A no 6 at 30-32, 3-5. \textsuperscript{113} Id par 64; see also the article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights of Freedom and Fundamental Rights. \textsuperscript{114} Ibid. \textsuperscript{115} Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) par 64; See also Leyla Şahin v Turkey [GC], no 44774/98, § 137, ECHR 2005. \textsuperscript{116} Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) at par 64.}
guarantees access to elementary education which is of high importance for a child’s development.\textsuperscript{117}

The Court observed that the applicant’s children were refused admission to the school which they had attended for the previous two years.\textsuperscript{118} The Government of Russia did not contest the applicant's submission that the true reason for the refusal had been that the applicant had surrendered his migrant’s card and had thereby lost his registration as a resident in the town of Nalchik.\textsuperscript{119}

The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols prohibit the denial of the right to education.\textsuperscript{120} The respondent confirmed that Russian law prohibits the exercise of children’s right to education on condition that their parents’ residence is registered.\textsuperscript{121} It follows that the applicant’s children were denied the right to education provided for by domestic law.\textsuperscript{122} Their exclusion from school was thus incompatible with the requirements of article 2 of Protocol 1.\textsuperscript{123} In that light, a violation of article 2 of Protocol 1 had occurred.\textsuperscript{124}

\textit{Kjeldsen Busk Madsen and Pedersen v Denmark} 55762/00 European Court of Human Rights

Procedure

This case involved three applications lodged with the European Commission on Human Rights (the Commission). The first application was lodged by Mr and Mrs Kjeldsen and was followed by those of Mr and Mrs Busk Madsen, and Mr and Mrs Pedersen.\textsuperscript{125} The Busk Madsens and the Pedersens, stated that they regarded their applications as closely linked with that of the Kjeldsens, thus the Commission

\begin{itemize}
\item\textsuperscript{117} \textit{Ibid.}
\item\textsuperscript{118} \textit{Id par 65.}
\item\textsuperscript{119} \textit{Ibid.}
\item\textsuperscript{120} \textit{Case of Timishev v Russia} (Applications nos 55762/00 and 55974/00) par 64; see also \textit{Leyla Şahin v Turkey} [GC], no 44774/98, § 137, ECHR 2005 at par 66.
\item\textsuperscript{121} \textit{Ibid.}
\item\textsuperscript{122} \textit{Ibid.}
\item\textsuperscript{123} \textit{Ibid.}
\item\textsuperscript{124} \textit{Id par 67.}
\item\textsuperscript{125} \textit{Ibid.}
\end{itemize}
decided to join the three applications in accordance with the then Rule 39 of its Rules of Procedure.¹²⁶

The applicants maintained that compulsory sex education, as introduced into state schools, was contrary to the parents’ beliefs and constituted a violation of article 2 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹²⁷

**Violation of Article 2 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms**

The applicants relied on article 2 of Protocol 1, which provides that:

> “No person shall be denied the right to education.”¹²⁸ Further, that the exercise of any functions which the Convention assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”¹²⁹

In opposing the application, the Government maintained that the second sentence of article 2 of Protocol 1 does not apply to state schools.¹³⁰ The Government also emphasised that Denmark does not force parents to entrust their children to state schools.¹³¹ Denmark allows parents to educate their children, or to have them educated, at home and, above all, to send them to private institutions to which the state pays substantial subsidies.¹³² In this regard, the “function in relation to education and to teaching”, within the meaning of article 2 of Protocol 1, has been fulfilled within these alternatives.¹³³ Thus, the court maintained that in Denmark the

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¹²⁶ Case of Timishev v Russia (Applications nos 55762/00 and 55974/00) par 67.
¹²⁷ Ibid, see also Leyla Şahin v Turkey [GC], no 44774/98, § 137, ECHR 2005.
¹²⁸ Id par 49; see also article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
¹²⁹ Article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “No one shall be denied the right to education. In exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.
¹³⁰ Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 50.
¹³¹ Ibid.
¹³² Ibid.
¹³³ Ibid.
obligation as stated in the second sentence of the provision is discharged by the said alternatives.  

The Court held that in Denmark private schools co-exist with a system of public education. The second sentence of article 2 of Protocol 1 is binding upon the Contracting States in the exercise of every function; it speaks of “any functions” that they undertake in the sphere of education and teaching, including those involved in the organisation and financing of public education.

Furthermore, the second sentence of article 2 of Protocol 1 must be read together with the first, which enshrines the right of everyone to education. The second sentence aims, in short, to safeguard the possibility of pluralism in education which is essential for the preservation of the “democratic society” as conceived by the Convention. In view of the power of the modern state, it is above all through state teaching that this aim must be realised.

The European Court of Human Rights thus concluded, as the Commission had done unanimously, that the Danish state schools fall within the ambit of Protocol 1. The Court held that the functions assumed by Denmark in relation to education and teaching, include the grant of substantial assistance to private schools.

The respondent pleaded in the alternative that the second sentence of article 2 of Protocol 1 governed state schools where attendance is not obligatory. This implies

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134 Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 50.
135 Ibid.
136 Ibid.
137 Article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “No one shall be denied the right to education. In exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.
138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid.
that parents have a right to have their children exempted from classes offering "religious instruction of a denominational character".\textsuperscript{143}

The Court, in disagreeing with the government view, held that article 2 of Protocol 1 does not permit a distinction to be drawn between religious instruction and other subjects.\textsuperscript{144} The Court held that the State must respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme.\textsuperscript{145} Article 2 of Protocol 1 constitutes a whole that is dominated by its first sentence.\textsuperscript{146} States Parties bind themselves not to “deny the right to education”. The States Parties guarantee to anyone within the jurisdiction of Kjeldsen, Busk Madsen and Pedersen in Denmark, “a right of access to educational institutions existing at a given time”.\textsuperscript{147}

The right set out in the second sentence of article 2 of Protocol 1\textsuperscript{148} is additional to this fundamental right to education.\textsuperscript{149} Parents may require the States to respect their religious and philosophical convictions with regard to their children’s education.\textsuperscript{150} The parents’ right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.\textsuperscript{151}

The provisions of the Convention and Protocol must be read as a whole. The two sentences of article 2 of Protocol 1 must be read not only in the light of each other, but also, in particular, in the light of articles 8, 9 and 10 of the ECHR.\textsuperscript{152} Both the Convention and the Protocol provide for the right of everyone, including parents and children, “to respect for his private and family life”, to “freedom of thought,

\textsuperscript{143} Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 51.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{146} Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 52.
\textsuperscript{147} Id par 52; see also the judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no 6 at 30-32 par 3-5.
\textsuperscript{148} Article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “No one shall be denied the right to education. In exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid.
\textsuperscript{151} Ibid.
\textsuperscript{152} Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 52.
conscience and religion”, and to “freedom to receive and impart information and ideas”. 153

The setting and planning of the school curriculum fall in principle within the competence of the States Parties. 154 This, in the main, involves questions of expediency on which it is not for the Court to rule, and whose solution may legitimately vary according to the country and the era. 155 In particular, the second sentence of article 2 of Protocol 1 does not prevent States Parties from imparting, through teaching or education, information or knowledge of a directly or indirectly religious or philosophical nature. 156

Article 2 of Protocol 1 does not permit parents to object to the integration of teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.157 The Court held that it would very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. 158

The second sentence of article 2 of Protocol 1 requires States Parties, in executing the functions of education and teaching, to take care that the information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. 159 The State is forbidden to pursue an objective of indoctrination that might be regarded as undermining the parents’ religious and philosophical convictions. 160 That is the limit that must not be exceeded.161

In Kjeldsen, Busk Madsen and Pedersen v Denmark, the court held that such an interpretation is consistent with the first sentence of article 2 of Protocol 1. Further, it

153 Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 52.
154 Id par 53.
155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid.
159 Ibid.
160 Ibid.
161 Ibid.
is consistent with articles 8 to 10 of the ECHR and with the general spirit of the
Convention.\textsuperscript{162}

The instruction of sex education in State schools is aimed less at instilling knowledge
that children do not have or cannot acquire by other means, than at giving them such
knowledge more correctly, precisely, objectively and scientifically.\textsuperscript{163} The instruction,
as provided for and organised by the legislation, is principally intended to give pupils
better information.\textsuperscript{164} The instruction cannot exclude, on the part of teachers, certain
assessments capable of encroaching on the religious or philosophical sphere; for
what are involved are matters where appraisals of fact easily lead on to value-
judgments.\textsuperscript{165} The minority of the Commission emphasised this point.

The Executive Orders and Circulars of 8 June 1971, 15 June 1972, and the “Guide”
of April 1971 sought to warn pupils about the excessive frequency of births out of
wedlock, induced abortions, and venereal diseases.\textsuperscript{166} The public authorities wish to
enable pupils “to take care of themselves and show consideration for others in that
respect, and not to land themselves or others in difficulties solely on account of lack
of knowledge”.\textsuperscript{167}

These considerations are indeed of a moral order, but they are very general in
character and do not entail overstepping the bounds of what a democratic State may
regard as the public interest.\textsuperscript{168} Examination of the legislation in dispute establishes
in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a
specific kind of sexual behaviour.\textsuperscript{169} It does not make a point of exalting sex or
inciting pupils to indulge precociously in practices that are dangerous for their
stability, health or future, or that many parents consider reprehensible.\textsuperscript{170} Further,
sex education at school does not affect the right of parents to enlighten and advise

\begin{itemize}
\item \textsuperscript{162} Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights, at
par 53.
\item \textsuperscript{163} Ibid.
\item \textsuperscript{164} Ibid.
\item \textsuperscript{165} Ibid.
\item \textsuperscript{166} Id par 54.
\item \textsuperscript{167} Ibid; see also section 1 of the Executive Order of 15 June 1972.
\item \textsuperscript{168} Ibid.
\item \textsuperscript{169} Ibid.
\item \textsuperscript{170} Ibid.
\end{itemize}
their children in accordance with the parents’ own religious or philosophical convictions.\footnote{Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 54}

The Court took into account that harm may occur whilst in pursuit of the these provisions; however, schools must take the utmost care to ensure that parents’ religious and philosophical convictions are not disregarded as a result of carelessness, lack of judgment or misplaced teachings.\footnote{Ibid.} However, it follows from the Commission’s decisions on the admissibility of the application that the Court is not at present seized with a problem of this kind.\footnote{Ibid.}

The European Court of Human Rights held that there is no violation of the applicant’s religious and philosophical convictions to an extent forbidden by the second sentence of article 2 of the Protocol 1, interpreted in the light of its first sentence and of the Convention as a whole.\footnote{Ibid.}

The Danish State preserves important measures for parents who, in the name of their creed or opinion, wish to dissociate their children from integrated sex education.\footnote{Ibid.} The Danish State allows parents the option of educating their children in private schools, public schools or through home schooling.\footnote{Ibid.}

The applicants also relied on the first sentence of article 2 of Protocol 1.\footnote{Ibid.} Denmark had not denied their children either access to educational institutions existing in Denmark, or the right of drawing, by official recognition of their studies, profit from the education received by them.\footnote{Ibid.; see also judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no 6 at 30-32 par 3-5}

The State argued that article 2 of Protocol 1 addressed religious instruction and not all forms of instruction.\footnote{Ibid.} The Court rejected this argument and held that any teaching should respect parents’ religious and moral convictions.\footnote{Ibid.} However, the

\begin{footnotes}
\item[171] Kjeldsen, Busk Madsen and Pedersen v Denmark 55762/00 European Court of Human Rights at par 54
\item[172] Ibid.
\item[173] Ibid.
\item[174] Ibid.
\item[175] Ibid.
\item[176] Ibid.
\item[177] Ibid.
\item[178] Ibid.
\item[179] Ibid; see also judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no 6 at 30-32 par 3-5
\item[180] Ibid.
\end{footnotes}
Court also held that article 2 of Protocol 1 would be violated only if, while imparting sex education, the teachers advocated sex at a particular age, or a particular type of sexual behaviour.\(^{181}\) Moreover, the parents still had the freedom to educate their children at home and to instil their own religious convictions and beliefs.\(^{182}\) Consequently, imparting sex education was not a violation of the article 2 of Protocol 1 of the ECHR.\(^{183}\)

**Cyprus v Turkey Application no 25781/94 European Court of Human Rights**

In this case the Court held that there had been a violation of article 2 of Protocol 1, which provided the right to education for Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them.\(^{184}\) The Turkish Government called on the authorities in Northern Cyprus to cease censoring Greek language textbooks. The Court found that “the discontinuance” of Greek-medium secondary schools amounted to a denial of the right to education.\(^{185}\)

**Costello-Roberts v The United Kingdom 89/1991/341/414**

**Procedure**

This case was referred to the European Court of Human Rights by the European Commission on Human Rights (“the Commission”) in accordance with the three-month period laid down in articles 32(1) and 47 of the Convention.\(^{186}\) The application was brought before the Commission against the United Kingdom of Great Britain and Northern Ireland. The application was by two British citizens, Mrs Wendy Costello-Roberts and her son.


\(^{182}\) Ibid.

\(^{183}\) Ibid.


\(^{185}\) Ibid.

\(^{186}\) Costello-Roberts v The United Kingdom 89/1991/341/414, European Court of Human Rights, at par 1.
Facts of the Case

Mrs Costello-Roberts sent the applicant, who was then aged seven, to an independent preparatory boarding school in Barnstaple, Devon.\textsuperscript{187} The school had approximately 180 pupils, none of whose fees were paid out of public funds, and it received no direct financial support from the Government.\textsuperscript{188}

The school’s prospectus stated that a high standard of discipline was maintained, but expressed no views on the use of corporal punishment.\textsuperscript{189} Mrs Costello-Roberts had made no enquiry about the school’s disciplinary regime, and did not, at the outset, make her opposition to corporal punishment known.\textsuperscript{190} The school in question operated a system whereby such punishment was administered once a pupil had accumulated five demerit marks.\textsuperscript{191} On 3 October 1985 the applicant received his fifth demerit mark for talking in the corridor.\textsuperscript{192} The other demerit marks were for the same conduct and for being a little late for bed on one occasion.\textsuperscript{193} Having consulted with his colleagues, the headmaster decided that the only answer to the applicant’s lack of discipline was to administer three “whacks” on his bottom through his shorts with a rubber-soled gym shoe.\textsuperscript{194} On 8 October the applicant was informed of the proposed punishment.\textsuperscript{195}

According to the applicant’s mother, the school confirmed to her that he had been chastised. Though this too was contested by the Government, the school had initially denied the fact.\textsuperscript{196} Mrs Costello-Roberts wrote to the Governors of the school to express her “grave concern” about the use of such a “barbaric practice”.\textsuperscript{197} She acknowledged that the “growing problems” began after the first week of term and said that “we made it very clear to the staff that we considered his [that is, the son’s] behaviour to be reflecting signs of an upset”.\textsuperscript{198} The headmaster, in his turn, wrote to
the Chairman of the Board of Governors on 7 November, stating that the applicant’s problems were due to a lack of discipline.\textsuperscript{199} The applicant refused to accept authority, and his behaviour was disrupting the life of the school community.\textsuperscript{200}

Mrs Costello-Roberts also wrote to the headmaster to inform him that she did not want her son to be subjected to corporal punishment.\textsuperscript{201} The headmaster replied by stating that if the parents did not appreciate the manner of discipline administered to their son, they had the option of removing him from the school.\textsuperscript{202}

**European Court of Human Rights’ assessment**

The European Court of Human Rights held that treatment at a private school which was incompatible with the ECHR would engage a State Party’s responsibility under it; that, despite the automatic nature of the punishment and the three days’ wait before its imposition, the minimum level of severity had not been attained and there was no evidence of any severe or long-lasting effects.\textsuperscript{203}

This case provides an important view regarding private action that can involve state responsibility.\textsuperscript{204} The dissenting judges (Ryssdal, Thor Vilhjalmsson, Matscher and Wildhaber) were prepared to accept spanking on the spur of the moment, but found that the lapse of time, together with the lack of adequate consent from Costello-Roberts’ mother, was enough to render it a degrading punishment.\textsuperscript{205} The majority did not address the issue of lack of consent, and presumably regarded it as being given, otherwise, as in *Campbell and Cosans*, it might have been necessary to consider a violation of article 2 of Protocol 1.\textsuperscript{206} The applicants mentioned failed to substantiate their complaints; thus the case was declared inadmissible by the Commission.\textsuperscript{207}

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\textsuperscript{199} *Costello-Roberts v The United Kingdom* 89/1991/341/414, European Court of Human Rights at par 9.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid.
\textsuperscript{204} Ibid.
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid.
\textsuperscript{207} Ibid.
(f) Conclusion

The European Union emphasises the non-denial of the right to education. The case studies have demonstrated that the EU prohibits the limitation of the right to education. The other factor highlighted, is that the right to education can be affected by circumstances such as the refusal of a migrant’s permit or school disciplinary procedures.

3.4 The Organisation of American States

The right to education under the OAS will be analysed in line with the provisions of the Charter of the Organisation of American States, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

(a) The Charter of the Organisation of American States

The Charter of the Organisation of American States (OAS Charter) provides that States Parties will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education. The OAS Charter further provides that elementary education shall be compulsory for children of school-going age and shall also be offered to all people who can benefit from such education. Education when provided by States Parties shall be without charge.

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209 Id art 49(a).

210 Ibid.
The OAS Charter provides that middle-level education shall be extended progressively to as many of the population as possible, with a view to social improvement.211 Education shall be diversified in such a way that it meets the developmental needs of each country, without prejudice to the provision of a general education.212 The OAS Charter also provides that higher education shall be made available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.213

The States Parties to the OAS bind themselves to give special attention to the eradication of illiteracy,214 and to strengthening adult and vocational education systems.215 Further, the States Parties ensure that the benefits of culture will be available to the entire population.216 Finally, the States Parties promote the use of all information through the media to fulfil these aims of the right to education.217

(b) The American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man (the Declaration)218 provides that every person has the right to education.219 The words “every person” include children. The right to education must be based on principles of liberty, morality and human solidarity.220 The Declaration also provides that every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.221 The right to education as stated by the Declaration includes the right to equality of opportunity in every case,

211 Id art 49(b).
212 Ibid.
213 Article 49(c) of the Charter of the OAS.
214 Id art 50.
215 Ibid.
216 Ibid.
217 Ibid.
218 The declaration is to be found in the Final Act of the 9th International Conference of American States, Bogota, Colombia held in 1948: Acta y Documentos, 297; OAS Res XXX, adopted by the 9th International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/SerLV/II82 doc 6 rev 1 at 17 (1992).
219 Article 12 of the American Declaration of the Rights and Duties of Man, was adopted by the 9th International Conference of American States of the Organization of American States in Bogota, Columbia on 2 May 1948.
220 Ibid.
221 Ibid.
in accordance with natural talents, merit, and the desire to utilise the resources that the State or the community is in a position to provide.\(^{222}\)

The Declaration further provides that children have the right to receive free primary education.\(^{223}\) The implication of this provision is that children under the age of eighteen are entitled to education free of charge. However, the provision does not bar persons over the age eighteen, who cannot afford to pay for education, from benefiting from free primary education. The obligation to receive and access education lies with the individual child.\(^{224}\) This means that the Member States’ primary obligation must be to provide the infrastructure for primary education and resources for those children who are unable to provide for themselves.

\(\text{(c) American Convention on Human Rights}\)

The American Convention on Human Rights (ACHR) provides that every minor child has the right to the measures of protection required by his condition as a minor, from his family, society, and the State.\(^{225}\) Measures of protection imply the provision of the protection of the right to education, which is of paramount importance to the growth and development of children. Therefore, the protection of the right to education is subsumed under article 19 of the ACHR.\(^{226}\)

The ACHR obliges the States Parties to recognise the right of children to education with a view to its achieving full realisation.\(^{227}\) The realisation of the right to education must be based on equal opportunity, in particular making primary education cost free.

\(^{222}\) Ibid.

\(^{223}\) Id art 12.

\(^{224}\) Article 31 the Organisation of American States American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969 provides that “it is the duty of every person to acquire at least an elementary education”.

\(^{225}\) Article 19 the Organisation of American States American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969 provides that “it is the duty of every person to acquire at least an elementary education”.

\(^{226}\) Brownlie I and Goodwin-Gill GS Basic documents on human rights (5th ed) (2006) provides that the ACHR is broadly similar to European Convention for the Protection of Human Rights and Fundamental Freedoms. In terms of the American Convention on Human Rights, “persons” means every human being. This entails that the ACHR’s protection of rights includes the protection of children’s rights.

and compulsory.\textsuperscript{228} The provision for cost free and compulsory education from States Parties must be provided as early as permitted by the availability of national resources.\textsuperscript{229}

\textbf{(d) The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights}

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Additional Protocol) provides that everyone has the right to education.\textsuperscript{230} The word “everyone” is inclusive of children. The Additional Protocol provides that education should be directed towards the full development of the human personality and human dignity.\textsuperscript{231} Moreover, the right to education must be aimed at strengthening respect for human rights, ideological pluralism, fundamental freedoms, justice, and peace.\textsuperscript{232}

The Additional Protocol states that education must enable everyone to participate effectively in a democratic and pluralist society.\textsuperscript{233} The Additional Protocol also provides that education must be a vehicle through which children may lead “decent” lives.\textsuperscript{234} Furthermore, such education should foster understanding, tolerance and friendship among all racial, ethnic or religious groups, and promote activities for the maintenance of peace.\textsuperscript{235}

States Parties to the Additional Protocol recognise that in order to achieve the full exercise of the right to education, primary education should be compulsory and accessible without cost.\textsuperscript{236} The Additional Protocol also provides for secondary education in its different forms, including technical and vocational training.\textsuperscript{237}

\textsuperscript{228} Ibid.
\textsuperscript{229} Ibid.
\textsuperscript{231} Id art 13(2).
\textsuperscript{232} Ibid.
\textsuperscript{233} Ibid.
\textsuperscript{234} Ibid.
\textsuperscript{235} Ibid.
\textsuperscript{236} Id art 13(3).
\textsuperscript{237} Article 13(3)(b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 provides that secondary education in its different forms, including technical and vocational secondary education, should be made generally
Parties must ensure that higher education is made equally accessible to all.\textsuperscript{238} By implication, the provision for free education is not mandatory at the higher education level. However, States Parties can progressively realise the ideal of free education at the higher level.

The Additional Protocol provides that basic education should be encouraged as far as possible for those persons who have not received or completed the whole cycle of primary instruction.\textsuperscript{239} States Parties must ensure that programs of special education are established for the handicapped.\textsuperscript{240} The provision of education must be in conformity with the domestic legislation of the States Parties concerned.\textsuperscript{241} Parents should have the right to select the type of education to be provided to their children.\textsuperscript{242}

(e) The Interpretation of the right to education in the OAS through case law

\textit{Dilcia Yean and Violeta Bosica v Dominican Republic} Inter-American Commission on Human Rights, Report 28/01, Case 12.189

In 1997, Dilcia, a ten-year-old, and Violeta, a twelve-year-old, were refused their request for birth certificates by the Dominican civil registry.\textsuperscript{243} Both girls were Dominican-born but of Haitian descent.\textsuperscript{244} The refusal to grant the birth certificates to Dilcia and Violeta meant they were effectively denied the right to nationality and to related civil, economic, political and social rights.\textsuperscript{245} Consequently, these two

\footnotesize{\textsuperscript{238} Article 13(3)(c) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 provides that higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education.}

\footnotesize{\textsuperscript{239} Article 13(3) (d) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988.}

\footnotesize{\textsuperscript{240} Id art 13(3) (e).}

\footnotesize{\textsuperscript{241} Id art 13(3) (d).}

\footnotesize{\textsuperscript{242} Ibid.}


\footnotesize{\textsuperscript{244} Ibid.}

\footnotesize{\textsuperscript{245} Id par 2.}
children were expelled from school, as only children with Dominican birth certificates were allowed to study.\textsuperscript{246}

The Movement for Dominican Women of Haitian Descent (MUDHA), together with the Centre for Justice and International Law, and the Human Rights Law Clinic at the University of California, Berkeley, filed a complaint before the Inter-American Commission on Human Rights, alleging multiple violations of the American Convention on Human Rights.\textsuperscript{247} This international route was chosen as it was felt that the level of national discrimination against those of Haitian descent was so high that the national judiciary would be biased.\textsuperscript{248} It was also hoped that by taking the case to an international court, the issue would receive international coverage and debate.\textsuperscript{249}

The case was brought on the grounds that the girls' civil rights had been breached, specifically their right to identity and nationality.\textsuperscript{250} International courts are less happy to rule directly on economic, social and cultural rights, as these are thought to be policy-related and therefore in the domain of national governments.\textsuperscript{251} However, by drawing links between the breach of civil rights and their impact on other rights, specifically the rights to health and education, the court could grant the relief sought.\textsuperscript{252}

Because of the high number of cases submitted to the Inter-American Commission on Human Rights (2000-3000 a year) it took five years for the case to be referred to the Inter-American Court of Human Rights, and another two years for it to be tried and for the Court to reach a verdict.\textsuperscript{253} In September 2005, the Court found that the Dominican Republic had violated a wide range of rights enshrined in the American

\textsuperscript{246} Ibid.
\textsuperscript{247} \textit{Dilcia Yean and Violeta Bosica v Dominican Republic}, Inter-American Commission on Human Rights, Report 28/01, Case 12.189 (22 February 2001) par 5.
\textsuperscript{248} Ibid.
\textsuperscript{249} Ibid.
\textsuperscript{251} Ibid.
\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid.
Convention. The Court further held that because the Dominican Constitution enshrines the *jus solis* the basis for nationality, the process applied to the two girls was discriminatory.

With regard to article 19 of the Convention, the State indicated that the fact that Violet had problems with her education was of no concern to the State. The State submitted that the different reasons that had prevented her from studying continuously had been caused by her family, as the family changed their place of residence constantly and she had to leave several educational establishments abruptly.

Even though Violeta did not present her birth certificate, she was allowed to attend school for several years. Despite the efforts of the competent public bodies to ensure the right to education and facilitate the enrolment of all children of school-going age, there is an unavoidable public policy rule with regard to education that makes it necessary to enrol children on the basis of their birth certificates.

The Court considered it necessary to emphasise that, although the rejection of the application for late registration of birth in the Registry Office took place on 5 March 1997, and the decision of the Public Prosecutor confirming this rejection was issued on 20 July 1998, both facts determined that the children Dilcia Yean and Violeta Bosico had no nationality until 25 September 2001.

Consequently, this denial persisted after 25 March 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Court; and this is the reason why this Court affirmed that it was competent to consider the refusal. The Court noted that when the State accepted the Court’s contentious jurisdiction, Dilcia Yean and Violeta Bosico were children who, as such, had special rights

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254 Ibid.
255 Ibid.
257 *Dilcia Yean and Violeta Bosica v Dominican Republic*, Inter-American Commission on Human Rights, Report 28/01, Case 12.189 (22 February 2001) at par 120(a).
258 Ibid.
259 Ibid.
260 Id par 120(b).
261 Id par 132.
262 Id par 132.
corresponding to specific obligations of the family, society and the State, that required the special protection of the State, and this should be understood as an additional and complementary right.\textsuperscript{262}

This Court stated that cases, in which the victims of human rights violations are children, are particularly serious.\textsuperscript{263} The prevalence of the child’s superior interest should be understood as the need to satisfy all the rights of the child, and this affects the interpretation of the other rights established in the Convention when the case refers to children.\textsuperscript{264} Moreover, the States Parties must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group.\textsuperscript{265}

In view of the above, the Court declined to rule on the alleged violation of article 19 of the American Convention in isolation, but included its decision in this regard with the examination of the other articles relevant to the case.\textsuperscript{266}

The Court unanimously held that the State had violated the rights to nationality and to equal protection embodied, respectively, in articles 20 and 24 of the American Convention, in relation to article 19 thereof, and also in relation to article 1(1) of the Convention, to the detriment of the children.

The Court awarded each of the girls’ $8000 damages.\textsuperscript{267} It also ordered the government to circulate the sentence publicly, offer a public apology to the victims, and institute a broad range of institutional reforms relating to nationality and access to education, to ensure that the violation did not happen again.\textsuperscript{268} The government did not comply with any of these orders, and has yet to publicly apologise or pay the damages.\textsuperscript{269} The State did, however, issue birth certificates and the girls did eventually access schooling.\textsuperscript{270} Finally, even without the implementation of the

\textsuperscript{262} Id par 133.
\textsuperscript{263} Id par 134.
\textsuperscript{264} Dilcia Yean and Violeta Bosica v Dominican Republic, Inter-American Commission on Human Rights, Report 28/01, Case 12.189 (22 February 2001) at par 134.
\textsuperscript{265} Ibid.
\textsuperscript{266} Id par 135.
\textsuperscript{267} Id par 226.
\textsuperscript{268} Ibid.
\textsuperscript{269} Ibid.
\textsuperscript{270} http://www.right-to-education.org/node/671 (accessed 14/03/2012).
Court’s ruling, the girls, and others of Haitian descent, have gained significantly through the proceedings.271


The petitioners were people living with HIV/AIDS.272 They alleged that the Government of El Salvador’s failure to provide them with triple therapy medication violated their rights to life, freedom from inhumane treatment, equal protection, judicial protection, and economic, social and cultural rights provided in the American Convention on Human Rights.273 They also alleged that it was a violation of the right to health guaranteed by article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).274

The Commission ruled that while it was not competent to determine violations of article 10275 of the Protocol of San Salvador, the Commission and the Inter-American Court of Human Rights only had jurisdiction to consider claims with respect to article 13 (the right to education).276 The Commission held that the right to education and other economic, social and cultural rights provisions of the Protocol of San Salvador can be utilised for interpretive purposes in order to more precisely define the guarantees under article 26277 of the American Convention.278

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271 Ibid.
274 Ibid.
275 Article 10 of the Protocol of San Salvador, provides for the right to health.
278 Ibid.
This case demonstrates the importance of the right to education. Where the court cannot explicitly rule that a violation has taken place, it may still use prescribed education rights as interpretative tools.\textsuperscript{279}

\textit{YakyeAxa v Paraguay (IACtHR, 17 June 2005)}

\textbf{Facts of the case}

The YakyeAxa and Sawhoyamaxa Indigenous Communities had been displaced from their traditional lands.\textsuperscript{280} They were unable to source water and food and were not provided with adequate health and education services.\textsuperscript{281} They had been living in temporary homes alongside the Pozo Colorado-Concepción highway for over 10 years.\textsuperscript{282} In these precarious conditions they had been unable to sustain their traditional activities, such as hunting, fishing and gathering honey, or their cultural and spiritual practices.\textsuperscript{283}

The applicant brought an action under article 4 of the Inter-American Convention on Human Rights which guarantee that “every person has the right to have his life respected”.\textsuperscript{284}

The YakyeAxa and Sawhoyamaxa lodged separate claims to the land to which they had the greatest attachment, a fraction of what they considered to be their traditional territory.\textsuperscript{285} However, after 10 years of unsuccessfully seeking resolution of their claim through all available national processes, they took their two cases to the Inter-American Commission of Human Rights, and then to the Inter-American Court of Human Rights.\textsuperscript{286}

\begin{flushleft}
\textsuperscript{279} Ibid.
\textsuperscript{280} Case of the \textit{YakyeAxa Indigenous Community v Paraguay} Inter-American Court of Human Rights Judgment of 17 June 2005 at par 1; see also http://www.corteidh.or.cr/docs/casos/articulos /seriec_125_ing.pdf; http://www.right-to-education.org/node/667 (accessed 26/07/2012).
\textsuperscript{281} Case of the \textit{YakyeAxa Indigenous Community v Paraguay} Inter-American Court of Human Rights Judgment of 17 June 2005 at par 50, 92.
\textsuperscript{282} Id par 50, 40.
\textsuperscript{283} Id par 50, 62.
\textsuperscript{284} Id par 2.
\textsuperscript{285} Id par 120.
\textsuperscript{286} http://www.right-to-education.org/node/667 (accessed 07/11/2012)
\end{flushleft}
A crucial rule governing the admissibility of a complaint is that the complainant must, in general, have exhausted all remedies in the state where the violation occurred before bringing a claim to an international body.\textsuperscript{287} This usually includes pursuing a claim through the local court system. There are, however, exceptions to this rule.\textsuperscript{288} In cases where a remedy is unreasonably withheld, is ineffective, or is otherwise unavailable to a party, owing, for example, to the denial of legal aid in a criminal case, then in such circumstances the complainant may look for relief in international courts.\textsuperscript{289}

In both the case of \textit{YakyeAxa Indigenous community v Paraguay} (judgment of 17 June 2005) and the case of \textit{Sawhoyamaza Indigenous community v Paraguay} (judgment of 29 March 2006), the Court found that the rights of the YakyeAxa and Sawhoyamaza to judicial protection, to property, and to life had been violated.\textsuperscript{290}

The Court held that Paraguay had failed to ensure that its domestic law guaranteed the community’s effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices.\textsuperscript{291} The Court also concluded that Paraguay had violated the rights to property and court protection, as well as the right to life, since it had prevented the community from access to its traditional means of livelihood.\textsuperscript{292}

Furthermore, the Court understood that the State had failed to adopt necessary positive measures to ensure that the community lived under dignified conditions during the period they had to exist without their land.\textsuperscript{293} While they stayed on the side of a road across from the land they claimed, the community lacked adequate access to food, health services, and education.\textsuperscript{294}

The Court concluded that the State had an obligation to adopt positive measures to promote a dignified life, particularly when high risk and vulnerable groups were involved, whose protection became a priority.\textsuperscript{295} In each case it ordered the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} Ibid.
\item \textsuperscript{288} Ibid.
\item \textsuperscript{289} Ibid.
\item \textsuperscript{290} http://www.right-to-education.org/node/667 (accessed 07/11/2012).
\item \textsuperscript{291} Ibid.
\item \textsuperscript{292} Ibid.
\item \textsuperscript{293} Ibid.
\item \textsuperscript{294} Ibid.
\item \textsuperscript{295} Ibid.
\end{itemize}
\end{footnotesize}
Paraguayan State to return the traditional lands of the YakyeAxa and Sawhoyamaxa within a period of three years and to provide a community development fund to ensure their survival once they return to their traditional land.\textsuperscript{296}

In addition, the Court ordered that until the traditional land was reinstated, the Paraguayan State must “supply, immediately and on a regular basis water, regular medical care and appropriate medicine, food in quantities, variety and quality that are sufficient to have minimum conditions for a decent life, latrines or appropriate toilets, and bilingual material for appropriate education”.\textsuperscript{297}

The Paraguayan State was also ordered to enact into its domestic legislation, legislative, administrative, and other measures necessary to provide an efficient mechanism to enable indigenous peoples in Paraguay to claim their traditional land.\textsuperscript{298} The Inter-American Court stated that it would supervise enforcement and ordered the State to submit a report on measures adopted within one year after the decision was notified.\textsuperscript{299}

However, the authorities have since failed to comply with the Inter-American Court’s orders, in particular regarding the restitution of their traditional lands.\textsuperscript{300} As such, the judgments have made little difference in practice to the lives of the YakyeAxa and Sawhoyamaxa.\textsuperscript{301} The three-year Court deadline passed for the YakyeAxa on 13 July 2008 and for the Sawhoyamaxa on 19 May 2009, yet the return of their traditional lands is still far from a reality.\textsuperscript{302} The YakyeAxa and Sawhoyamaxa, although separate communities within the Enxet ethnic group, have united to exert pressure on the Paraguayan government to resolve their land claims.\textsuperscript{303}

In November 2008 President Fernando Lugo signed a bill on the expropriation of the traditional lands of the YakyeAxa.\textsuperscript{304} This was due to be discussed by Congress in the session beginning in March 2009.\textsuperscript{305}

\textsuperscript{296} Ibid.
\textsuperscript{297} Ibid.
\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid.
\textsuperscript{301} Ibid.
\textsuperscript{302} Ibid.
\textsuperscript{303} Ibid.
\textsuperscript{304} Ibid.
\textsuperscript{305} Ibid.
The Inter-American Court has reaffirmed its wide interpretation of the right to life to include the right to education, amongst other rights, as set out in the Protocol of San Salvador. The Court showed that the rights to life and to education can be violated in communities deprived of a means of livelihood. Some courts, even if currently few and far between, are prepared to order a State to adopt positive measures to fulfil a dignified standard life.

As the Inter-American Court so did, the other courts are also competent to require governments to amend legislation and also to give priority treatment to vulnerable groups. When the struggle for the land began, Mr Albino Fernadez also began the struggle to establish a school in the YakyeAxa Indigenous Community, which was recognised by the State as an “Indigenous School” with an allocation for payment of a teacher in 1996.

The school is located within the current settlement of the YakyeAxa Community and there are 57 boys and girls regularly enrolled at this school. However, some children drop out of school because they fall ill or because they have no food or water and cannot endure studying. Others have no clothes or shoes and are ashamed to attend classes under those circumstances. The parents of most of the boys and girls are unemployed.

Furthermore, the members of the community cannot farm because their current settlement is on a fringe of land that the authorities classify as a “public road” and also because they have been forbidden from hunting and gathering firewood and water from these lands. The little house where the school operates is made of palm leaves, and has a sod floor, two blackboards, and desks with chairs.

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306 Ibid.
307 Ibid.
308 Ibid.
309 Ibid.
311 Ibid.
312 Ibid.
313 Ibid.
314 Ibid.
315 Ibid.
316 Ibid.
house is also the chapel. Due to its conditions and structure, the school is especially affected during the rainy season.\textsuperscript{317}

The material used in the school is provided by the Governor’s Office and by the “Instituto Paraguayodel Indígena”.\textsuperscript{318} The material is insufficient for the school year, so the members of the Community seek additional material through donation.\textsuperscript{319} The books are provided by the Office of the Supervisor of Indigenous Education of the Ministry of Education, and they are in Spanish and Guaraní.\textsuperscript{320} The books are not in a language (Enxet) the children understand, and therefore teaching becomes impractical, and as a result transmission is hampered.\textsuperscript{321}

The elders impart the values and practices of their own culture.\textsuperscript{322} The witness (Mr Albino Fernández) explains to the boys and girls during celebrations—such as the Weykeneten festivity (celebrated at the time of the first menstruation of a girl or of puberty, usually at age 15) traditional themes regarding their ancestors.\textsuperscript{323} The danger of losing their language, their values, and traditions is also associated with the fact that the parents alternate their lives on the estates, where they interact socially with Paraguayans who speak Spanish and Guaraní.\textsuperscript{324}

The celebrations at the YakyeAxa Community settlement could not be carried out fully in accordance with the people’s tradition.\textsuperscript{325} For example, they lacked the food they would use during celebrations, which they would normally have produced on their lands.\textsuperscript{326} This is because the YakyeAxa Community was not allowed access to their lands and to their habitat.\textsuperscript{327} The witness had seen acts of violence suffered by the community from criminal elements.\textsuperscript{328}

\textsuperscript{317} Ibid
\textsuperscript{318} Ibid
\textsuperscript{319} Ibid
\textsuperscript{320} Ibid
\textsuperscript{321} Ibid
\textsuperscript{322} Ibid.
\textsuperscript{323} Ibid.
\textsuperscript{324} Ibid.
\textsuperscript{325} Ibid.
\textsuperscript{326} Ibid.
\textsuperscript{327} Ibid.
\textsuperscript{328} Ibid.
The Community therefore lived in fear and sadness. Its member families were not at peace as they did not have land and were forced to live alongside a road, where vehicles went by at high speeds and there was a danger of accidents.\(^{329}\) In one incident on this highway two youths were involved in an accident, Wilfredo Gómez Fernández died, and the other, Arsenio Ramos, lost a leg.\(^{330}\)

Two of the witnesses’ children, Mauro, who was two years old, and Fidelina, who was one year old, died due to the conditions in which they lived alongside the road.\(^{331}\) In the belief system followed by the families, a death meant that they had to leave their home and move away from “the presence” of the deceased beloved one. When his mother died, the witness took apart his house and built another nearby.\(^{332}\) Their ancestors’ cemetery was in the lands of YakyeAxa, east of the main buildings of the Loma Verde estate.\(^{333}\) If they recovered their lands, they would continue burying their dead there.\(^{334}\) To change and improve their situation, they needed their lands.\(^{335}\) Without their lands, the teacher suffered, the boys and girls suffered, and their parents suffered.\(^{336}\)

In its decision, the Inter-American Court, by seven votes to one, declared that the State had violated the right to fair trial and to judicial protection, embodied in articles 8 and 25, respectively, of the ACHR read with articles 1(1) and 2 of the same Convention, to the detriment of the members of the YakyeAxa Indigenous Community.\(^{337}\) It had also violated the right to property embodied in article 21 of the ACHR read with articles 1(1) and 2 of that same Convention, to the detriment of the members of the YakyeAxa Indigenous Community.\(^{338}\)

\(^{329}\) Ibid.

\(^{330}\) Ibid.

\(^{331}\) Ibid.


\(^{333}\) Ibid.

\(^{334}\) Ibid.

\(^{335}\) Ibid.

\(^{336}\) Ibid.

\(^{337}\) Id par 242(1) http://www.corteidh.or.cr/docs/casos/articulos/seriec_125 ing.pdf (accessed 15 August 2012).

\(^{338}\) Id par 242(2).
(f) Conclusion

The OAS provides in-depth protection of the right to education. The OAS complies with the right to education embodied in the UN human rights system. Further, the court decisions have demonstrated that the right to education can be violated in situations where an indigenous community has been stripped of its ancestral land.

3.5 THE AFRICAN UNION

3.5.1 Introduction

The right to education will be evaluated under the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child.

(a) The African Charter on Human and People’s Rights

The African Charter on Human and Peoples’ Rights (the ACHPR)\(^{339}\) contains provisions aimed at protecting children’s rights. Amongst the many rights protected in the ACHPR, is the right to education.\(^{340}\) The protection of the right to education goes together with an over-arching prohibition on discrimination based on race, ethnic group, colour, sex, language, religion, etc.\(^{341}\) Thus the ACHPR prohibits discrimination with regard to the right to education.

In the protection of children’s rights, the ACHPR provides that States Parties must promote African values and build on the virtues of African historical traditions while alleviating human rights violations.\(^{342}\) The ACHPR also provides that the enjoyment of children’s rights and freedoms also implies the performance of duties on the part of everyone.\(^{343}\) This means that States Parties, children, and parents must ensure that the right to education is realised. Finally, the ACHPR recognises that the

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340 Id art 17.
341 Id art 2.
343 Ibid.
realisation of the right to development and civil and political rights cannot be dissociated from economic, social and cultural rights.  

(b) The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (the ACRWC) provides that every child shall have the right to an education. Children’s right to education shall be directed to the promotion and development of the child’s personality, talents, mental, and physical abilities to their fullest potential. Further, education of children must be directed at fostering respect for human rights and fundamental freedoms.

The ACRWC provides that the right to an education is a vehicle through which the preservation and strengthening of positive African morals, traditional values, and cultures can be achieved. The right to an education serves as a preparatory tool for children by which they can learn to live a responsible life in a free society. Further, the provision of education shall be in the spirit of understanding, tolerance, dialogue, mutual respect, and friendship among all peoples of different ethnic, tribal and religious groups. The right to education also speaks to the promotion of the children’s understanding of primary health care. In addition, expanding children’s understanding of their rights through education, has the consequences of enriching children’s broader capacity.

The situation of most African children remains critical due to their unique socio-economic, cultural, traditional and developmental circumstances. In addition, natural disasters, armed conflicts, exploitation, and hunger, add to the critical

344 Ibid.
346 Article 11(2)(a) of the ACRWC.
347 Article 11(2)(b) of the ACRWC.
348 Id art 11(2)(c).
349 Id art 11(2)(d).
350 Ibid.
351 Id art 11(2)(h).
352 Ibid.
situation that persists in Africa. The above-mentioned factors warrant special attention from States Parties to ensure that children’s physical and mental immaturity is safeguarded.

States Parties to the ACRWC must take all appropriate measures with a view to achieving the full realisation of the right to education, and must, in particular, provide free and compulsory basic education. The right to education must be aimed at encouraging the development of secondary education in its different forms and to progressively make it free and accessible to all.

The ACRWC also provides that higher education must be accessible to all on the basis of capacity and ability by every appropriate means. States Parties are obliged to take measures to encourage regular attendance at schools and the reduction of drop-out rates. Moreover, States Parties must take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

States Parties to the ACRWC must respect the rights and duties of parents, and, where applicable of legal guardians, to choose their children’s schools. Under the ACRWC, parents or legal guardians have the right to ensure their children’s religious and moral education consistent with the evolving capacities of those children.

The ACRWC provides that school discipline imposed on children shall be administered with humanity and with respect for the inherent dignity of the child and in conformity with the ACRWC. It further provides that all appropriate measures be taken to ensure that children who fall pregnant before completing their education

353 Preamble of the ACRWC.
354 Ibid.
355 Id art 11(3)(a).
356 Id art 11(3)(b).
357 Id art 11(3)(c).
358 Article 11(3)(d) of the ACRWC.
359 Article 11(2)(e) of the ACRWC; see also Sloth-Nielsen J Children’s rights in Africa: A legal perspective (2008). Sloth-Nielsen notes at 38 the distinguishing features of the ACRWC with regard to article 11(3)(e) of the ACRWC obliges states to take affirmative action and measures with regard to female, disadvantaged and gifted children.
360 Id art 11(4).
361 Ibid.
362 Id art 11(5).
shall have an opportunity to continue with their education on the basis of their individual ability.\textsuperscript{363}

\begin{enumerate}
\item[(c)] The Committee of Experts on the Rights and Welfare of the Child
\end{enumerate}

The ACRWC has established a Committee of Experts on the Rights and Welfare of the Child (the ACERWC), to examine the progress made by States Parties in realising the aims of the ACRWC.\textsuperscript{364} The ACERWC is the central body entrusted with developing jurisprudence relating to the rights and welfare of the child.\textsuperscript{365}

The ACERWC consist of ten experts of high moral standing and recognised competence in the field covered by the ACRWC.\textsuperscript{366} The members of ACERWC are elected by States Parties from among their nationals.\textsuperscript{367} The elected members serve in their personal capacity with consideration being given to equitable geographical distribution, as well as to the principal legal systems.\textsuperscript{368} The members of the ACERWC are elected by secret ballot from a list of persons nominated by States Parties.\textsuperscript{369}

Each State Party nominates one person from among its own nationals.\textsuperscript{370} The initial election to the ACERWC is held no later than six months after the date of the entry into force of the present ACRWC, and thereafter every second year.\textsuperscript{371}

\textsuperscript{363} Article 11(6) ACRWC; see also Sloth-Nielsen J \textit{Children's rights in Africa: A legal perspective} (2008). Sloth-Nielsen notes at 38 that “the distinguishing features as far as the ACRWC provides the opportunity for such girls to complete their education, on grounds of their individual ability, without interruption, and pregnancy is not a legitimate ground for any kind of discrimination”.

\textsuperscript{364} Article 43(1) ACRWC; see also Davel CJ (ed) \textit{Introduction to child law in South Africa} (2000) at 225. The ACRWC provides for a supervisory body, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).


\textsuperscript{367} Ibid.

\textsuperscript{368} Ibid; see also Davel CJ (ed) \textit{Introduction to child law in South Africa} (2000) at 225. “The OAU Assembly of Heads of State and Government elects the eleven members of the Committee must have ‘competence in matters of the rights and welfare of the child’. They serve in their personal capacities. They consequently serve as independent, ‘uninstructed’ experts, rather than as government functionaries.”

\textsuperscript{369} Id art 43(3).

\textsuperscript{370} Ibid.

\textsuperscript{371} Ibid.
before the date of each election, the Secretary-General of the United Nations will address a letter to States Parties inviting them to submit their nominations within two months.372

The election of members is held at meetings of States Parties convened by the Secretary-General at United Nations headquarters.373 At those meetings, two thirds of States Parties shall constitute a quorum.374 The persons elected to the ACERWC are those who obtain the most votes.375 The members of the ACERWC are elected for a term of four years.376 The members are eligible for re-election if re-nominated.377

(d) The Composition of the Commission on Human and People’s Rights

The African Commission on Human and Peoples’ Rights (the Commission) plays an important role in the protection of children’s rights. The Commission provides a platform where the violation of children’s rights can be remedied. The Commission is composed of 11 members378 chosen from amongst African experts in the area of children’s rights of the highest reputation.379

The members of the Commission serve in their personal capacity.380 The Commission does not include more than one member from nationals of the same State.381 The members of the Commission are elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States Parties to the present ACHPR.382

372 Id art 43(4).
373 Id art 43(5).
374 Ibid.
375 Ibid.
376 Ibid.
377 Id art 43(6).
379 Ibid.
380 Id art 31(2).
381 Id art 32.
382 Id art 33.
Each State Party to the present Charter may nominate no more than two candidates.\textsuperscript{383} The candidates must have the nationality of one of the States Parties to the ACHPR.\textsuperscript{384} When two candidates are nominated by a State, one of them may not be a national of that State.\textsuperscript{385}

The Secretary General of the Organization of African Unity (now the AU) shall invite States Parties to the ACHPR at least four months before the elections to nominate candidates.\textsuperscript{386} The Secretary General of AU draws up an alphabetical list of the persons nominated and communicates it to the Heads of State and Government at least one month before the elections.\textsuperscript{387}

The members of the Commission are elected for a six-year period and shall be eligible for re-election.\textsuperscript{388} However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.\textsuperscript{389} Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the AU shall draw lots to decide the names of those members referred to in article 36 of the ACHPR.\textsuperscript{390}

After the members’ election, the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.\textsuperscript{391} In the case of death or resignation of a member of the Commission, the Chairman of the Commission must immediately inform the Secretary General of the AU, who shall declare the seat vacant from the date of death, or from the date on which the resignation takes effect.\textsuperscript{392} If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman

\textsuperscript{383} Ibid.
\textsuperscript{384} Id art 33(2)
\textsuperscript{385} Id art 33(3).
\textsuperscript{386} Id art 35(1).
\textsuperscript{387} Id art 35(2).
\textsuperscript{388} Id art 36.
\textsuperscript{389} Ibid.
\textsuperscript{391} Id art 38.
\textsuperscript{392} Id art 39(1).
of the Commission shall inform the Secretary General of the AU, who must then declare the seat vacant.393

In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term, unless that period is less than six months.394 Every member of the Commission shall hold office until the date on which his successor assumes office.395

The Secretary General of the AU must appoint a Secretary of the Commission. The Secretary General must also provide the staff and services necessary for the effective discharge of the duties of the Commission.396 The AU shall bear the costs of the staff and services.397

The Commission must elect its Chairman and Vice Chairman for a two-year period.398 They shall be eligible for re-election.399 The Commission shall lay down its rules of procedure.400 Seven members shall form the quorum.401 In the case of an equality of votes, the Chairman shall have a casting vote.402 The Secretary General may attend the meetings of the Commission.403 He shall not participate in deliberations nor shall he be entitled to vote.404 The Chairman of the Commission may, however, invite him to speak.405

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges

393 Id art 39(2).
394 Id art 39(3).
395 Id art 40.
396 Ibid.
397 Ibid.
398 Id art 42(1).
399 Id art 42(2).
400 Id art 42(3).
402 Ibid.
403 Ibid.
404 Ibid.
405 Id art 42(5).
and Immunities of the Organization of African Unity. Provision is also made for the allowances of the members of the Commission in the Regular Budget of the AU.

The Commission’s mandates include the promotion of human and peoples’ rights through research and education activities; the articulation of rules on legal questions; and cooperation with other African and international institutions concerned with human and peoples’ rights; the interpretation of provisions of the ACHPR at the request of a State Party, an institution of the African Union, or an African organisation recognised by the African Union; and finally, hearing inter-State communications about violations of the rights set out in the ACHPR.

Further, the Commission’s mandates include the adjudication upon communications brought by individuals and specified non-State actors, for example NGOs, concerning violations of the rights in the ACHPR. The Commission enjoys jurisdiction even if a Government has not formally recognised its competence to hear complaints. Further, the Communication must be made within a reasonable time after the exhaustion of local remedies and if the matter would be unduly prolonged in the domestic courts.

(e) The African Court on Human and People’s Rights

The African Court on Human and Peoples’ Rights (the Court) has recently been established through the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the Protocol).

The Court has a broader mandate than the Commission. Article 3 of the Protocol extends the Court’s jurisdiction to all cases and disputes submitted to it concerning the interpretation and application of the ACHPR, the Protocol establishing the Court,
and any other relevant human rights instrument ratified by the States concerned.\footnote{Article 3 of the Protocol Establishing the African Court on Human and Peoples’ Rights.} Depending on the Court’s interpretation of “any other relevant human rights instruments”, it may apply any other universal, regional, or sub-regional treaties that the State in question has ratified, such as the African Charter on the Rights and Welfare of the Child, which includes substantial provisions on the right to education.\footnote{Article 44 of the African Charter on Human and Peoples’ Rights.}

The Court will consider cases referred to it by the ACHPR, by States Parties to the Protocol, and, where a State Party has accepted its jurisdiction, by individuals and NGOs.\footnote{Ibid.} The following countries have ratified the Protocol and thus accepted the Court’s jurisdiction: Algeria, Burkina Faso, Burundi, Cote d’Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo and Uganda.\footnote{Ibid.} Unlike the decisions of the ACHPR and the Committee on the Rights and the Welfare of the Child, the rulings of the Court are binding.\footnote{Ibid.} It should be noted that although the Court has officially been established, it has yet to adopt its Rules of Procedure, so is not ready to receive petitions.\footnote{Ibid.}


States Parties to the ACRWC undertake to submit reports to the Committee of Experts on the Rights and Welfare of the Child (the Committee) through the Secretary-General of the AU.\footnote{Article 43 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG /24.9/49 (1990) entered into force 29 November 1999.} The States Parties must report on the measures they have adopted which give effect to the provisions of the ACRWC and on the progress made in the enjoyment of those rights.\footnote{Ibid.} The reports must be made within...
two years of the entry into force of the ACRWC for the State Party concerned.\textsuperscript{423} Thereafter, reports must be submitted every three years.\textsuperscript{424}

Every report made under article 43 of the ACRWC must contain sufficient information on the implementation of the ACRWC.\textsuperscript{425} The information provided will provide the Committee with a comprehensive understanding of the implementation of the ACRWC in the relevant country. The reports shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the ACRWC. A State Party which has submitted a comprehensive first report to the Committee, need not, in its subsequent reports, repeat the basic information previously provided.

\textbf{(g) The Interpretation of the right to education through case law in the AU}

\textit{Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire}\textit{(2000)}

\textit{AHRLR 74 (ACHPR 1995)}

The Communication was filed by the Free Legal Assistance Group, the Austrian Committee against Torture, and the Centre Haitien des Droits et Libertés, all members of the World Organization Against Torture (OMCT).\textsuperscript{426} The Communication alleged the torture of 15 persons by a military unit at Kinsuka near the Zaire River. Several people protested against the torture and as a result were detained and held indefinitely.\textsuperscript{427}

There were several groups that lodged their grievances with the Commission. The applicants alleged that there had been arbitrary arrests, arbitrary detentions, torture, extrajudicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the press.\textsuperscript{428}

\begin{flushleft}
\textsuperscript{423} Ibid.
\textsuperscript{424} Ibid.
\textsuperscript{425} Ibid.
\textsuperscript{426} Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74 (ACHPR 1995) Communications 25/89, 47/90, 56/91, 100/93 at par 1.
\textsuperscript{427} Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74 (ACHPR 1995) Communications 25/89, 47/90, 56/91, 100/93 at par 1.
\textsuperscript{428} Id par 2.
\end{flushleft}
Further, they alleged the persecution of the Jehovah’s Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education.\(^{429}\)

The groups also alleged that public finances were mismanaged, that the failure of the government to provide basic services was degrading, that there was a shortage of medicines, that the universities and secondary schools had been closed for two years, that freedom of movement had been violated, and that ethnic hatred was incited by the official media.\(^{430}\)

The Commission determined that the communications, taken together, evidenced a grave and massive violation of human rights in Zaire and proceeded to bring the matter to the attention of the Assembly of the Heads of State of the AU.\(^{431}\) The Commission also requested that a two-person mission drawn from its ranks, be allowed to visit Zaire, to establish the extent and cause of human rights violations and to assist the government to ensure full respect for the ACHPR.\(^{432}\)

Between 1990 and 1993, numerous reminders were sent by the Secretariat to the government of Zaire, but no response was received.\(^{433}\) The Secretariat also sent the complainants regular updates on the status of the communications.\(^{434}\) On 23 September 1993, the Ministry of Justice of Zaire wrote that no copy of the communication had been received.\(^{435}\) A copy was sent on 3 March 1994 by registered post to the Embassy of Zaire in Dakar, but again no response was forthcoming.\(^{436}\) At its 16th session, held in April 1994, the Commission decided to send a mission to Zaire in order to establish a dialogue.\(^{437}\)

The communications against Zaire were declared admissible.\(^{438}\) The government of Zaire was notified of this decision on 26 April 1995.\(^{439}\) At its 18th session, held in October 1995, the Commission decided to apply article 58(1) of the Charter and to

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\(^{429}\) Id par 3.
\(^{430}\) Id par 4.
\(^{431}\) Id par 5.
\(^{432}\) Id par 6.
\(^{433}\) Id par 8.
\(^{434}\) Id par 9.
\(^{435}\) Id par 10.
\(^{437}\) Id par 12.
\(^{438}\) Id par 13.
\(^{439}\) Id par 14.
draw the attention of the Heads of State and Government to the serious and massive violations of human rights in Zaire.\textsuperscript{440}

The Commission deliberated on article 58 of the ACHPR and considered that the communication against Zaire revealed the existence of serious and massive violations of human rights.\textsuperscript{441} Article 56 of the ACHPR requires that complainants exhaust local remedies before approaching the Commission.\textsuperscript{442} The other requirement is that if the remedies are as a practical matter unavailable or will be unduly prolonged, then the Commission will render the matter admissible.\textsuperscript{443} The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.\textsuperscript{444} In this case, the government had received notice of the violation.\textsuperscript{445}

The Commission has never held that the requirement of local remedies applies literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation.\textsuperscript{446} The Commission declared the case admissible because of the vast and varied scope of human rights violations alleged, and the general situation prevailing in Zaire.\textsuperscript{447}

The main goal of the communications procedure before the Commission is to initiate a positive dialogue between the complainant and the State concerned in order to reach an amicable settlement.\textsuperscript{448} A prerequisite for amicably remedying violations of the ACHPR is based on the good faith of the parties concerned, including their willingness to participate in a dialogue.\textsuperscript{449}

In the present case, there was no substantive response from the government of Zaire, despite the numerous notifications of the communications sent by the

\textsuperscript{440} Id par 15.
\textsuperscript{441} Id par 35.
\textsuperscript{442} Id par 36.
\textsuperscript{443} Ibid.
\textsuperscript{444} Id par 36.
\textsuperscript{445} Id par 36.
\textsuperscript{446} Id par 36.
\textsuperscript{447} Id par 37.
\textsuperscript{448} Ibid.
\textsuperscript{449} Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74 (ACHPR 1995) Communications 25/89, 47/90, 56/91, 100/93 at par 39.
\textsuperscript{449} Ibid.
The Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as accurate. This principle conforms to the practice of other international human rights adjudicatory bodies and the Commission’s duty to protect human rights. Since the government of Zaire did not wish to participate in a dialogue, the Commission continued its consideration of the case on the basis of facts and opinions submitted by the complainants alone.

Article 5 of the ACHPR prohibits torture and inhuman or degrading treatment. The torture of 15 persons by a military unit at Kinsuka, near the Zaire River, as alleged in communication, constituted a violation of this article. Article 6 of the ACHPR guarantees the right to liberty and security of person. The indefinite detention of those who protested against torture violated article 6 of the ACHPR. Article 4 of the ACHPR protects the right to life. The Communication, in addition to alleged arbitrary arrests, arbitrary detention, and torture, also alleged extrajudicial executions which are a violation of article 4. Article 7 of the ACHPR specifies the right to have one’s cause heard. The unfair trials constituted a violation of article 7. Article 8 of the African Charter protects freedom of conscience. The harassment of the Jehovah’s Witnesses constituted a violation of this article, since the government presented no evidence that the practice of their religion in any way threatened law and order. The arbitrary arrests of believers of this religion likewise constituted a contravention of article 6 above. The torture, executions, arrests,
detention, unfair trials, restrictions on freedom of association and freedom of the press violated articles 8.\(^{464}\)

Article 16 of the Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people.\(^{465}\) The failure of the government to provide basic services, such as safe drinking water and electricity, and the shortage of medicine, violated article 16.\(^{466}\) Article 17 of the ACHPR guarantees the right to education.\(^{467}\) The closures of universities and secondary schools constituted a violation of article 17.\(^{468}\) The Commission held that the government committed serious and massive violations of the ACHPR, namely of articles 4, 5, 6, 7, 8, 16 and 17.\(^{469}\)

**Purohit and Moore v Gambia African Commission on Human and Peoples’ Rights, Communication 241/200, Decided at 33\(^{rd}\) Ordinary Session of the African Commission (15-29 May 2003)**\(^{470}\)

The communication alleged, amongst other things, that the legislative regime in the Gambia violated the rights of mental health patients to enjoy the best attainable state of physical and mental health.\(^{471}\) The other right violated was the right of disabled persons to special measures of protection in keeping with their physical and moral needs.\(^{472}\)

The Commission stated that the Gambia did not satisfy articles 16 and 18(4) of the Charter and that enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.\(^{473}\)

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\(^{464}\) Ibid.

\(^{465}\) Ibid.

\(^{466}\) Ibid.

\(^{467}\) Id par 48.

\(^{468}\) Ibid.

\(^{469}\) Id par 49.

\(^{470}\) http://www.right-to-education.org/node/163 (accessed 15/06/2012)

\(^{471}\) Article 16 of the African Charter on Human and Peoples’ Rights.

\(^{472}\) Article 18(4) of the African Charter on Human and Peoples’ Rights.

\(^{473}\) http://www.right-to-education.org/node/699, (accessed 15/06/2012)
Recognising the prevailing poverty that renders African countries incapable of providing the necessary amenities, infrastructure and resources to facilitate enjoyment of the right to health, the Commission read the obligation on States Parties, “to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind” into article 16 of the ACHPR.474

The Commission’s finding is relevant to the right to education because it is likely that the Commission would make similar demands in a case regarding the right to education, even that of mentally handicapped children.475


The Complainant was a human rights law office in Sudan and submitted the communication on behalf of all university students and teachers in Sudan.476 The complainant alleged that, on 26 September, the Minister of Education in Sudan announced that all the universities in Sudan would be closed for one month.477 The closure of the universities was alleged to be aimed at assisting the military to mobilise for the civil war in Southern Sudan.478

The complainant included the complaint’s sworn affidavit by a university lecturer at the Khartoum University who attested to these allegations.479 The complainant notified the Commission that, though an administrative appeal had been filed against the decision of the Minister of Education, the complaint did not believe that this had any realistic chance of success.480 The complainant urged the Commission to adopt provisional measures under rule 111 of its Rules of Procedure, requesting the

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474 Ibid.
475 Ibid.
477 Id par 3.
479 Id par 4.
480 Id par 5.
government of Sudan to re-open the universities immediately and prevent further interference with university teaching.  

The complainant alleged a violation of the articles 6, 7(c) and 17(1) of the ACHPR. During the 30th session, the rapporteurs introduced the communications and reviewed the facts and the status of each case. The Commission thereafter heard the oral submission of the respondent to the case. The Commission noted that the respondent did not respond to the questions raised by the complainant. 

The Secretariat of the African Commission informed the parties of the decision of the Commission and requested the respondent state to forward its written submissions within two months of the date of notification of this decision. On 7 March 2002, a reminder was sent to the respondent state to forward its submissions within the prescribed time to enable the Secretariat to proceed with the communication.

Article 56(5) of the African Charter provides that communications relating to human and peoples’ rights referred to under article 55 and received by the Commission, shall be considered if they are sent after local remedies have been exhausted, or if it is obvious that the procedure will be unduly prolonged. Concerning the question of exhausting local avenues of recourse, the complainant informed the Commission that no effective recourse was available and that, even if used, the Constitutional Court would be of no assistance as the state of emergency and political limitations made it impossible to legitimately complain to the Court.

The complainant maintained that the grounds for a local remedy that could apply were rendered ineffective by the fact that the legal system in Sudan was neither free

481 Id par 6.
482 Id par 7.
483 Id par 31.
484 Ibid.
485 Ibid.
486 Id par 32.
487 Id par 33.
489 Ibid.
490 Id par 35.
nor independent.\textsuperscript{491} This was due to the Sudanese courts having been controlled by the executive since 1998 and that, given this situation, the judiciary could not rule on proceedings brought against the Sudanese government, based on international humanitarian law, or even apply this law when it was clearly relevant.\textsuperscript{492}

The complainant alleged that, in practice, the procedures which allowed for compensation for human rights violations committed by the government of Sudan were often inaccessible to those individuals whose rights had been violated.\textsuperscript{493} This was due to the fact that current administrative and legal solutions had become serious obstacles to the protection of the complainants’ rights.\textsuperscript{494} Consequently, complainants who asked that their rights be protected before Sudanese courts came up against obstacles which made these avenues of redress ineffective.\textsuperscript{495}

The Sudanese government alleged that the complainants had not used the remedies available to them in the local courts before applying to the Commission.\textsuperscript{496} It insisted that neither the lawyer lodging the complaint, nor the complainants had filed an appeal against the decision; this was proved from the registers of the administrative courts.\textsuperscript{497} The government further maintained that the complainants, despite their insistence in previous correspondence, did not send them the reference number of the appeal that had been filed.\textsuperscript{498} This proved that no appeal had been filed, contrary to the assertions of the complainants, who had, therefore, not exhausted all the local remedies as provided in article 56 of the ACHPR.\textsuperscript{499}

The government argued that the right of the complainants to file an appeal against a decision of the Court was provided for in article 20(1) of the Administrative and Constitutional Code of Justice of 1996, as amended in 2000.\textsuperscript{500} Article 56(5) of the

\textsuperscript{491} Id par 36.
\textsuperscript{492} Ibid.
\textsuperscript{493} Id par 37.
\textsuperscript{494} Ibid.
\textsuperscript{495} Ibid.
\textsuperscript{496} Id par 38.
\textsuperscript{498} Id par 39.
\textsuperscript{499} Ibid.
\textsuperscript{500} Id par 40.
ACHPR requires that communications be sent only after exhausting local remedies, if any, unless it is obvious that the local remedies would be unduly prolonged.\textsuperscript{501}

The complainant before the Commission was received by the Secretariat on 14 October 1998 and the decision to close the universities had been taken on 26 September 1998, an interval of one month between closure of the universities and receipt of the complaint.\textsuperscript{502} The Commission was of the view that an interval of one month was sufficient time within which the complainant could have accessed and exhausted all local remedies.\textsuperscript{503}

Furthermore, the complainant gave no indication of instituting proceedings before the domestic courts.\textsuperscript{504} The Court held in accordance with article 56(5) of the ACHPR which sets out grounds of admissibility of a communication and consequently, the Commission declared this communication inadmissible due to non-exhaustion of local remedies.\textsuperscript{505}

(h) Conclusion

The ACRWC affords a much more detailed and protective measures on education, with no corresponding provisions at the UN level.\textsuperscript{506} The advantage of the African Charter is that, under articles 60 and 61, the Commission has the mandate to go beyond the Charter’s rights, and to look at international standards. The ACERWC is, however, plagued by obstacles with one of the major difficulties being the non-accessibility of the documents and jurisprudence of the ACERWC on the rights and welfare of the child.\textsuperscript{507} The other problem is the issue of compatibility of children’s legal rights with customary and religious laws which poses particularly acute problems when law reform, harmonisation, and domestication are considered.\textsuperscript{508}

\textsuperscript{501} Id par 41.
\textsuperscript{502} Ibid.
\textsuperscript{503} Id par 42.
\textsuperscript{504} Ibid.
\textsuperscript{505} Id par 43.
\textsuperscript{507} Ibid.
CHAPTER 4: THE BEST INTERESTS OF THE CHILD PRINCIPLE

4 Introduction

The best interest of the child principle is a fundamental yardstick by which the protection of children’s rights is measured.\(^1\) Therefore, this chapter will study the best interests of the child principle as covered in the Geneva Declaration of the Rights of the Child, UDHR, the UNCRC, the ICCPR, and the ICESCR. Thereafter the best interest of the child principle will be analysed under regional human rights instruments within the EU, the OAS, and the AU as the principle forms one of the general principles underpinning the protection of children’s rights.\(^2\)

4.1


(a) The Geneva Declaration of the Rights of the Child, 1924

The best interest of the child principle is not a recent phenomenon. In 1924 it was provided in the Declaration of the Rights of the Child (the Geneva Declaration), that men and women of all nations recognise that mankind owes to the child the best it has to give.\(^3\) The Geneva Declaration further states that the community shall declare and accept as their duty, beyond and above all considerations of race, nationality or creed, that the child must be given the means required for its normal development, both material and spiritual.\(^4\)

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\(^1\) Freeman M Children’s rights: Progress and perspective, essays from the International Journal of Children’s Rights (2011) at 397. The best interests of the child principle connote the yardstick for measuring all state action, laws and policies affecting children.

\(^2\) Manful E The Developing of Children’s Rights in Africa and Europe, Comparing Legislation in Ghana and Northern Ireland (2010) at 74, the four underlying principles of the UNCRC are non-discrimination (article 2), the best interests of the child (article 3), the right to life, survival and development (article 6), and acknowledgment of the views of the child (article 12). “The underlining principles take account of the increasing maturity of the child so acknowledging that the views of the child must be respected. However, this acknowledgment is within the context of ensuring the best interests and not the recognition of rationality equal to that of adults, with concomitant autonomy of choice as to what is in the child’s own interest.”


\(^4\) Ibid; see also Manful op cit at 58 who is of the opinion that the Geneva Declaration, 1924 played a significant role in the promotion of the rights of children globally.
The Geneva Declaration provides that when children are hungry they must be fed.\(^5\) Children who are sick must be nursed, and children who are backward must be helped.\(^6\) Delinquent children must be reclaimed, and the orphan and the waif must be sheltered and succored.\(^7\) It further provides that children must be the first to receive relief in times of distress, \(^8\) and must be put in a position to earn a livelihood, and be protected against every form of exploitation.\(^9\) Finally, children must be raised in the awareness that their talents must be devoted to the service of their fellowman.\(^10\) However, the scope of the Geneva Declaration is limited in that it is not legally binding.\(^11\)

The Geneva Declaration of 1924 however, does not mention the best interest of the child in the manner that the UN General Assembly Resolution 1386 (XIV) of 10 December 1959 does. The UN GA res 1386 (1959) provides that in the enactment of laws for the purpose of full development of the child, the best interests of the child shall be the paramount consideration.\(^12\) Further, that the best interests of the child shall be the guiding principle of States institutions and all persons responsible for the education and guidance of children.\(^13\)

(b) The Universal Declaration of Human Rights

Although, the UDHR makes no specific reference to the best interests of the child as a distinct concept or criterion for the exercise of rights, it does provide in article 25 (2) that mothers and children must be provided with special care and assistance.\(^14\) Further, Member States must ensure that all children, whether born in or out of wedlock, enjoy the same special protection and assistance.\(^15\) These provisions make it clear that the UDHR recognises the protection of the children’s rights. The special

\(^5\) Geneva Declaration, 1924 principle 2.
\(^6\) Ibid.
\(^7\) Ibid.
\(^8\) Ibid principle 3.
\(^9\) Id principle 4.
\(^10\) Ibid.
\(^12\) UN General Assembly Resolution 1386 (XIV) of 10 December 1959, principle 2.
\(^13\) Id principle 7.
\(^15\) Ibid; see also Manful op cit at 58.
protection that must be afforded to children may imply that such assistance and protection must be in children’s best interests.

The UDHR also provides that “everyone” has the right to a standard of living adequate for the health and well-being of himself/herself and of his/her family.\textsuperscript{16} Included in the “adequate standard of living” are food, clothing, housing and medical care and necessary social services, and the right to security.\textsuperscript{17} In the event of unemployment, sickness, disability, or other lack of livelihood in circumstances beyond his control, adequate protection must still be provided.\textsuperscript{18}

It is implied from the abovementioned provisions that the term ‘everyone’ includes children. Therefore, in the absence of any provision explicitly dealing with the best interests of the child, these provisions will suffice as a guideline in terms of which the best interests of the child can be assessed. In the analysis of article 25 of the UDHR, it is evident that the rights covered, encompass those which would be in the best interests of the child.\textsuperscript{19}

(c) The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) provides that States Parties are obligated to respect the liberty of parents and guardians to ensure the religious and moral education of their children is in conformity with their own convictions.\textsuperscript{20} The ICCPR also provides that there is to be no discrimination of any kind against all individuals.\textsuperscript{21} Therefore, since children form part of society, then this protection will also be afforded to them. However it is not provided that the protection afforded in the ICCPR to children is to be governed by the best interests of the child.

\textsuperscript{16} Article 25(2) of the UDHR.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Article 25 of the UDHRprovides that “motherhood and childhood are entitled to special care and assistance.”
\textsuperscript{20} Article 18 and 18(4) of the ICCPR.
\textsuperscript{21} Article 2 of the ICCPR.
principle. Thus it may be concluded that the ICCPR does not explicitly cover the best interest of the child principle.\textsuperscript{22}

(d) \textbf{The International Covenant on Economic, Social and Cultural Rights}

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises children in several articles such as the right to education and to non-discrimination.\textsuperscript{23} The ICESCR provides that the family is the fundamental group of society, thus the widest possible protection should be accorded to the family, particularly for the care and education of the children.\textsuperscript{24}

The ICESCR also provides for special protection due to mothers during a reasonable period before and after birth.\textsuperscript{25} This special protection must be provided on behalf of children without any discrimination for reasons of parentage or other conditions.\textsuperscript{26} The ICESCR further prohibits social and economic exploitation and the employment of children in health hazardous conditions.\textsuperscript{27} The employment of children in work harmful to their morals, health, and dangerous to their life or likely to hamper their normal development should be punishable by law.\textsuperscript{28}

The above mentioned paragraphs demonstrate what may be in the best interests of the child. However there is no reference or direct mention of the best interests of the child principle in the ICESCR.

(e) \textbf{The United Nations Convention on the Rights of the Child}

The UNCRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

\textsuperscript{22} Freeman M (2007) op cit at 16.  
\textsuperscript{23} Article 13 of the ICESCR.  
\textsuperscript{24} \textit{Id} art 10.  
\textsuperscript{25} \textit{Id} art 10(2).  
\textsuperscript{26} \textit{Id} art 10(3).  
\textsuperscript{27} \textit{Ibid.}  
\textsuperscript{28} \textit{Ibid.}
legislative bodies, the best interests of the child shall be of primary consideration”. The Committee on the Rights of the Child regards article 3 of the UNCRC as forming one of the four general principles (the freedom from discrimination, best interest of the child, the right to life, and respect for the child’s views) of the UNCRC. Although the best interest of the child principle is not more important than any of the three general principles, it may however, be argued that the recognition of the child’s best interests underpins all the other provisions in the UNCRC.

The best interests of the child principle apply not only in the context of legal and administrative proceedings, or in other narrowly defined contexts, but also in relation to all actions concerning children. Further, the scope of the best interests of the child principle purports to be comprehensive. However, the best interest of the child principle’s application is limited only to actions which affect children. This means that the best interest of the child principle does not extend to parents.

The UNCRC obliges State Parties to ensure that children have such protection and care as is necessary for their well-being. Moreover, children’s protection must take into account the rights and duties of the parents, legal guardians, or other individuals legally responsible for the children. The UNCRC obliges State Parties to take all appropriate legislative and administrative measures for the realisation of children’s rights.

States Parties are also obliged to ensure that institutions and facilities responsible for the protection of children rights must be in accordance with the standards established by competent authorities. In relation to the right to education, the above provision implies that States Parties must provide educational facilities which

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29 Article 3(1) of the UNCRC adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.
30 Freeman (2007) op cit at 1.
31 The other three underpinning principles of the UNCRC are article 2 (freedom from discrimination), article 6 (the right to life) and article 12 (respect for the child’s views). Freeman (2007) op cit at 1.
32 Article 3(1) of the UNCRC; see also Alston P “The best interests principle: Towards a reconciliation of culture and human rights” (1994) 8 IJL and the Family at 4.
33 Alston P op cit at 44.
34 Ibid.
35 Ibid.
36 Ibid.
37 Article 3(2) of the UNCRC.
38 Ibid.
39 Ibid.
40 Article 3(3) UNCRC.
are in the best interests of the child.\textsuperscript{41} Specific focus shall be granted to areas such as children’s safety, health, suitability of their staff, as well as competent authorities.\textsuperscript{42}

The UNCRC employs the best interests of the child as a yardstick in cases where there is a need for children to be separated from their parents. The UNCRC further states that children must not be separated from their parents against the children’s will.\textsuperscript{43} However, exceptions exist whereby authorities can in accordance with the best interest of the child, separate children from their parents, if it is necessary for the well-being of those children.\textsuperscript{44} The determination using the best interest of the child principle is necessary particularly in cases where harm to the child at the hands of their own parents may occur.\textsuperscript{45} Other grounds include situations where parents are not living together and a decision must be made regarding a suitable place of residence for the child with one of the parents.\textsuperscript{46}

The UNCRC provides that children have the right to maintain personal contact with one or both parents on a regular basis, except if the arrangement will be contrary to the child’s best interests.\textsuperscript{47} It is clear from the aforementioned provision that the best interest of the child is used as a yardstick to determine the suitability of contact between children and parents.

Separation of children resulting from any action commenced by a State Party, such as the detention, or death of one or both parents of the child, that State Party must, provide the parents or child with the essential information concerning the whereabouts of the absent members of the family.\textsuperscript{48} However, the information concerned must not be provided if it would harm the well-being of the child.\textsuperscript{49} States Parties must also ensure that the submission of such a request must contain no adverse consequences for the children and guardians involved.\textsuperscript{50}

\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Id art 9(1).
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} Id art 9(3).
\textsuperscript{48} Id art 9(4).
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
The UNCRC obliges States Parties to utilise their best efforts to ensure that both parents have equal responsibilities for the upbringing and development of the child.\textsuperscript{51} Further, parents or legal guardians, have the primary responsibility for the upbringing and development of the child.\textsuperscript{52} This best interest of the child principle must apply to each unique set of facts. This may occur for example, in a situation where parents’ views with regard to education conflict with those of what the court deems suitable. The principle is of great value in ascertaining the best possible solution when the best interests of the child are uncertain.

The best interest of the child principle is an “umbrella” provision which prescribes the approach to be followed “in all actions concerning children”.\textsuperscript{53} It is for this reason that it will often be invoked in conjunction with other articles of the UNCRC in order to support, justify or clarify a particular approach to the issues arising under the UNCRC. There is no article in the UNCRC, and no right recognised therein, to which the best interests of the child principle embodied in article 3(1) is not relevant.\textsuperscript{54}

Article 3(1) of the UNCRC might also play two further roles.\textsuperscript{55} First, the best interests of the child can act as a mediating principle in assisting to resolve conflicts between different rights which arise within the overall framework of the UNCRC.\textsuperscript{56} Secondly, the best interests of the child can also serve to evaluate laws, practices, and policies relating to children that are not covered by express obligations under the UNCRC.\textsuperscript{57}

The Committee on the UNCRC provides guidelines for periodic reports on the application of the best interest of the child principle by State Parties.\textsuperscript{58} The reports must provide the necessary information into the views of the Committee on the UNCRC about the corresponding obligations of States Parties under the UNCRC.\textsuperscript{59} Further, the reports should indicate whether the best interests of the child principle

\textsuperscript{51} Id art 18(1).
\textsuperscript{52} Ibid.
\textsuperscript{53} Detrick S, A commentary on the United Nations Convention on the Rights of the Child (1999) at 92; see also article 3(1) of the UNCRC.
\textsuperscript{54} Id at 92.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{59} CRC/C/AUS/CO/4, Consideration of reports submitted by States Parties under article 44 of the UNCRC.
and the need for it to be a primary consideration in all actions concerning children, is reflected in the State’s domestic laws.\(^{60}\)

The periodic reports must provide information on the consideration given to the best interests of the child by State Parties’ courts of law, administrative authorities or legislative bodies, as well as by public or private social welfare agencies.\(^{61}\) The information must indicate how the best interests of the child have been given primary consideration in family life, school life, and social life.\(^{62}\)

The information is vital, specifically in areas such as budgetary allocations, including at the central, regional and local levels, and, where appropriate, at the federal and provincial levels and within governmental departments.\(^{63}\) The information must also indicate in what ways the principle of the “best interests of the child” is made part of the training of professionals dealing with children’s rights.\(^{64}\)

The CRC’s *travaux preparatoires* reveal that the content of the principle of the best interests of the child was not discussed.\(^{65}\) However, the representative from Venezuela did draw attention to the subjectivity of the standard, especially if the UNCRC contained no prior stipulation that the best interests of the child referred to the child’s all-round or physical, mental, spiritual, moral, and social development.\(^{66}\)

This means that the UNCRC left the ultimate interpretation of the best interests of the child to the courts as the upper guardian of children, institution or organisation applying the standard.\(^{67}\) Against the criticism of this indeterminacy, the UNCRC as a whole strives to provide the broad ethical or value framework which would give a greater degree of certainty to the content of the best interest principle.\(^{68}\)

The other criticism of the inclusion of the best of the interests of the child principle in the UNCRC is that it introduces cultural considerations which will allow State Parties

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\(^{61}\) Ibid.

\(^{62}\) Ibid.

\(^{63}\) Ibid; Other instances in which the best interests of the child information is given primary consideration are; planning and development policies, including housing, transport and environmental policies; adoption; immigration, asylum-seeking and refugee procedures, the administration of juvenile justice; the placement and care of children in institutions; social security.


\(^{65}\) Id at 89.

\(^{66}\) Ibid.

\(^{67}\) Ibid.

to influence the implementation of the rights recognised in the UNCRC.\(^{69}\) This, in turn, could undermine the basic consensus that these rights reflect.\(^{70}\) Against this criticism, it has been submitted that the principle of the best interests of the child indeed provides important scope for introducing considerations of culture into the implementation of the UNCRC by State Parties, and that it is entirely appropriate to allow some scope for a culturally sensitive interpretation of various provisions of the UNCRC.\(^{71}\)

In accordance with article 3 of the UNCRC, State Parties must ensure that the impact of the best interests of the child is apparent in domestic laws and policies and that child’s rights’ protection is carefully considered from development to implementation of law and policy.\(^{72}\)

(f) Conclusion

The best interests of the child principle forms one of the cornerstones for the protection of children’s rights. The principle provides guidance in the interpretation of children’s rights. The international framework highlights the importance of the best interests of the child principle and its value to protection of children’s rights.

Part 2: REGIONAL HUMAN RIGHTS SYSTEMS

4.2 THE EUROPEAN UNION

(a) Introduction

Within the EU human rights system, the evaluation of the best interests of the child principle will focus on the European Union Charter of Fundamental Rights, the European Convention on Human Rights, the European Social Charter, the European

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\(^{69}\) Ibid.

\(^{70}\) Ibid.

\(^{71}\) Ibid.


(b) The European Union Charter of Fundamental Rights

The European Union Charter of Fundamental Rights\textsuperscript{73} provides that in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.\textsuperscript{74} This entails that any right affecting children must be interpreted in conformity with the best interests of the child principle.

The European Union Charter of Fundamental Rights also provides that children must have the right to the protection and care necessary for their wellbeing.\textsuperscript{75} Children have the right to express their views freely,\textsuperscript{76} and their views must be taken into consideration in any matters which concern them in accordance with their age and level of maturity.\textsuperscript{77} Moreover, children have the right to maintain a personal relationship and direct contact with both parents on a regular basis, unless this would be contrary to the child’s best interests.\textsuperscript{78}

These provisions can be construed as granting direct interpretation of the best interest of the child principle with regard to children’s freedom of expression and contact with their parents. Therefore, it may be implied that the European Union Charter of Fundamental Rights provides for the application of the best interests of the child principle.


\textsuperscript{74} *Id* art 24(2).

\textsuperscript{75} *Id* art 24(1).

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid.

\textsuperscript{78} *Id* art 24(3).
(c) The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\(^{79}\) makes no specific reference to children, except in its First Protocol of 1952 and certainly not to their welfare or the principle of the best interests of the child.\(^{80}\) The failure to provide for the best interests of the child principle has been a subject of concern to the EU.\(^{81}\) There are specific references to children in article 5(1) (d) and in article 6, and the First Protocol of 1952 forbids the denial of the right to education.\(^{82}\) It is further contended that there was always going to be space for a child’s best interests in article 8 of the ECHR.\(^{83}\)

The ECHR provides that “everyone has the right to respect for his private and family life, his home and communications”.\(^{84}\) However, this right is subject, \textit{inter alia}, to the protection of the rights and freedoms of others.\(^{85}\) Further, children have been construed as “others”, and their best interests incorporated into this umbrella clause as opposed to a provision dealing specifically with their rights.\(^{86}\)

(d) The European Social Charter

The European Social Charter provides that children and young persons have the right to special protection against the physical and moral hazards to which they are exposed to.\(^{87}\) Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.\(^{88}\)


\(^{80}\) Freeman (2007) op cit at 20-21.

\(^{81}\) Freeman M \textit{Commentary on the UNCRC} at 12; see also Fortin J \textit{Children’s Rights and the Developing Law} (3rd ed) (2009) at 33, unlike the UNCRC, “the European Convention on Human Rights was not designed specifically to protect children as a group. But children as human beings are entitled to claim its protection and it has a direct influence on the way in which children’s rights are protected.”

\(^{82}\) Freeman at 12.

\(^{83}\) \textit{Ibid}.

\(^{84}\) Article 7 of the European Union Charter of Fundamental Rights.

\(^{85}\) Freeman (2007) op cit at 12.

\(^{86}\) \textit{Ibid}.

\(^{87}\) Article 7(7) of the European Social Charter.

\(^{88}\) \textit{Id} art 12.
The best interests of the child principle supports the notion that decisions taken by or on behalf of a child must be for the benefit of the wellbeing of that child. The best interest of the child principle under the European Social Charter has been applied with regard to children’s employment. Thus, in the context of employment, article 7 of European Social Charter, with a view of ensuring the effective exercise of the rights of children and young person’s to protection, requires that States Parties undertake to provide that the minimum age for admission to employment be set at 15 years.89

However, exceptions are allowed for children employed in prescribed light work which cannot cause harm to their health, morals or education.90 The European Social Charter provides that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy.91

Children who are still subject to compulsory education shall not be employed in work that would deprive them of the full benefit of their education.92 Children’s working hours shall be limited in accordance with their developmental needs, and particularly with their need for vocational training.93

State Parties shall recognice the right of young workers and apprentices to a fair wage or other appropriate allowances.94 Time spent by young persons in vocational training during normal working hours and with the consent of the employer, shall be regarded as constituting part of the working day.95

The European Social Charter provides that employed children shall be entitled to a minimum of four weeks’ annual holiday with pay.96 Moreover, these children shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations.97

89 Article 7(1) European Social Charter.
90 Ibid.
91 Id art 7(2).
92 Id art 7(3).
93 Id art 7(4).
94 Id art 7(5).
95 Id art 7(6).
96 Id art 7(7).
97 Id art 7(8).
Children employed in occupations prescribed by national laws or regulations shall be subject to regular medical control. Moreover, State Parties must ensure that special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

In contextualising the abovementioned provision, it can be said that in situations where children undertake employment, what would be in their best interests is apparent, based on article 7 of the European Social Charter.

*(e) The European Convention on the Exercise of Children’s Rights*

The European Convention on the Exercise of Children’s Rights provides that the best interests of the child should be promoted. The promotion of the best interests of the child extends to where children have an opportunity to exercise their rights in family proceedings.

State Parties are obliged to provide children with relevant information to enable their best interests to be promoted and due weight to be given to their views. The European Convention on the Exercise of Children’s Rights recognises the importance of the parental role in protecting and promoting the rights and the best interests of children. Moreover, State Parties must also engage in the protection and promotion of the best interests of the child.

The European Convention on the Exercise of Children’s Rights provides that the best interests of the child principle entails that the State Party must promote children’s rights. Further, to grant children procedural rights and facilitate the exercise of the best interests principle by ensuring that children are, themselves or

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98 Id art 7(9).
99 Article 7(10) of the European Social Charter.
through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.\textsuperscript{105}

During decision-making processes affecting children, the judicial authority must, before taking such a decision, consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child.\textsuperscript{106} Thus children must participate in the process. Where necessary, the judicial authority shall obtain further information, in particular from the holders of parental responsibilities, in a case where the child is considered by applicable law as having insufficient understanding.\textsuperscript{107}

“Sufficient understanding” means that children would have received all relevant information pertaining to the specific issue that affects them.\textsuperscript{108} This provision is based on the assumption that such children would have sufficient intellect to understand the information applicable to the issue. Further, the consultation with the child in person in appropriate cases or privately if necessary, must be conducted in a manner appropriate to the child’s understanding.\textsuperscript{109} However, such consultation cannot be conducted if it would be manifestly contrary to the best interests of the child.\textsuperscript{110} Furthermore, the judicial authority must allow the children to express their views\textsuperscript{111} and give due weight to those views.\textsuperscript{112}

In the case of proceedings before a judicial authority affecting a child, the child’s representative shall provide all relevant information to the child.\textsuperscript{113} However, the provision of such information must not be manifestly contrary to the best interests of the child.\textsuperscript{114} The phrase “manifestly contrary” entails a standard in terms of which the information appears, on the face of it, to be detrimental or to entail irreparable consequence for a child’s well-being.

\textsuperscript{105} Ibid.
\textsuperscript{106} Article 6(a) of the European Convention on the Exercise of Children’s Rights.
\textsuperscript{107} Ibid.
\textsuperscript{108} Id art 6(b).
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
\textsuperscript{112} Id art 6(c).
\textsuperscript{113} Id art 6(c).
\textsuperscript{114} Ibid.
The child’s representatives must explain to the child in cases where the child is considered by internal law to have a sufficient understanding of the possible consequences of compliance with his or her views, and the possible consequences of any action by the representative. Finally, the child’s representatives shall determine the views of the child and present these views to the judicial authority.116

(f) The European Convention on Contact Concerning Children

The European Convention on Contact Concerning Children (ECCC)117 utilises the best interests of the child principle in deciding whether a child must have contact with its parents. The ECCC provides that a child and his or her parents shall have the right to obtain and maintain regular contact with each other.118 The contact may be restricted or excluded only where necessary in the best interests of the child.119

Where it is not in the best interests of a child to maintain unsupervised contact with one of his or her parents, the possibility of supervised personal contact or other forms of contact with the particular parent shall be considered.120 The ECCC also provides that subject to the child’s best interests, contact may be established between the child and persons other than his or her parents with whom he or she has family ties.121

The ECCC provides that a child considered by internal law as having sufficient understanding shall have the right to receive all relevant information with regard to contact with the parents.122 Children must be consulted and have the right to express their views unless this would be manifestly contrary to their best interests.123 Due weight must be given to the views and the ascertainable wishes and feelings of the children.124

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115 Article 10(b) of the European Convention on the Exercise of Children’s Rights.
116 Id art 10(c).
117 Convention on Contact concerning Children CETS no 192.
118 Id art 4(1).
119 Id art 4(2).
120 Id art 4(3).
121 Id art 5(1).
122 Ibid.
123 Id art 6(1).
124 Id art 6(2).
Before taking a decision, the judicial authority shall ensure that it has sufficient information regarding the child at its disposal.\textsuperscript{125} Particular emphasis should be directed to the holders of parental responsibilities, in order to take a decision in the best interests of the child.\textsuperscript{126} The judicial authority, where necessary, must obtain further information from other relevant bodies or persons.\textsuperscript{127}

(g) Conclusion

The best interest of the child principle as applied in the EU is primarily used in the determination of custody issues. The principle also serves as a guiding tool by the judicial bodies to determine a situation that would benefit the child in cases of conflicting rights

4.3 THE ORGANISATION OF AMERICAN STATES

(a) Introduction

The best interests of the child principle in the OAS will be studied under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

(b) The American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man (the OAS Declaration) makes no explicit reference to the best interests of the child principle. However, it does provide that all women, during pregnancy and the nursing period, and all

\textsuperscript{125} Id art 7(c).
\textsuperscript{126} Article 7(c) of the Convention on Contact concerning Children CETS no 192.
\textsuperscript{127} Ibid.
children, have the right to special protection, care, and aid.\textsuperscript{128} This special protection entails a duty on every person to aid, support, educate and protect minor children.\textsuperscript{129}

Therefore, it could be implied from the above mentioned provisions that the OAS Declaration aims to provide the best protection for children as it obliges Member States to provide special protection for children.\textsuperscript{130} The OAS Declaration places a duty upon children always to honour their parents and to support and protect them when they are in need.\textsuperscript{131} However, it would be questionable as to whether the duty placed upon children would be in the child’s best interest?

(c) The American Convention on Human Rights

The American Convention on Human Rights (ACHR) provides that in cases of dissolution of marriage, provision shall be made for the necessary protection of any children solely on the basis of their best interests.\textsuperscript{132} Moreover, article 19 provides that every minor child has the right to the measures of protection from his family, society, and the State, as required by his or her condition as minor.\textsuperscript{133} The ACHR recognises equal rights for children born in and out of wedlock.\textsuperscript{134}

(d) The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

The Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (the Additional Protocol) provides that every child, whatever the parentage, the right to protection that the status of a child as a minor requires from his family, society, and the State.\textsuperscript{135} The Additional Protocol also provides that children have the right to grow up under the protection and responsibility their parents.\textsuperscript{136} Save in

\begin{itemize}
\item[\textsuperscript{128}] Article 7 of the American Declaration of the Rights and Duties Man.
\item[\textsuperscript{129}] Id art 30.
\item[\textsuperscript{130}] Article 7 of the American Declaration of the Rights and Duties Man.
\item[\textsuperscript{131}] Ibid.
\item[\textsuperscript{132}] Article 17(4) of the American Convention on Human Rights.
\item[\textsuperscript{133}] Id art 19.
\item[\textsuperscript{134}] Id art 17(5).
\item[\textsuperscript{135}] Article 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.
\item[\textsuperscript{136}] Ibid.
\end{itemize}
exceptional or judicially recognised circumstances, a child must not be separated from his/her mother.\textsuperscript{137}

The Additional Protocol has no standard definition of the best interests of the child, this generally being left to the deliberation that courts when deciding what type of services, actions, and orders will best serve a child, as well as who is best suited to take care that child.\textsuperscript{138} The best interest of the child determination is generally made by considering a number of factors related to the circumstances of the child.\textsuperscript{139} These factors include the child’s potential caregivers, the child’s safety, and the child’s well-being.\textsuperscript{140}

The American situation with regard to the best interests of the child is that approximately 16 States and the District of Columbia list in their statutes specific factors for courts to consider in making determinations, regarding the best interests of the child.\textsuperscript{141} The factors vary considerably from State to State, some factors commonly required include, the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (13 States and the District of Columbia).\textsuperscript{142}

Other factors include the capacity of the parents to provide a safe home and adequate food, clothing, and medical care for the children (eight States);\textsuperscript{143} the mental and physical health needs of the child (five States and the District of Columbia);\textsuperscript{144} the mental and physical health of the parents (six States and the District of Columbia);\textsuperscript{145} and finally, the determination as to whether there is a presence of domestic violence in the home (eight States).\textsuperscript{146}

\textsuperscript{137} Ibid.
\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{146} Child Welfare Information Gateway op cit.
(e) Conclusion

The OAS complies with the international framework for the provision of the best interests of the child. The OAS emphasize the special protection of children’s rights, this may be implied to mean that such special protection taken on behalf of children must be in the best interest of the child.

4.4 THE AFRICAN UNION

(a) Introduction

The best interests of the child at the AU human rights system will be evaluated in terms of the African Charter on Human and People’s Rights and the African Charter on the Rights and Welfare of the Child.

(b) The African Charter on Human and People’s Rights

The African Charter on Human and People’s Rights (ACHPR) does not have a provision dealing with the best interests of the child. The ACHPR subscribes to the Charter of the United Nations and the Universal Declaration of Human Rights.\textsuperscript{147} This means that if the two instruments refer to the best interests of the child principle the Commission or the Court may have to seek inspiration as provided by article 60 and 61 of the African Charter.

The best interests of the child may also take into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterise the reflection on the protection of children’s rights.\textsuperscript{148} The consideration must be to the enjoyment of rights and freedoms which also implies the performance of duties on the part of everyone.\textsuperscript{149} Therefore, the best interest of the child may be assessed in accordance with the above mentioned provisions.


\textsuperscript{148} Ibid.

The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) provides that the best interests of the child must be the primary consideration in all actions concerning the child.\(^{150}\) Further, that the best interests of the child principle is paramount over the other three underpinning principles.\(^{151}\) The ACRWC provides that all its provisions must be interpreted, first and foremost, in the child’s best interests.\(^{152}\) The criticism of the supremacy of the best interests of the child principle in the ACRWC is that it tends to reflect western culture rather than embracing the African values.\(^{153}\) This means that the best interest of the child may override the duty that is placed upon children to act in accordance with their obligations under the ACRWC.

However, it must be noted that the best interests of the child have been the paramount consideration in determining a variety of children’s issues, such as custody, in both customary law and formal civil law in Africa, dating back to the late eighteen century, and has been applied consistently ever since.\(^{154}\) Although the best interest of the child principle was not codified in the western sense, but the rights of children was always safeguarded.

It should also be noted that article 4(1) of the ACRWC extends to all actions by any person or entity, which means that parents are included.\(^{155}\) The ACRWC provides a wider scope of protection than article 3(1) of the UNCRC.\(^{156}\)

(d) Conclusion

The best interests of the child principle serves as an interpretative tool in the protection of children’s rights based on their unique set of circumstance. In the African context the principle is applied in situations where basic needs such as water

\(^{150}\) Sloth-Nielsen J Children’s rights in Africa: The African regional system for the protection of children’s rights (2008) at 36.; “the four underpinning rights are the best interest of the child, the right to life, survival and development, child participation and respect for the view of the child”.

\(^{151}\) Ibid.

\(^{152}\) Ibid.

\(^{153}\) Ibid.

\(^{154}\) Ibid.

\(^{155}\) Freeman (2007) op cit at 20-21.

\(^{156}\) Ibid.
and food are necessities. Therefore, compliance with the provision as outlined in the UNCRC would be applied in recognition of the socio-economic and cultural situation in the AU region in ensuring the application of African values.
CHAPTER 5: UNITED NATIONS IMPLEMENTATION MECHANISMS IN RESPECT OF CHILDREN'S RIGHTS

5.1 Introduction
The UNCRC obliges States Parties to undertake in accordance with international law to implement the UNCRC.¹ Thus, implementation mechanisms provided in the UNCRC are at the heart of protecting children’s rights. Therefore, chapter 5 will examine the UN human rights system’s implementation measures in respect of children’s rights.

5.2 The Implementation Mechanisms of the United Nations Convention on the Rights of the Child
The UNCRC obliges States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the UNCRC.² The UNCRC also states that with regard to economic, social and cultural rights, States Parties must undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.³

Article 4 of the UNCRC reflects a realistic view, that lack of resources can hamper the full implementation of economic, social and cultural rights.⁴ Unfortunately, the implementation of children’s rights also falls into the affected area on which lack of resources does hamper progress in the protection of children’s rights. For example, economic, social and cultural rights include the right to education. The right to education cannot be fully realised because of the lack of resources in some States Parties.⁵ However, some States Parties have introduced the concept of “progressive

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¹ CRC/GC/2003/5, Committee on the United Nations Convention on the Rights of the Child General Comments: General Measures of Implementation of the Convention on the Rights of the Child, at par 1; see also article 4 of the UNCRC.
² Article 4 of the UNCRC; see UNCRC General Comment no 2 (2002)/CRC/GC/2002/2. The role of independent national human rights institutions in the promotion and protection of the rights of the child.
³ Article 4 of the UNCRC.
⁴ CRC General Comment no 5 (2003), General measures of implementation of the CRC (arts 4, 42 and 44, par 6) at par 7.
⁵ South Africa is a case in point in the decision of Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).
realisation” of children’s rights. The States Parties must in utilising this progressive
realisation, demonstrate that they have implemented “to the maximum extent of their
available resources” and, where necessary, have sought international co-operation
in implementing children’s rights.\(^6\)

The implementation of children’s rights entails taking action to ensure the realisation
of all rights in the UNCRC for all children within a States Parties’ jurisdiction.\(^8\)
Implementation must also contribute, through international co-operation, to global
implementation of children’s rights.\(^9\)

Independent National Human Rights Institutions (NHRIs) are an important
implementation mechanism in the promotion and protection of the provisions of the
UNCRC.\(^10\) The Committee of the UNCRC (the Committee) considers the
establishment of such bodies to fall within the commitment made by State Parties.\(^11\)
The commitment was made upon the ratification of the UNCRC to ensure the
implementation of the UNCRC and advance the realisation of children’s rights.\(^12\)

The Committee has also welcomed the establishment of children’s rights
ombudspersons or commissioners and similar independent bodies for the promotion
and monitoring of the implementation of the UNCRC by States Parties.\(^13\) However,
States Parties are still faced with obstacles such as political instability which affect
the implementation of children’s rights.\(^14\)

The Committee issues general comments in order to encourage States Parties to
establish independent institutions for the promotion and monitoring of
implementation of the UNCRC and to support the institutions in enforcing children’s

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\(^{6}\) CRC General Comment no 5 (2003), General measures of implementation of the CRC (arts 4, 42
and 44, par 6) at par 7.

\(^{7}\) Ibid.

\(^{8}\) Ibid.

\(^{9}\) Ibid.

\(^{10}\) “Right to Education Project: Promoting mobilising and legal accountability “http://www.right-to-
education.org/node/54 (accessed 10/07/2012).

\(^{11}\) CRC General Comment no 2 (2002)/CRC/GC/2002/2.

\(^{12}\) Ibid.

\(^{13}\) Id par 154.

\(^{14}\) Ibid.
rights. The NHRIs must provide for the essential elements of such institutions and the activities which should be carried out by them.

Where such NHRIs have already been established, the Committee shall call upon States Parties to review their status. The NHRIs must also review their own effectiveness in promoting and protecting children’s rights as enshrined in the UNCRC and other relevant international instruments.

5.3 General Measures of Implementation of the United Nations Convention on the Rights of Children

Implementation of children’s rights is defined as a process whereby States Parties to the UNCRC takes action to ensure the realisation of all the rights in the UNCRC for all children within their jurisdiction. States Parties must provide relevant information pursuant to article 4 (measures and extent of implementation of the UNCRC) of the UNCRC. This information must include details of measures taken by States Parties to harmonise national laws and policy with the provisions off the UNCRC, and mechanisms planned at national or local level for co-ordinating policies relating to children and monitoring the implementation of the UNCRC.

States Parties which undertake to comply with the provisions of the UNCRC must ensure that implementation of the UNCRC engages all sectors of society, including children. In addition, the Committee has identified a wide range of measures that

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16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Article 4 of the United Nations Convention on the Rights of the Child, 1989 and provides that:
States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.
22 Ibid.
23 Ibid.
are needed for effective implementation.\textsuperscript{25} Included are the development of special structures, monitoring, training and other activities in government, parliament and the judiciary at all levels.\textsuperscript{26}

States Parties must describe the measures they have taken or that are foreseen, pursuant to article 42\textsuperscript{27} (advocacy for children’s rights) of the UNCRC.\textsuperscript{28} In addition, States Parties must describe measures undertaken or foreseen, pursuant to article 44(6) (publication of reports), of the UNCRC.\textsuperscript{29} For example, the specific obligations enumerated under article 28(1)(eg, right to education) of the UNCRC are imposed on States Parties with a view to achieving the right of the child to education “progressively” and on the basis of equal opportunity.\textsuperscript{30}

The second sentence of article 4\textsuperscript{31} reflects a realistic acceptance on the part of States Parties that lack of appropriate implementation of children’s rights can hamper the realisation of the provisions of the UNCRC.\textsuperscript{32} This provision introduces the concept of “progressive realisation” of the rights in the UNCRC.\textsuperscript{33}

The second sentence of article 4 is similar to the wording used in the ICESCR with regard to progressive realisation.\textsuperscript{34} The Committee on the UNCRC provides that

\begin{table}
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\hline
\textbf{Article} & \textbf{Description} \\
\hline
42 & States Parties must undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike. \\
\hline
44(6) & States Parties shall make their reports widely available to the public at large in their own countries. \\
\hline
4 & States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation. \\
\hline
2(1) & Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a \\
\hline
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“even where the available resources are demonstrably inadequate, the obligation remains for a States Parties to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances”. Notwithstanding their economic circumstances, States Parties are required to undertake all possible measures towards the realisation of children’s rights, particularly the most disadvantaged groups.

The Committee provides that it is intended to promote the full enjoyment of all rights in the UNCRC by all children, through legislation, the establishment of co-ordinating, monitoring bodies, governmental and independent, comprehensive data collection, awareness-raising, training and the development and implementation of appropriate policies, services and programmes.

One of the satisfying results of the adoption and ratification of the UNCRC has been the development at national level of a wide variety of new child-focused and child-sensitive bodies, structures and activities. Children’s rights structures include Governments, ministers for children, inter-ministerial committees on children, parliamentary committees, child impact analysis, children’s budgets and “state of children’s rights” reports, NGO coalitions on children’s rights, children’s ombudspersons, and children’s rights commissioners.

The development of a children’s rights perspective within all three spheres of government, executive, legislative and the judiciary is required for effective implementation of the UNCRC as a whole. Moreover, article 3(1) aid in the implementation of children’s rights, because “public or private social welfare

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36 Id par 8.
37 Id par 9.
38 Ibid.
39 Ibid.
41 Ibid; see also article 3 of the United Nations Convention on the Rights of the Child, 1989 provides that the best interests of the child as a primary consideration in all actions concerning children.
institutions, courts of law, administrative authorities or legislative bodies” must utilise the best interest of the child principle.\textsuperscript{42}

The best interest of the child principle requires active measures throughout government, parliament and the judiciary.\textsuperscript{43} Further, State Parties must, in reforming their legislative, administrative and judicial bodies or institutions, apply the best interest principle.\textsuperscript{44} The principle must be applied systematically to consider how children’s rights and interests are or will be affected by parents or institutions’ decisions and actions.\textsuperscript{45} Implementation measures must be aimed at achieving the optimal development for all children.\textsuperscript{46}

The UNCRC highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights.\textsuperscript{47} The active participation of children must apply equally to all measures adopted by States Parties in their implementation of the UNCRC.\textsuperscript{48} Once-off or regular events like children’s parliaments can be stimulating in raising the general awareness about children’s rights.\textsuperscript{49} However, article 12 of the UNCRC requires consistent and ongoing arrangements.\textsuperscript{50} The involvement of and consultation with children must also avoid being tokenistic and aim to ascertain the authentic views of children.\textsuperscript{51}

The Committee obliges States Parties to provide a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the UNCRC.\textsuperscript{52} The Committee also states that after an examination has found that, after second and third periodic reports under the UNCRC, the review process at the national level is less than satisfactory, the Committee shall advise a more rigorous approach.\textsuperscript{53} The review needs to consider the UNCRC not only article by

\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid; see also article 12 of the UNCRC which provides that the child’s right to express his or her views freely in “all matters affecting the child”, those views being given due weight.
\textsuperscript{48} Article 12 of the UNCRC.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} Id par 18.
\textsuperscript{53} Ibid.
article, but also holistically, recognising the interdependence and indivisibility of human rights. Further, the review needs to be continuous rather than once-off.

States Parties need to ensure, by all appropriate means, that the provisions of the UNCRC are given legal effect within their domestic legal systems. This remains a challenge in many States Parties. The need to clarify the extent of applicability of the UNCRC in States Parties where the principle of “self-execution” applies, and in others where it is claimed that the UNCRC “has constitutional status” or has been incorporated into domestic law, remains the biggest obstacle to children’s rights implementation. The obstacles remain because without a clear set of rules on how children may enforce their rights, implementation thereof will also be ambiguous.

In order to promote the full implementation of children’s rights, additional legislative and other measures may be necessary. In order for children’s rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the UNCRC and consistently referred to in the other major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights.

Therefore, States Parties need to give particular attention to ensuring that there are effective child-sensitive procedures available to children and their representatives. The measures should include the provision of child-friendly information, advice, advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where children’s rights are found to have been breached, there should be appropriate reparation, including compensation. Further, where necessary, measures to promote physical and psychological

54 Article 18 of the UNCRC.
55 Ibid.
57 Ibid.
58 Ibid.
59 Id par 21.
60 Ibid.
61 Ibid; The other major international human rights instruments include, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights.
62 Id par 24.
63 Ibid.
64 Ibid.
recovery, rehabilitation and reintegration, as required by article 39 of the UNCRC, must be undertaken.\textsuperscript{65}

The Committee provides that effective implementation of the UNCRC requires visible cross-sectoral co-ordination to recognise and realise children’s rights among governments and children themselves.\textsuperscript{66} Rigorous monitoring of implementation is required, which should be built into the process of government at all levels but also independent monitoring by NHRIs, NGOs, and others.\textsuperscript{67}

The States Parties’ strategies for children’s rights implementation must be endorsed at the highest level of government.\textsuperscript{68} Children’s rights strategies need to be linked to national development planning and included in the national budget.\textsuperscript{69} Failure to include the children’s rights strategies into the national budget may lead to the strategies remaining marginalised outside key decision-making processes.\textsuperscript{70}

In examining States Parties’ reports, the Committee has found it necessary to encourage further co-ordination of government to ensure effective implementation.\textsuperscript{71}

The Committee also provides that in all circumstances the State Parties which ratified the UNCRC remain responsible for ensuring the full implementation of the UNCRC throughout the territories under their jurisdiction.\textsuperscript{72}

The Committee further provides that enabling the private sector to provide services and run institutions may lessen the States Parties’ obligation to ensure for all children within their jurisdiction, the full recognition and realisation of all rights in the

\textsuperscript{65} \textit{Ibid}; see also article 39 of the UNCRC which provides that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

\textsuperscript{66} \textit{Id} par 27.

\textsuperscript{67} \textit{Ibid}; see also article 39 of the UNCRC.


\textsuperscript{69} \textit{Ibid}.

\textsuperscript{70} \textit{Ibid}.

\textsuperscript{71} \textit{Id} par 37.

\textsuperscript{72} CRC/GC/2003/5, Committee on the United Nations Convention on the Rights of the Child General Comments: General Measures of Implementation of the Convention on the Rights of the Child par 41; “coordination refers to relationship forged among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society”.

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UNCRC. The Committee requires that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service provide respect the UNCRC.

The Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions.

The Committee commends certain States Parties which have adopted legislation requiring the preparation and presentation to parliament and or the public of formal impact analysis statements. States Parties must consider how they can ensure compliance with article 3(1) and do so in a way which further promotes the visible integration of children in policy-making and sensitivity to children’s rights.

Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementation. The Committee recognises that responsibilities to respect and ensure the rights of children extend in practice beyond the States and States-controlled services and institutions, to include children, parents and wider families, other adults, and non-State services and organisations.

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75 Id par 46.

76 Id par 47.

77 Ibid.

78 Id par 48.

79 General Comment no 14 (2000) of the Committee of Economic, Social and Cultural Rights, on par 42, of which states:“While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities”.

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The States Parties need to work closely with NGOs in the widest sense, while respecting their autonomy. This includes, for example, human rights NGOs, child- and youth-led organizations, youth groups, parent and family groups, faith groups, and academic institutions and professional associations. NGOs played a crucial part in the drafting of the UNCRC, and their involvement in the process of implementation of children’s rights is vital.

The Committee welcomes the development of NGO coalitions and alliances committed to promoting, protecting and monitoring children’s human rights. The Committee urges governments to give effect to the NGOs’ non-directive support and to develop positive formal as well as informal relationships with the NGOs.

The engagement of NGOs in the reporting process under the UNCRC, coming within the definition of “competent bodies” under article 45(a) of the UNCRC, has in many cases given a real impetus to the process of implementation. The NGO Group for the Convention on the Rights of the Child has a very welcome, strong and supportive impact on the reporting process and other aspects of the Committee’s work. The media is also a valuable partner in implementing children’s rights.

The Committee encourages States Parties to provide, and to use, technical assistance in the process of implementing the UNCRC. The United Nations Children’s Fund (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR), and other United Nations and United Nations-related agencies can provide technical assistance with many aspects of implementation. States Parties

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82 Ibid.
83 Ibid.
84 Ibid. par 59.
85 Ibid.
86 Ibid.
88 Ibid par 63.
89 Ibid.
are encouraged to identify their interest in technical assistance in their reports under the Convention.\textsuperscript{90}

5.4 The Role of Independent Human Rights Institutions

In its General Comment no 2 (2002) entitled “The role of independent national human rights institutions in the protection and promotion of the rights of the child”, the Committee noted that it “considers the establishment of such bodies to fall within the commitment made by States Parties upon ratification to ensure the implementation of the UNCRC”.\textsuperscript{91}

Independent human rights institutions are complementary to effective government structures for children’s rights implementation.\textsuperscript{92} The role of national human rights institutions is to monitor independently the States Parties’ compliance and progress towards implementation and to ensure full respect for children’s rights.\textsuperscript{93}

These may require the institution to develop projects to enhance the promotion and protection of children’s rights, but should not lead to the government delegating its monitoring obligations to the national institution.\textsuperscript{94} It is essential that institutions remain entirely free to set their own agendas and determine their own activities.\textsuperscript{95}

Children need to acquire knowledge of their rights, and the Committee places special emphasis on incorporating learning about the UNCRC and human rights in general into the school curriculum at all stages.\textsuperscript{96} The UNCRC is comparatively weak with respect to provisions on implementation by States Parties.\textsuperscript{97} The UNCRC relies almost exclusively on States Parties’ reports, which are to be submitted on a regular basis.\textsuperscript{98}

\begin{flushleft}
\textsuperscript{90} Ibid.
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid.
\textsuperscript{96} Id par 68.
\textsuperscript{97} Dillon S A \textit{International children’s rights} (2010) at 52.
\textsuperscript{98} Ibid.
\end{flushleft}
It does not allow for State-to-State complaints, nor does it provide any avenue for individuals to bring complaints against a State.\textsuperscript{99} These limitations are in stark contrast to some of other international human rights instruments which provide a framework for both state and individual complaints.\textsuperscript{100} The UNCRC does not have its own system for handling complaints.\textsuperscript{101}

Therefore, the institutions will be forced to rely on the courts of the various States Parties to interpret and implement the provisions of the UNCRC.\textsuperscript{102} In turn, this reliance on domestic courts will open the door to a wide range of interpretations, including narrow readings that may further limit children’s rights.\textsuperscript{103}

The biggest limitation to full implementation of the UNCRC in this context is whether the UNCRC is self-executing or non-self-executing.\textsuperscript{104} When an international agreement or treaty is self-executing, no domestic implementing legislation is needed, and the treaty is immediately applicable and enforceable on a domestic level upon its entry into force.\textsuperscript{105} The UNCRC does not apply immediately because it is a non-self-executing treaty.\textsuperscript{106}

5.5 The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child

The World Conference on Human Rights, held in 1993, reaffirmed in the Vienna Declaration and Programme of Action the “important and constructive role played by national institutions for the promotion and protection of human rights, and encouraged the establishment and strengthening of national institutions”.\textsuperscript{107}

\begin{footnotesize}
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\item\footnote{Ibid.}{Ibid.}
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The UN General Assembly (UN GA) and the Commission on Human Rights have repeatedly called for the establishment of NHRIs. The UN GA recognised the important role of NHRIs in promoting and protecting human rights and enhancing public awareness of those rights. In its general guidelines for periodic reports, the Committee requires that States Parties furnish information on “any independent body established to promote and protect the rights of the child”; hence, it consistently addresses this issue during its dialogue with States Parties.\textsuperscript{108}

While adults and children alike need independent NHRIs to protect their human rights, additional justifications exist for ensuring that children’s human rights are given special attention.\textsuperscript{109} These include the fact that children’s developmental state makes them particularly vulnerable to human rights violations.\textsuperscript{110} Children’s opinions are still rarely taken into account and most children have no vote and cannot play a meaningful role in the political process that determines governments’ response to their rights.\textsuperscript{111}

Children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights.\textsuperscript{112} Children’s access to organisations that may protect their rights is generally limited.\textsuperscript{113} Broad-based NHRIs should include within its structure either an identifiable commissioner specifically responsible for children’s rights, or a specific section or division responsible for children’s rights.\textsuperscript{114}

The Committee encourages every State to establish an independent human rights institution with responsibility for promoting and protecting children’s rights.\textsuperscript{115} The Committee’s principal concern is that the institution, whatever its form, should be able, independently and effectively, to monitor, promote and protect children’s


\textsuperscript{109} Id par 5.

\textsuperscript{110} Ibid.

\textsuperscript{111} Ibid.

\textsuperscript{112} Ibid.

\textsuperscript{113} CRC/GC/2002/02: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child at par 5.

\textsuperscript{114} Id par 6.

\textsuperscript{115} Id par 7.
It is essential that promotion and protection of children’s rights is “mainstreamed” and that all human rights institutions existing in a country work closely together to this end.  

NHRIs should, if possible, be constitutionally entrenched and must at least be legislatively mandated. The Committee mandates a broad scope for promoting and protecting human rights, incorporating the UNCRC, its Optional Protocols and other relevant international human rights instruments.

The domestic legislation must include provisions setting out specific functions, powers and duties relating to children linked to UNCRC and its Optional Protocols. If NHRIs was established before the existence of the UNCRC, or without expressly incorporating it, necessary arrangements, including the enactment or amendment of legislation, should be put in place so as to ensure conformity of the institution’s mandate with the principles and provisions of the UNCRC.

NHRIs should ensure that their composition includes pluralistic representation of the various elements of civil society involved in the promotion and protection of human rights. Government departments should be involved in an advisory capacity only. NHRIs should have appropriate and transparent appointment procedures, including an open and competitive selection process.

NHRIs should have the power to support children taking cases to court, including the locus standi to themselves institute action in cases involving children’s issues. Further, they should have the power to intervene in court cases to inform the court about the human rights issues involved in the case.

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116 Ibid.
117 Ibid.
119 Ibid.
120 Ibid.
121 Ibid.
122 Ibid par 12.
123 Ibid.
124 Ibid.
125 Ibid par 14(a).
126 Ibid par 14(b).
NHRIs should be geographically and physically accessible to all children.\textsuperscript{127} In the spirit of article 2 of the UNCRC, States Parties must proactively reach out to all groups of children, in particular the most vulnerable and disadvantaged children, through education.\textsuperscript{128} NHRIs legislation should include the right of the institution to have access in conditions of privacy to children in all forms of alternative care and to all institutions that include children.\textsuperscript{129}

In the light of the general principles of human rights implementation, the NHRI’s mandate is the promotion of public understanding and awareness of the importance of children’s rights.\textsuperscript{130} The NHRI’s purposes include working closely with the media and undertaking or sponsoring research and educational activities in the field.\textsuperscript{131}

The UN has a long-standing programme of assistance for the establishment and strengthening of national human rights institutions.\textsuperscript{132} This programme, which is based in the Office of the High Commissioner for Human Rights (OHCHR), provides technical assistance and facilitates regional and global co-operation and exchanges among national human rights institutions.\textsuperscript{133} States Parties should avail themselves of this assistance where necessary.

The United Nations Children’s Fund (UNICEF) also offers expertise and technical co-operation in this area.\textsuperscript{134} As articulated in article 45 of the UNCRC, the Committee may also transmit, as it considers appropriate, to any specialised United Nations agency, OHCHR, and any other competent body, any reports from States Parties that contain a request or indicate a need for technical advice or assistance in the establishment of NHRIs.\textsuperscript{135}
5.6 Regional and International Co-operation

Regional and international processes and mechanisms can strengthen and consolidate NHRI{s through shared experience and skills. The NHRI{s share common problems in the promotion and protection of human rights in their respective countries. In this respect, NHRI{s should consult and co-operate with relevant national, regional and international bodies and institutions on children’s rights issues.

Children’s human rights issues are not constrained by national borders, and it has become increasingly necessary to devise appropriate regional and international responses to a variety of child rights’ issues. International and regional mechanisms and exchanges are encouraged, as they provide NHRI{s with an opportunity to learn from each other’s experience, collectively strengthen each other’s positions, and contribute to resolving human rights problems affecting both countries and regions.

5.7 Principles relating to Status of National Institutions: The Paris Principles

National institutions are vested with competence to promote and protect human rights. National institutions must be given as broad a mandate as possible, which shall be clearly set out in a constitutional or legislative text, specifying their composition and sphere of competence.

A national institution shall, *inter alia*, have the responsibilities to submit reports to the government, parliament and any other competent body, on an advisory basis either at the request of the authorities concerned, or through the exercise of its power to hear a matter without higher referral and opinions. National institutions shall make

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136 Id par 27.
137 Ibid.
139 Id par 27.
140 Id par 29.
142 Id par 2.
143 Id par 3(a).
recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.\textsuperscript{144} Further, the national institution may decide to publicise these opinions, recommendations, proposals and reports that falls under its mandate.\textsuperscript{145}

The national institution must examine the domestic legislation and administrative provisions in force, as well as bills and proposals.\textsuperscript{146} Thereafter, it must make recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights.\textsuperscript{147} National institutions shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force, and the adoption or amendment of administrative measures.\textsuperscript{148}

National institutions must prepare reports with regard to human rights in general, and on more specific matters.\textsuperscript{149} National institutions must also draw the attention of the government to situations in any part of the country where human rights are violated and make proposals for initiatives end such situations and, where necessary, express an opinion on the positions and reactions of the government.\textsuperscript{150}

National institutions must promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.\textsuperscript{151} Further, national institutions must encourage States Parties to ratify human rights instruments and to implement them.\textsuperscript{152}

National institutions must contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations.\textsuperscript{153} The national institutions shall also co-operate with the United Nations and any other organisation in the United Nations system, the

\textsuperscript{144} Ibid.
\textsuperscript{145} ibid 3(a).
\textsuperscript{147} ibid.
\textsuperscript{148} ibid.
\textsuperscript{149} ibid 3(a)(iii) and (ii).
\textsuperscript{150} ibid.
\textsuperscript{151} ibid 3(b).
\textsuperscript{152} ibid 3(c).
\textsuperscript{153} ibid 3(d).
regional institutions, and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights.\textsuperscript{154}

National institutions shall assist in the formulation of programmes for the teaching of, and research into, human rights and take part in their execution in schools, universities and professional circles.\textsuperscript{155} Finally, national institutions must publicise human rights issues and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of the media.\textsuperscript{156}

\section*{5.8 Composition and Guarantees of Independence and Pluralism}

The composition of a national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the civil society involved in the protection and promotion of human rights.\textsuperscript{157} The representativeness of the national institutions shall include NGOs, trade unions, and concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists.\textsuperscript{158}

The national institution shall have an infrastructure which is suited to the effective conduct of its activities, in particular adequate funding.\textsuperscript{159} The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.\textsuperscript{160}

The appointment of the national institutions’ staff shall be effected by an official Act which shall establish the specific duration of the mandate in order to maintain

\textsuperscript{154} Ibid.
\textsuperscript{155} Id par 3(f).
\textsuperscript{158} Ibid.
\textsuperscript{159} Id par 2.
\textsuperscript{160} Ibid.
independence. The mandate may be renewable, provided that the pluralism of the institution’s membership is ensured.

5.9 Methods of Operation

The national institution’s methods of operation must be to consider freely any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner.

Any person may access any information and any documents necessary for assessing situations falling within the competence of the national institution. In addition, the national institutions must address public opinion directly or through any media, particularly in order to publicise its opinions and recommendations. The members of the national institution must subject to due notice meet on a regular basis, as well as whenever it is necessary.

National institutions must also establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions. National institutions must continually consult with other organisations responsible for the promotion and protection of human rights.

NGOs play an important role in expanding the work of national institutions. National institutions help to develop NGOs devoted to promoting and protecting human rights. The development centres on economic and social issues, the combating of racism, and protecting particularly vulnerable groups (especially

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161 Id par 3.
162 Ibid.
164 Id par (b).
165 Id par (c).
166 Id par (d).
167 Id par (e).
168 Id par (f), bodies that will need to be consulted are in particular, ombudsmen, mediators and similar institutions.
169 Id par (g).
170 Ibid.
children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas.  

5.10 Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence

A national institution can be authorised to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions, or any other representative organisations.

The powers and functions of the national institutions are to seek an amicable settlement through conciliation or, within the limits prescribed by law, through binding decisions. Where necessary these decisions will be given on the basis of confidentiality. National institutions shall inform the party who filed the petition of his/her rights, in particular the remedies available, and promote the party’s access to them.

The powers and functions include hearing any complaints or petitions, or transmitting the information to any other competent authority within the limits prescribed by law. The powers and functions further include the making of recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices.

\- \[171 \text{Ibid.} \]
\- \[173 \text{Id par (b).} \]
\- \[174 \text{Id par (c).} \]
\- \[175 \text{Id par (d).} \]
5.11 Conclusion

The implementation of children’s rights can be achieved through co-operation between the States Parties, international organisations, NGOs, United Nations Children’s Fund (UNICEF), and NHRI’s. Further, implementation mechanisms for children’s rights are multifaceted with regard to the circumstances in which they can be applied. Thus, the UN has encouraged civil society to participate actively in the implementation of children’s rights at regional and domestic level.

5.12 Relevance for the African Union system

The African Charter, like the UNCRC, is predicated on four cardinal principles which are intended to assist in the interpretation of the Charter as whole and thereby guide national programmes on implementation.\(^{178}\)

Obstacles with regard to implementation mechanisms of children’s rights are gravely challenging.\(^{179}\) Children are more likely to be victims of human rights violations than adults.\(^{180}\) The children of Africa are furthermore, likely to be victims of human rights violations than children from developed countries.\(^{181}\) Human rights violations in Africa contribute to poverty, HIV/AIDS, warfare, famine, harmful cultural practices, and these have a disproportionate impact on the continent’s children.\(^{182}\)

However, the most remarkable landmark in the Charter is in the framework of its implementation mechanism.\(^{183}\) The Committee of Independent Experts, the treaty body responsible for the supervision and monitoring of implementation of the Charter provisions, has a broad interpretative and promotional mandate.\(^{184}\) Thus, the task of the Committee is not limited to the clarification of Charter provisions; it can also


\(^{179}\) Ibid.


\(^{181}\) Ibid.

\(^{182}\) Ibid.


\(^{184}\) Ibid.
formulate principles and rules aimed at promoting children’s rights in Africa.\textsuperscript{185} The Committee also positively influences the formulation of national policies.\textsuperscript{186}

The Committee is empowered to consider periodic reports by States Parties on their national implementation of the Charter. Apart from the implementation of the Charter at the regional level, the Committee is important for children’s rights activism at domestic levels.\textsuperscript{187} NGOs are also a powerful force for creating awareness.\textsuperscript{188}

The Committee encourages governments to adopt three strategies. Firstly, governments must positively aim to implement the Charter through progressive legislation; secondly, governments must ensure awareness among their officials and staff at all levels; and thirdly, governments must ensure that school education is instrumental in raising awareness among children themselves.\textsuperscript{189}

The media has an informative and educational role to play in the protection of children’s rights.\textsuperscript{190} The media should bear the task of scrutinising government measures and giving systematic coverage to the status of children and the fulfilment of their rights.\textsuperscript{191} In discharging its role, the media must respect the integrity of the children and encourage the participation of children.

NGOs still play an important role in Africa in protecting children’s rights. The NGOs are the primary watchdogs for children’s rights. Apart from litigation strategy, there must be effective awareness campaigns and other education activities to alert people about children’s rights violations.\textsuperscript{192} The NGOs must break new ground as regards both content and process, by developing the political agenda and pointing to effective means of implementation.\textsuperscript{193}

The African Charter on the Rights and Welfare of the Child (ACRWC) is a potentially powerful tool in enhancing the lives of millions of African children.\textsuperscript{194} Notwithstanding

\textsuperscript{185} Ibid.
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid.
\textsuperscript{188} Id at 397.
\textsuperscript{189} Freeman M \textit{Children’s rights progress and perspectives: Essays from the International Journal of Children’s Rights} (2011) at 403.
\textsuperscript{190} Ibid.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid.
\textsuperscript{193} Ibid.
\textsuperscript{194} Id at 401.
the implementation of the ACRWC at the regional level, it is vital for children’s rights activism at domestic levels.\textsuperscript{195} Although the pace of ratification of the ACRWC by African States is remarkably slow, the ACRWC remains nonetheless a proper tool for the advancement of children’s rights in Africa.\textsuperscript{196} Since most African states are party to the ACHPR, its provisions can be applied in national courts through expansive interpretation.\textsuperscript{197}

5.13 Conclusion

The implementation mechanisms must have element of acceptance on the part of people to whom they apply. The AU region has not only complied with the international children’s rights legal framework; but has expanded its application to suit the African situation. This they achieved by the adoption of the ACRWC.

\textsuperscript{195} \textit{Id} at 402.
\textsuperscript{196} \textit{Ibid}.
\textsuperscript{197} \textit{Ibid}.
CHAPTER 6: CONCLUSION

6.1 Conclusion

The UNCRC obliges States Parties to ensure the implementation of rights contained in the UNCRC in accordance with their national laws and their obligations under the relevant international instruments.¹

The ratification of the UNCRC obliges States Parties to review their domestic laws pertaining to the protection of children’s rights.² The ratification of the UNCRC not only serves as a means of compliance with the international legal framework, but also ensures effective implementation of children’s rights. The process of effective implementation involves reviewing existing laws or enacting legislation that will comply with the implementation mechanisms of the UNCRC.³

The UNCRC is the single United Nations human rights instrument that has achieved nearly universal ratification with the exception of only three countries namely, the United States of America, South Sudan, and Somalia have not ratified the UNCRC. The rate of ratification is indicative of the acknowledgment by the international community of the need to protect children’s rights and the willingness of the international community as a whole to embark on such protection.

Thus, the International community at the UN human rights level and regional human rights level have adopted human rights instruments that specifically protect children’s rights. The regional human rights organisations considered in this dissertation, namely the EU, the OAS, and the AU, have adopted specific children’s rights instruments which provide and enable the enjoyment of children’s rights in accordance with the UNCRC.

Through the UNCRC, the UN level has put in place implementation mechanisms that protect and aim to ensure the enjoyment of children’s rights. The regional implementation mechanisms play an important role in the protection of children’s

² Ibid.
rights due to the unique circumstances which exist in the different regional human rights systems.

The UDHR is the foundational human rights document. The UDHR protects fundamental human rights. Included in the protection of fundamental human rights is the specific protection of children’s rights. The UDHR forms part of international customary law, which means that the international community must not only recognise its provisions, but must (because is binding) implement the provisions contained in the UDHR.

The salient point of this dissertation is the implementation of the right to education and the application of the best interest of the child principle, as provided by United Nations human rights system and by regional human rights systems. The UN human rights system provides the framework for implementation mechanisms of children’s rights. Further, the UN human rights system is the yardstick against which the regional children’s rights implementation mechanisms are measured.

The UN human rights system through the UDHR provides that children are entitled to special protection. Included in this special protection is the protection of children’s right to education. Following from the UDHR is the UNCRC which provides for the right to education and the best interests of the child. Thereafter, the EU, the OAS, and the AU which have complied with both the UDHR and the UNCRC’s provisions with regard to the right to education and the best interests of the child principle.

This study has demonstrated that the UNCRC encourages legislative reform in order for States Parties to align their implementation mechanisms with those of the UNCRC. However, the study has shown that even after compliance with the UNCRC’s implementation mechanisms by regional human rights systems, there are still phenomenon within States Parties that hamper the realisation of the right to education and the proper application of the best interests of the child.

These phenomena include: State instability, war, and lack of resources. The list is not exhaustive, but the phenomena above emerge as the most significant factors that the effective implementation of children’s rights in Africa. These impediments are, however, not absolute in that there are examples of unstable States which
nonetheless manage to ensure a satisfactory realisation of their children’s right to education.

Ratification of international instruments aimed at protecting children’s rights is a commendable act on the part of the States Parties. However, inadequate implementation of those instruments has been at the root of obstacles that have made the protection and enjoyment of children’s rights impossible.

The UNCRC covers a wide range of children’s rights and provides implementation measures in articles 44 and 44.5 This means that, with the exception of three countries, all the States making up the international community are obliged to comply with its provisions. However, implementation of children’s rights has not proved to be the simplest of tasks. This is due to factors such as capacity to enforce children’s rights, socio-economic and cultural factors, and regional differences.

The capacity to enforce children’s rights is not a problem restricted to States Parties to the UNCRC. Within the regional human rights systems, children’s rights instruments incorporate both the right to education and the best interest of the child principle. Further, all countries have legislation dealing with children’s right to education. If most countries comply with the UNCRC, meet the requirements set in the regional systems under which they resort, and have embodied children’s right to education in their domestic legislation, the only obstacle that remains is the attitude of the citizens themselves.

4 Article 4 of the UNCRC provides that

1 States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 44 of the UNCRC States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2 Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3 A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1(b) of the present article, repeat basic information previously provided.

4 The Committee may request from States Parties further information relevant to the implementation of the Convention.

5 The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6 States Parties shall make their reports widely available to the public in their own countries.
Capacity, in children’s rights protection context means the willingness on the part of NGOs, civil societies and the independent national human rights institutions, to investigate children’s rights violations. Moreover, for these institutions, tribunals and courts must ensure vigorous enforcement of decisions pertaining to children’s rights. Various institutions or mechanisms of implementation of children’s rights have been adopted both in UN human rights system, and in regional human rights systems, such as Independent Children’s Rights Institutions (ICRIs), NGOs, and civil society groups.

These entities should be commended for their role in striving for the elimination of children’s rights violations. However, the struggle continues, because millions of children are deprived of the right to education which would have served as a bulwark in the fight against children’s abuse.

This brings us to the socio-economic obstacles to efficient implementation. States Parties to various children’s rights instruments must ensure the enjoyment of the right to education and the application of the best interests of the child appropriate for its well-being. This study has demonstrated that enacting legislation without an efficient implementation mechanism renders the efforts meaningless.

The realisation of the right to education is subject to a process of progressive realisation where this is required. Thus, States Parties that lack the capacity fully to provide for the right to education and specifically free education at all levels must take steps within their means to realise the right to education progressively.

Regional implementation mechanisms of children’s rights protection play an important role in ensuring children’s issues which are unique to that region are properly addressed. However, regional differences can hamper compliance with the UN human rights system. The implementation of children’s rights for example as provided in the ACRWC, has been marked as uniquely African and as a response to the UNCRC which did not fully consider African values. Therefore, with this apparent disparity between the UN framework and the AU regional framework, children may be the only losers.

It is this type of difference that presents an obstacle to the effective implementation of children’s rights and may negatively impact on the realisation of the right to
education and the best interests of the child principle. Furthermore, implementation mechanisms must accommodate the unique set of circumstances presented by each regional human rights system. Although the human rights violations suffered by children may follow similar pattern in different regions, the remedies will certainly differ in line with societal, economic and cultural needs.

The efficacy of implementation of the right to education can be assessed on two legs. The first is to determine whether the provisions contained both at the UN level and regional level fully protect children’s rights? The second leg is to establish whether inadequate implementation is due to the lack of a will to enforce or inadequate capacity of the regional bodies or States Parties concerned.

There are differences in the nature and extent of the protection of the right to education and the best interest principle in the three regional systems considered. In the EU region, for instance, article 2 of Protocol 1 prohibits the denial of the right to education. Further, the EU region is the only region that covers the right to education in the negative.

The OAS region follows the UNCRC provision of providing that everyone has the right to education. The same compliance with the UNCRC is followed in the AU region. However, the AU region recognises the historical conditions that shaped the African child’s environment. Thus, the provision of the right to education and the application of the best interests of the child principle, take cognisance of the persisting problems that still face the African continent.

The common factors in all three regions, is free education at all levels. The children’s rights instruments at all levels contain the provision of free education. However, the ideal of free education is mandatory only at primary level. The three regions also recognise that the right to education must be progressively realised. Further, higher education is also provided by all the three regions, with States Parties striving for free higher education. However, the difference in the EU region, when compared to the OAS and the AU, is that the right to education is not made mandatory upon State Parties to provide for free compulsory education at primary level.

Any State that is a Member of the United Nations must abide by its human rights instruments. Any society is judged by how it treats its children. Regional human
rights systems are best placed to ensure effective implementation. Proximity to issues in regional children’s rights protection may be an aid in effective implementation mechanisms.

Having regard to the UN human rights framework for the protection of children’s rights, the best interests of the child principle is covered, though sometimes not in explicit terms. This, study has shown that the EU, the OAS, and AU also provide for the best interest of the child principle. Promulgation of children’s rights legislation especially with provisions containing the best interest of the child is a step in the right direction with regard to ensuring proper implementation. However, there must be continual monitoring of the best interests of the child principle in its proper context with respect to the laws and values in specific States Parties. Institutions such UNICEF, NGO’s, and civil society also have an important role to play ensuring that a proper application of the best interest of the child principle is realised.

The application of regional human rights jurisprudence by national courts is much less developed within the African and Inter-American regional systems largely because the jurisprudence of those tribunals is less extensive. However, even in the European system, because of the restricted scope of the European Convention, implementation by the courts is largely limited to civil and political rights, social and economic rights being relegated to non-binding Charters and protocols.

The notion of progressively realising the right to education is a step towards ensuring efficient implementation of children’s rights. However, given the importance of education for children, one must argue that the gradual realisation of this right is far from ideal. In fact, the right to education needs to be realised immediately.

There is no doubt that the UN human rights system adequately protects children’s rights. There is also no doubt the regional human rights systems considered in this work comply with the international legal framework on the right to education and the best interests of the child principle. Therefore, the only question that remains is that why are children still suffering? The answer is that parents, States, NGO’s, and civil

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7 Ibid.
society must work together to protect all children’s rights irrespective of circumstances.
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