

**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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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.¹ 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.² 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.³ Therefore, the application and effectiveness

¹ Sloth-Nielsen J *Children's Rights in Africa: A legal perspective* (2008) at 185; see also The United Nations Convention on the Rights of the Child UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (accessed 15/04/2012). "The Convention rests on a foundation of four general principles that express its philosophy and offer guidance to national programs for putting that philosophy into effect. Key provisions focus on, Non-discrimination, best interests of the child, right to life, survival and development, and views of the child"; see also <http://www.un.org/cyberschoolbus/treaties/child> (accessed 1/07/2012).

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."

³ Article 3 of the UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, at 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> at par 7 (accessed 15/11/2012); see also 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 actions, laws and policies of a state affecting children".

of the best interests of the child principle will ensure adequate protection of children's 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

United Nations, United Nations human rights system, International law, International human rights law, children's rights law, children's right to education, best interests of the child principle, European Union, Organisation of American States, African Union, Implementation of children's rights.

List of abbreviations

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
ACHR	American Convention on Human Rights
ADRDM	The American Declaration of the Rights and Duties of Man
ECHR	European Convention for the Protection of Human Rights and Fundamental Rights
ECECR	European Convention on the Exercise of Children's Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
UN	United Nations
UN Doc	United Nations Documents
UNCHR	United Nations Commission on Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNDCR	United Nations Declaration the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
OAS	Organisation of American States
DRC	The Geneva Declaration of the Rights of the Child
UNGA	United Nations General Assembly

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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

¹ Ronen Y and Greenbaum (eds) *The case for the child: Towards a new agenda, chapter 1, Introduction to a new agenda for children: From mixed success in the past to future progress UNICEF, 2003; 2007, (2008)* at 2.

² *Ibid.*

³ *Ibid.*

⁴ Preamble of UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (accessed 10/04/2012).

⁵ *Id* art 1.

⁶ Buck T *International Child Law* (2005) at 12.

⁷ Article 6 of the United Nations Convention on the Rights of the Child UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series vol 1577 at 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (accessed 15/11/2012) provides that children have the inherent right to life.

⁸ *Ibid.*

⁹ *Ibid.*

campaigners for children's rights.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 1924.¹¹

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),¹² the International Covenant on Civil and Political Rights (ICCPR),¹³ and the International Covenant on Economic Social and Cultural Rights (ICESCR).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.¹⁵ The UDHR specifically states that special care and assistance must be provided for children.¹⁶ 147 States have ratified the ICCPR,¹⁷ while 150 States have ratified the ICESCR.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.

¹⁰ Article 6 of the UNCRC.

¹¹ *Ibid.*

¹² The Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 (1948) at 71.

¹³ The International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).

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).

¹⁵ Article 25(2) of the Universal Declaration of Human Rights, UN GA Res 217A (III), UN Doc A/810 (1948) at 71.

¹⁶ *Ibid.*

¹⁷ Eide A "Economic, social and cultural rights as human rights" in Eide A and RosasA *Economic, Social and Cultural Rights: A Universal Challenge* (1995) at 11; see also <http://www2.ohchr.org/english/law/cescr-ratify.htm> (accessed on 5 August 2012).

¹⁸ *Ibid.*

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.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.²⁰

The protection of children's rights exists on three levels; the international, the regional, and the domestic.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

¹⁹ Kaime T *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) at 2; see also, Status of ratification: Signatories, 140. Parties: 193. United Nations, Treaty Series, vol 1577 at 3; depository notifications CN 147.1993.TREATIES-5 of 15 May 1993 [amendments to article 43 (2)] and CN322.1995.TREATIES-7 of 7 November 1995 [amendment to article 43 (2)] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 18/07/2012).

²⁰ Eide A "Economic, social and cultural rights as human rights" in Eide A and Rosas A *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."

²¹ Marks SP "From the 'single confused page' to the 'decatalogue for six billion persons': The roots of the Universal Declaration of Human Rights in the French Revolution" (1998) 20 *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

¹ Achilihu SN *Do African children have rights? A comparative and legal analysis of the United Nations Convention of the Rights of the Child* (2010) at 19; see also Kaime T *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) at 1.

² *Ibid.*

³ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 1.

⁴ 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).

⁵ *Ibid.*

⁶ *Ibid.*

adoption.⁷ As of 19 December 2012, the UNCRC had been ratified by 193 States Parties.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.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.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.¹¹ Although this special care and assistance is underpinned by the family which remains the core for the protection of children’s rights,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.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.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

⁷ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 1.

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).

⁹ Preamble to the United Nations Convention on the Rights of the Child General Assembly resolution 44/25 of 20 November 1989, UNTS vol 1577 at 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (hereafter UNCRC) (accessed 15/11/2012).

¹⁰ *Id* par 2.

¹¹ *Id* par 4.

¹² *Ibid*.

¹³ *Id* par 5.

¹⁴ *Id* par 6.

children in order to prepare them for life in society.¹⁵ 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.¹⁶

Traditions and cultural values play an important role in each society.¹⁷ 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.¹⁸ 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.¹⁹ 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)²⁰ to examine the progress made by States Parties in realising the obligations undertaken under the UNCRC.²¹ The Committee consists of ten experts of high moral standing and recognised competence in the field covered

¹⁵ Preamble of the UNCRC at par 7.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Id* par 11.

¹⁸ *Ibid.*

¹⁹ Article 18 of the UNCRC. 1989. Entry into force 2 September 1990, in accordance with article 49 par 2.

²⁰ *Id* art 43.

²¹ *Ibid.*

by the UNCRC.²² The Committee has encouraged states to review the age of majority to increase the level of protection for all children under 18.²³

The UNCRC applies to all children equally (e.g. prohibition of discrimination).²⁴ 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.²⁵

The UNCRC provides that the best interests of the child principle must be the primary concern in all decisions affecting children's rights.²⁶ This means that States Parties have a responsibility to take all available measures to ensure that children's rights are respected, protected, and fulfilled,²⁷ 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.²⁸ The UNCRC further provides that States Parties should respect the rights and responsibilities of families to direct and guide their children.²⁹ The family unit provides a conducive environment where children grow and learn to exercise their rights appropriately.³⁰ 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.

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 HERCZOG, Mr Sanphasit KOOMPAPHANT, 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.

²⁸ Article 41 UNCRC; see also Children's Alliance Information Sheet (2008) http://www.childrensrights.ie/sites/default/files/information_sheets/files/AllianceInfoQAUNCRC_0.pdf (accessed 11/09/2012).

²⁹ Article 5 of the UNCRC.

³⁰ *Ibid.*

The UNCRC provides for children's right to life of which they can be no limitation.³¹ 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.³²

The UNCRC protects children's rights to a legally registered name and officially recognised by the State Party.³³ Furthermore, children have the right to a nationality³⁴ and an identity.³⁵ 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.³⁶

Children have the right to live with their parents, provided that such an arrangement is in child's best interests.³⁷ Children whose parents do not live together have the right to maintain contact with both parents,³⁸ unless this would impact adversely on the child's rights.³⁹ Families whose members live in different countries should be allowed to move between those countries,⁴⁰ to ensure that parents and children maintain family ties.⁴¹ 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.⁴² In this regard, article 11 of the UNCRC is particularly concerned with parental abductions.⁴³ Thus, States Parties shall take measures to combat the illicit transfer and non-return of children abroad.⁴⁴ To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.⁴⁵

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*.

⁴⁵ *Ibid*, see also see also UNICEF Fact Sheet, Summary of the Rights under the Convention on the Rights of the Child; http://www.unicef.org/crc/files/Rights_overview.pdf (accessed 12/09/2012).

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.

See also Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 18 January 2002.

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*.

⁵⁰ Chapter 3 of "Kid's Talk: Freedom of Expression and the UN Convention on the Rights of the Child", published by Article 19, London, January 1999. Reprinted with permission. Implementing children's right to freedom of expression in sub-Saharan Africa. <http://www.waccglobal.org/en/19993-changing-perspectives-in-europe-today/821-Implementing-childrens-right-to-freedom-of-expression-in-sub-Saharan-Africa--.html>.

⁵¹ Article 14 of the UNCRC.

⁵² *Ibid*.

⁵³ Article 15 of the UNCRC.

⁵⁴ *Ibid*.

Children have a right to privacy.⁵⁵ 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.⁵⁶ 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.⁵⁷

Children have the right to have information that is important to their health and well-being.⁵⁸ 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.⁵⁹

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.⁶⁰ Further, States Parties must respect the responsibility of parents to provide appropriate guidance to their children.⁶¹ The UNCRC states that children have the right to be protected from mistreatment either physically or mentally.⁶² 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.⁶³

The UNCRC provides that children who cannot be looked after by their own family have a right to special care by the States Parties.⁶⁴ Further, children have the right to care and protection if they are adopted or in foster care.⁶⁵ The best interests of the child must be the foremost consideration in the determination of placing a child under

⁵⁵ Article 16 of the UNCRC.

⁵⁶ Shmueli B and Blecher-Prigat A "A privacy for children" (2011) 42 *Columbia Human Rights Law Review* at 759.

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 connote the yardstick for measuring all actions, laws and policies of a state affecting children.

⁶¹ *Ibid*.

⁶² *Id* art 19.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

adoption, foster care or custody of a State institution.⁶⁶ After such a determination has been made, a child may be placed in foster care or adopted.⁶⁷ Children with disability have the right to special care and support from the States Parties, so that they can live full and independent lives.⁶⁸ Moreover, the UNCRC provides that children must have the right to good quality health care.⁶⁹

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.⁷⁰ The UNCRC provides that children's care and treatment should always be based on what would be in their best interests.⁷¹ Children, either through their guardians or by themselves, have the right to assistance from the States Parties if they are poor or in need.⁷²

The UNCRC provides that children have the right to a standard of living that is sufficient to meet their physical and mental needs.⁷³ 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.⁷⁴

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.⁷⁵ The right to practise one's own culture, language, and religion applies to everyone.⁷⁶

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.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.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.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.⁸⁰ Further, children should be protected from all forms of sexual exploitation and abuse.⁸¹ States Parties must take all measures possible to make sure that children are not abducted, sold or trafficked.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.⁸³ Moreover, no one is allowed to punish children in a cruel or harmful way.⁸⁴ The UNCRC provides that children should not be detained in the same prison with adults.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.⁸⁶

The UNCRC has obliged States Parties to protect and care for children affected by war.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.⁸⁸ In the wake of conflicts between the USA and Iraq, Palestine and Israel, Libya, Nigeria, and the Lord's

⁷⁷ *Id* art 31.

⁷⁸ Article 32 of the UNCRC.

⁷⁹ *Ibid.*

⁸⁰ *Id* art 33.

⁸¹ *Id* art 34.

⁸² *Id* art 35.

⁸³ *Id* art 36.

⁸⁴ *Id* art 37.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Article 38 of the UNCRC.

⁸⁸ *Ibid.*

Resistance Army LRA in Uganda) the need to protect children in these situations has become increasingly important.⁸⁹

Children who have been neglected, abused or exploited must receive special help to recover physically and psychologically and be reintegrated into society.⁹⁰ Particular attention must in this regard be paid to restoring the health, self-respect and dignity of the children.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.⁹² States Parties are therefore required to set a minimum age below which children cannot be held criminally responsible.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.⁹⁴ States Parties must make the UNCRC known to adults and children.⁹⁵ Adults should help children learn about their rights.⁹⁶ This provision emphasizes 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).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.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.⁹⁹

⁸⁹ <http://www.globalissues.org/issue/83/conflicts-in-africa>; (accessed 7/08/2012) see also <http://www.warchild.org.uk/issues/the-lords-resistance-army> (accessed 7/08/2012).

⁹⁰ *Id* art 39.

⁹¹ Article 39 of the UNCRC.

⁹² *Id* art 40.

⁹³ *Ibid*.

⁹⁴ *Id* art 41.

⁹⁵ *Id* art 42.

⁹⁶ *Ibid*; see also art 4 of the UNCRC.

⁹⁷ Article 43 UNCRC.

⁹⁸ http://www.unicef.org/crc/files/Committee_fact_sheet.pdf: (accessed on 4/06/2012).

⁹⁹ *Ibid*.

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.¹⁰⁰ Although they are nominated and elected by the governments that have ratified the UNCRC, the Committee members act in their personal capacity.¹⁰¹ The members do not represent their countries’ governments or any other organisation to which they might belong.¹⁰²

The Committee derives its mandate from the UNCRC itself and the Committee is “accountable solely to the children of the world”.¹⁰³ The members of the Committee are elected by secret ballot.¹⁰⁴ Members are elected for four years only.¹⁰⁵ Further, the Committee establishes its own rules of procedure.¹⁰⁶

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.¹⁰⁷ Every two years, the Committee reports on its activities to the UN General Assembly through the UN Economic and Social Council.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰

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.¹¹¹

¹⁰⁰ *Id* art 43(2).

¹⁰¹ *Ibid.*

¹⁰² Article 43(2) of the UNCRC.

¹⁰³ http://www.unicef.org/crc/files/Committee_fact_sheet.pdf: (accessed on 4/06/2012).

¹⁰⁴ Article 43(3) of the UNCRC.

¹⁰⁵ *Id* art 43(6).

¹⁰⁶ *Id* art 43(8).

¹⁰⁷ http://www.unicef.org/crc/files/Committee_fact_sheet.pdf: (accessed on 4/06/2012).

¹⁰⁸ *Ibid.*

¹⁰⁹ Article 45 of the UNCRC.

¹¹⁰ *Id* art 45(a).

¹¹¹ *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.¹¹² The Committee may also make suggestions and general recommendations based on information received pursuant to States Parties' reports and specialised agencies of the UNCRC.¹¹³ 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.¹¹⁴

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.¹¹⁵ 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.¹¹⁶ Moreover, States Parties must provide relevant information on factors that are aimed at the efficacy of children's rights implementation.¹¹⁷

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.¹¹⁸ States Parties will further provide progress reports on the implementation of the rights contained in the UNCRC.¹¹⁹

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.¹²⁰ Reports must also contain sufficient information to provide the Committee with a

¹¹² *Id* art 45(c).

¹¹³ Article 45(c) of the UNCRC.

¹¹⁴ *Id* art 45(d).

¹¹⁵ 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 22nd Meeting (1st Session) on 15 October 1991 at par 21.

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.¹²¹ 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)¹²² of the UNCRC, repeat basic information initially provided.¹²³

States Parties must make their reports widely available to the public in their own countries.¹²⁴ 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.¹²⁵ This ongoing monitoring provides a further impetus to the full protection of children's rights.¹²⁶

States Parties are obliged to indicate factors, affecting the degree of fulfillment of their obligations under the UNCRC.¹²⁷ 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.¹²⁸

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.¹²⁹

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).

¹²⁶ http://www.unicef.org/crc/files/Committee_fact_sheet.pdf (accessed on 4/06/2012).

¹²⁷ *Id* art 44(2).

¹²⁸ *Ibid.*

¹²⁹ 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 22nd Meeting (1st Session) on 15 October 1991 at par 21.

operation with local and national organisation of a governmental or non-governmental nature.¹³⁰ Institutions such as social welfare services must be utilised in the implementation of the UNCRC.¹³¹ Moreover, States Parties are encouraged to provide additional relevant statistical information and indicators relating to children's rights enshrined in the UNCRC.¹³²

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.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.¹³⁴ Further, the right to education's aim is to encourage children to respect human rights.¹³⁵

The need to protect children's right was stated in the Declaration of the Rights of the Child¹³⁶ adopted by the UNGA on 20 November 1959 and is further recognised in the UDHR, the ICCPR,¹³⁷ the ICESCR,¹³⁸ the UNCRC, and relevant instruments of

¹³⁰ *Ibid.*

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 22nd Meeting (1st Session) on 15 October 1991 at par 21.

¹³² *Ibid.*

¹³³ Article 28 UNCRC.

¹³⁴ *Id* art 29.

¹³⁵ *Ibid.*

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."

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."

specialised agencies and international organisations concerned, with the welfare of children.¹³⁹ 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.¹⁴⁰

The realisation of children's right to education may arise, in particular, when States Parties make free primary education compulsory and available to all.¹⁴¹ This duty has evolved over time to extend beyond primary education in the majority of countries in the world.¹⁴² However, this is less encouraging if enforcement and implementation are threatened by other factors such as socio-economic problems.¹⁴³

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.¹⁴⁴ First, the UNCRC does not mention enforcement mechanisms as regards the right to education.¹⁴⁵ 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."

¹³⁸ 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."

¹³⁹ Preamble to the UNCRC.

¹⁴⁰ *Ibid.*

¹⁴¹ *Id* art 28(1)(a).

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid*; see also the "Right to Education Project: promoting mobilising and legal accountability" <http://www.right-to-education.org/node/54> (10/04/2012).

¹⁴⁵ *Ibid.*

children.¹⁴⁶ 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.¹⁴⁷ Compulsory education can also be seen as a key factor in combating discrimination.¹⁴⁸ This reinforces the need to protect children from practices that appear to perpetuate the discrimination of children.¹⁴⁹

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.¹⁵⁰ Notwithstanding, the Committee has indicated that States Parties should establish clear limits on the completion of compulsory education and specific compulsory duration of education.¹⁵¹

States Parties are required to indicate the particular measures adopted to make primary education compulsory.¹⁵² 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.¹⁵³

¹⁴⁶ *Ibid.*

¹⁴⁷ "Right to Education Project: promoting mobilising and legal accountability" <http://www.right-to-education.org/node/54> (accessed 10/03/2012).

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."

¹⁴⁹ "Right to Education Project: promoting mobilising and legal accountability" <http://www.right-to-education.org/node/54> (accessed 10/03/2012).

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.¹⁵⁴ This developmental education must be made available and accessible to all children.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.¹⁵⁶ Higher education must also be made accessible to all by every appropriate means.¹⁵⁷

The UNCRC provides that educational, vocational information and guidance must be available and accessible to all children.¹⁵⁸ States Parties to the UNCRC must also take measures to encourage regular attendance at schools and the reduction of drop-out rates.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.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.¹⁶¹ International co-operation in matters relating to education shall be aimed at the elimination of ignorance and illiteracy throughout the world.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.¹⁶³ The facilitation of

¹⁵⁴ Article 28(1)(b) of the UNCRC.

¹⁵⁵ *Ibid.*

¹⁵⁶ Article 28(1)(b) of the UNCRC.

¹⁵⁷ *Id* art 28(1)(c).

¹⁵⁸ *Id* art 28(1)(d).

¹⁵⁹ *Id* art 28 (1)(e).

¹⁶⁰ *Ibid.*

¹⁶¹ *Id* art 28(3).

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

access to scientific knowledge must take cognisance of the needs of developing countries.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.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.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Id* art 29(a).

CHAPTER 3: THE RIGHT TO EDUCATION AT THE UNITED NATIONS LEVEL

3 Part 1

3.1 Introduction

Education is a fundamental human right.¹ It is an enabling right that permits the exercise of other fundamental rights.² The right to education enhances the fulfilment of all other rights and freedoms.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.⁴ This means that education must be provided to children and all persons within the jurisdiction of the Member States.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.⁶ Consequently, the UDHR provides for free and compulsory elementary education to all. The use of

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.

² *Ibid.*

³ *Ibid.*; see also Sloth-Nielsen and Mezmur *Free education is a right for me: A report on free and compulsory primary education* (2007).

⁴ Article 26(1) of the UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁵ *Ibid.*

⁶ *Ibid.*

the word “compulsory” makes it clear that only persons under the age of 18 can be compelled to attend school.⁷ This is because children or persons under 18 are compelled to attend school by domestic law and various international instruments (e.g. UNCRC).⁸

The UNCRC also provides for technical and professional education to be made generally available, and higher education shall be equally accessible to all.⁹ 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.¹⁰

The Member States to the UDHR agreed that education shall be directed to the full development of the human personality.¹¹ Further, education is aimed at the strengthening of respect for human rights and fundamental freedoms.¹² Education is also a vehicle for the promotion of understanding, tolerance and friendship among all nations, racial or religious groups.¹³ Moreover, in maintaining the UN human rights ethos, the UDHR states that educational activities shall be for the maintenance of peace.¹⁴ 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.¹⁵ 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.

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 *Id* art 26(2).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Id* art 26(3).

(b) 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

¹⁶ Preamble of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999 at 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (accessed 18/04/2012).

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.

¹⁹ Article 18(4) of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999 at 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (accessed 18 April 2012).

²⁰ *Ibid.*

indispensable means of realising other human rights.²¹ 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.²²

(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.²³

The ICESCR makes provision for the right to education of children.²⁴ The ICESCR states that the right to education may not be unjustly limited or disrupted.²⁵ Thus unjustifiable disruption and limitation of the right to education for children will be a violation of article 5 of the ICESCR.²⁶ 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.²⁷

²¹ Committee on Economic, Social and Cultural Rights 1999, at par 1; Sloth-Nielsen J *Children's rights in Africa: A legal perspective, Chapter 17 The Hidden Ones: Children with Disabilities in Africa and The Right to Education* (2008) at 299.

²² Committee on Economic, Social and Cultural Rights 1999, par 1; Sloth-Nielsen J *Children's rights in Africa: A legal perspective, Chapter 17 The Hidden Ones: Children with Disabilities in Africa and The Right to Education* (2008) at 299.

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.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.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.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.³¹ The ICESCR also provides for free primary education which should be compulsory.³² Further, such education must be made available to everyone.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.³⁴

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

²⁸ *Id* 13(1).

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".

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."

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."

³² *Ibid*.

³³ *Ibid*.

³⁴ *Id* art 13(2)(b).

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.³⁶

Higher education in terms of the ICESCR must be made equally accessible to all.³⁷ The realisation of the right to education must be based on capacity and be achieved by every appropriate means.³⁸ The ICESCR also states that fundamental education shall be encouraged as far as possible for those persons who have not received primary education.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.⁴⁰ This entails that an adequate schooling system must be established and the material conditions of teaching staff must be continuously improved.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.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.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.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.⁴⁵ The establishment of such institutions is subject to the observance of the principles set forth in article 13(1)⁴⁶ and to the requirement that the education offered in such

³⁶ Article 13(2)(b) and (c) of the ICESCR.

³⁷ *Id* 13(2)(c).

³⁸ *Ibid.*

³⁹ *Id* 13(2)(d).

⁴⁰ *Id* 13(1).

⁴¹ *Ibid.*

⁴² Article 26(3) of the UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁴³ Article 13(1) of the ICESCR.

⁴⁴ *Ibid.*

⁴⁵ *Id* art 13(4).

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.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.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.⁴⁹

States Parties to the ICESCR must put into place implementation mechanisms which give effect to the right to education of children.⁵⁰ States Parties must progressively realise the right to education.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.

(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.

(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.

⁴⁷ Article 13(4) of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993 at 3.

⁴⁸ *Id* art 10(1).

⁴⁹ *Ibid*.

⁵⁰ *Id* art 10.

⁵¹ *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

The legal framework governing the right to education in the EU is contained in the European Union Charter of Fundamental Rights⁵² and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵³

(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.⁵⁴ 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.⁵⁵

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

⁵² The European Union Charter of Fundamental Rights (2000/C 364/01).

⁵³ The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, together with Protocols 1, 4, 6, and 7, as amended by Protocol no 11.

⁵⁴ Article 14(1) of the European Union Charter of Fundamental Rights (2000/C 364/01).

⁵⁵ *Ibid.*

mandatory for Member States.⁵⁶ 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.⁵⁷ This freedom must, however, have due regard and respect for the parents' religious, philosophical and pedagogical convictions.⁵⁸ The freedom must be exercised in accordance with national laws governing the exercise of freedoms and rights.⁵⁹

Parents or guardians have the prerogative with regard to the type and manner of education their children should receive.⁶⁰ 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.⁶¹ 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.⁶²

⁵⁶ Article 14(1) European Union Charter of Fundamental Rights (2000/C 364/01).

⁵⁷ *Id* art 14(3).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Article 2 of Protocol no 1, as Amended by Protocol no 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

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 Cosans*⁶⁷ 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

⁶³ Van Dijk P, Van Hoof F, Van Rijn A and Zwaak L *Theory and practice of the European Convention on Human Rights* (2006) at 896; see also article 2 of the protocol no 1 of Protocol no 1, as amended by Protocol no 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Van Dijk P, Van Hoof F, Van Rijn A and Zwaak L *Theory and practice of the European Convention on Human Rights* (2006) at 896: see also Article 2 of Protocol no 1, as amended by Protocol no 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

⁶⁸ Article 2 of Protocol No 1, as amended by Protocol No 11 of the European Convention for the Protection of Human Rights and Fundamental freedoms.

⁶⁹ Van Dijk P, Van Hoof F, Van Rijn A and Zwaak L *Theory and practice of the European Convention on Human Rights* (2006) at 898.

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.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.⁷⁵

The right to education in this instance is framed as a negative right, “no one shall be denied the right to education”.⁷⁶ This means that States Parties do not have a positive obligation to provide or subsidise education. The provision of education or the subsidising thereof by a State Party must be available to all children.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.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.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.⁸⁰

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.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ 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.

⁷⁸ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 478.

⁷⁹ <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf> (accessed 08/07/2012).

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 applications⁸² 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,⁸⁸ belonged to a Chechen ethnic group.⁸⁹ On 31 December 1994 his property in the town of Grozny was destroyed

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.⁹⁰ As a result of the destruction to his property, he had been living in Nalchik as a forced migrant, since 15 August 1996.⁹¹

In 1997 the applicant applied for permanent residence registration in Nalchik.⁹² 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.⁹³ The refusal of the local authorities was upheld by the Nalchik Town Court and by the Supreme Court of the Kabardino-Balkarian Republic.⁹⁴

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.⁹⁵ The applicant was awarded compensation for the property he had lost in the Chechen Republic.⁹⁶ 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.⁹⁷

The applicant's son and daughter attended school, but were refused admission since the applicant could not produce his migrant's card.⁹⁸ 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.⁹⁹

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.¹⁰⁰ The Department replied that, after 24 December 1999, the applicant had had no lawful grounds for remaining in Nalchik and that his requests amounted

⁹⁰ Case of *Timishev v Russia* (Applications nos 55762/00 and 55974/00) at par 10.

⁹¹ *Ibid.*

⁹² *Id* par 11.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Id* par 22.

⁹⁶ *Id* par 23.

⁹⁷ *Ibid.*

⁹⁸ *Id* par 24.

⁹⁹ *Ibid.*

¹⁰⁰ *Id* par 25.

to a violation of the lawful rights of other children because School no 8 was extremely overcrowded even without his children.¹⁰¹

On 1 November 2000 the Nalchik Town Court dismissed the applicant's proceedings on the ground that they were unsubstantiated.¹⁰² 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.¹⁰³

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 230.¹⁰⁴ On 21 November 2000, in an appeal by the applicant, the Supreme Court of the Kabardino-Balkaria Republic upheld the judgment of the court *aquo*.¹⁰⁵

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.¹⁰⁶ 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".¹⁰⁷

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.¹⁰⁸ Thus, the argument

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.¹⁰⁹

The respondent (the Russian Government) conceded that the right of the applicant's children to education had been unlawfully restricted.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.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.¹¹²

This article forbids arbitrary denial of the right to education.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.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.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).¹¹⁶ There is no doubt that the right to education

¹⁰⁹ Case of *Timishev v Russia* (Applications nos 55762/00 and 55974/00) at par 61.

¹¹⁰ *Id* par 62.

¹¹¹ *Ibid.*

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.

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.

¹¹⁴ *Ibid.*

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.

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.¹¹⁷

The Court observed that the applicant's children were refused admission to the school which they had attended for the previous two years.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.¹¹⁹

The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols prohibit the denial of the right to education.¹²⁰ The respondent confirmed that Russian law prohibits the exercise of children's right to education on condition that their parents' residence is registered.¹²¹ It follows that the applicant's children were denied the right to education provided for by domestic law.¹²² Their exclusion from school was thus incompatible with the requirements of article 2 of Protocol 1.¹²³ In that light, a violation of article 2 of Protocol 1 had occurred.¹²⁴

***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.¹²⁵ The Busk Madsens and the Pedersens, stated that they regarded their applications as closely linked with that of the Kjeldsens, thus the Commission

¹¹⁷ *Ibid.*

¹¹⁸ *Id* par 65.

¹¹⁹ *Ibid.*

¹²⁰ *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 at par 66.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Id* par 67.

¹²⁵ *Ibid.*

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 states 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

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 Rights 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.¹³⁴

The Court held that in Denmark private schools co-exist with a system of public education.¹³⁵ 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.¹³⁶

Furthermore, the second sentence of article 2 of Protocol 1¹³⁷ must be read together with the first, which enshrines the right of everyone to education.¹³⁸ 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.¹³⁹ In view of the power of the modern state, it is above all through state teaching that this aim must be realised.¹⁴⁰

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 1.¹⁴¹ The Court held that the functions assumed by Denmark in relation to education and teaching, include the grant of substantial assistance to private schools.¹⁴²

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

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 Article 2 of Protocol no 1 of the European Convention for the Protection of Human Rights and Fundamental Rights 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”.

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”.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.¹⁴⁴ The Court held that the State must respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme.¹⁴⁵ Article 2 of Protocol 1 constitutes a whole that is dominated by its first sentence.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”.¹⁴⁷

The right set out in the second sentence of article 2 of Protocol 1¹⁴⁸ is additional to this fundamental right to education.¹⁴⁹ Parents may require the States to respect their religious and philosophical convictions with regard to their children’s education.¹⁵⁰ The parents’ right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.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.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,

¹⁴³ *Kjeldsen, Busk Madsen and Pedersen v Denmark* 55762/00 European Court of Human Rights at par 51.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Kjeldsen, Busk Madsen and Pedersen v Denmark* 55762/00 European Court of Human Rights at par 52.

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.

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.”

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

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.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.¹⁶³ The instruction, as provided for and organised by the legislation, is principally intended to give pupils better information.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.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.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”.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.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.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.¹⁷⁰ Further, sex education at school does not affect the right of parents to enlighten and advise

¹⁶² *Kjeldsen, Busk Madsen and Pedersen v Denmark* 55762/00 European Court of Human Rights, at par 53.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Id* par54.

¹⁶⁷ *Ibid*; see also section 1 of the Executive Order of 15 June 1972.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

their children in accordance with the parents' own religious or philosophical convictions.¹⁷¹

The Court took into account that harm may occur whilst in pursuit of 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.¹⁷² 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.¹⁷³

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.¹⁷⁴

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.¹⁷⁵ The Danish State allows parents the option of educating their children in private schools, public schools or through home schooling.¹⁷⁶

The applicants also relied on the first sentence of article 2 of Protocol 1.¹⁷⁷ 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.¹⁷⁸

The State argued that article 2 of Protocol 1 addressed religious instruction and not all forms of instruction.¹⁷⁹ The Court rejected this argument and held that any teaching should respect parents' religious and moral convictions.¹⁸⁰ However, the

¹⁷¹ *Kjeldsen, Busk Madsen and Pedersen v Denmark* 55762/00 European Court of Human Rights at par 54

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Id* par 55.

¹⁷⁸ *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

¹⁷⁹ <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf>. (accessed 20/4/2012)

¹⁸⁰ *Ibid.*

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.

¹⁸¹ <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf> (accessed 20/4/2012)

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Adapted from COHRE’s “Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier” (2006) <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf> (accessed 20/4/2012) at 260-261.

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.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.¹⁸⁸

The school's prospectus stated that a high standard of discipline was maintained, but expressed no views on the use of corporal punishment.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.¹⁹⁰ The school in question operated a system whereby such punishment was administered once a pupil had accumulated five demerit marks.¹⁹¹ On 3 October 1985 the applicant received his fifth demerit mark for talking in the corridor.¹⁹² The other demerit marks were for the same conduct and for being a little late for bed on one occasion.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.¹⁹⁴ On 8 October the applicant was informed of the proposed punishment.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.¹⁹⁶ Mrs Costello-Roberts wrote to the Governors of the school to express her "grave concern" about the use of such a "barbaric practice".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".¹⁹⁸ The headmaster, in his turn, wrote to

¹⁸⁷ *Costello-Roberts v The United Kingdom* 89/1991/341/414, European Court of Human Rights at par 7.

¹⁸⁸ *Id* par 8.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Id* par 9.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

the Chairman of the Board of Governors on 7 November, stating that the applicant's problems were due to a lack of discipline.¹⁹⁹ The applicant refused to accept authority, and his behaviour was disrupting the life of the school community.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.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.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.²⁰³

This case provides an important view regarding private action that can involve state responsibility.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.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 1.²⁰⁶ The applicants mentioned failed to substantiate their complaints; thus the case was declared inadmissible by the Commission.²⁰⁷

¹⁹⁹ *Costello-Roberts v The United Kingdom* 89/1991/341/414, European Court of Human Rights at par 9.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Adapted from COHRE's "Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier" (2006) <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners20Dossier.pdf> (accessed 20/4/2012) at 260-1.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

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.²⁰⁸ 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.²⁰⁹ Education when provided by States Parties shall be without charge.²¹⁰

²⁰⁸ Article 49 of the Charter of the Organisation American States As amended by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", signed on 27 February 1967 at the 3rd Special Inter-American Conference, by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", approved on 5 December 1985 at the 14th Special Session of the General Assembly, by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Washington", approved on 14 December 1992 at the 16th Special Session of the General Assembly, and by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua" adopted on 10 June 1993, at the 19th Special Session of the General Assembly.

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.

(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.

²²⁷ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 58.

and compulsory.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.²²⁹

(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.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.²³¹ Moreover, the right to education must be aimed at strengthening respect for human rights, ideological pluralism, fundamental freedoms, justice, and peace.²³²

The Additional Protocol states that education must enable everyone to participate effectively in a democratic and pluralist society.²³³ The Additional Protocol also provides that education must be a vehicle through which children may lead “decent” lives.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.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.²³⁶ The Additional Protocol also provides for secondary education in its different forms, including technical and vocational training.²³⁷ States

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Article 13(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988.

²³¹ *Id art 13(2).*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Id art 13(3).*

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.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.²³⁹ States Parties must ensure that programs of special education are established for the handicapped.²⁴⁰ The provision of education must be in conformity with the domestic legislation of the States Parties concerned.²⁴¹ Parents should have the right to select the type of education to be provided to their children.²⁴²

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

***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.²⁴³ Both girls were Dominican-born but of Haitian descent.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.²⁴⁵ Consequently, these two

available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education.

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.

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.

²⁴⁰ *Id* art 13(3) (e).

²⁴¹ *Id* art 13(3) (d).

²⁴² *Ibid*.

²⁴³ *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 2; Working Paper no 3ESC Rights Litigation Programme Centre on Housing Rights and Evictions (COHRE) January 2006 <http://www.right-to-education.org/node/671>; <http://cidh.org/annualrep/2000eng/ChapterIII/Admissible/Ecuador12.124.htm>.

²⁴⁴ *Ibid*.

²⁴⁵ *Id* par 2.

children were expelled from school, as only children with Dominican birth certificates were allowed to study.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.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.²⁴⁸ It was also hoped that by taking the case to an international court, the issue would receive international coverage and debate.²⁴⁹

The case was brought on the grounds that the girls' civil rights had been breached, specifically their right to identity and nationality.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.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.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.²⁵³ In September 2005, the Court found that the Dominican Republic had violated a wide range of rights enshrined in the American

²⁴⁶ *Ibid.*

²⁴⁷ *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.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *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 1; see also Working Paper no 3ESC Rights Litigation Programme Centre on Housing Rights and Evictions (COHRE) January 2006; see also [http://www .right-to-education.org/node/671](http://www.right-to-education.org/node/671) (accessed 14/03/2012); <http://cidh.org/annualrep/2000eng/ChapterIII/Admissible/Ecuador12.124.htm>(accessed 14/03/2012).

²⁵¹ <http://www.right-to-education.org/node/671> (accessed 14/03/2012).

²⁵² *Ibid.*

²⁵³ *Ibid.*

Convention.²⁵⁴ The Court further held that because the Dominican Constitution enshrines the *jus solias* the basis for nationality, the process applied to the two girls was discriminatory.²⁵⁵

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,²⁵⁶ as the family changed their place of residence constantly and she had to leave several educational establishments abruptly.²⁵⁷

Even though Violeta did not present her birth certificate, she was allowed to attend school for several years.²⁵⁸ 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.²⁵⁹

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 2001.²⁶⁰

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.²⁶¹ 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

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *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 1; see also Working Paper no 3ESC Rights Litigation Programme Centre on Housing Rights and Evictions (COHRE) January 2006; see also [http://www .right-to-education.org/node/671](http://www.right-to-education.org/node/671) (accessed 14/03/2012); <http://cidh.org/annualrep/2000eng/ChapterIII/Admissible/Ecuador12.124.htm> (accessed 14/03/2012).

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 *Id* par 120(b).

²⁶⁰ *Id* par 132.

²⁶¹ *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.²⁶²

This Court stated that cases, in which the victims of human rights violations are children, are particularly serious.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.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.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.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.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.²⁶⁸ The government did not comply with any of these orders, and has yet to publicly apologise or pay the damages.²⁶⁹ The State did, however, issue birth certificates and the girls did eventually access schooling.²⁷⁰ Finally, even without the implementation of the

²⁶² *Id* par 133.

²⁶³ *Id* par 134.

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.

²⁶⁵ *Ibid.*

²⁶⁶ *Id* par 135.

²⁶⁷ *Id* par 226.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

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

***Jorge Odir Miranda Cortez et al v El Salvador* 12.249, Report no 29/01, OEA/SerL/V/II111 Doc 20 rev at 284 (2000) (C5b vc iii)**

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

²⁷¹ *Ibid.*

²⁷² *Jorge Odir Miranda Cortez et al v El Salvador*, Case 12.249, Report no 29/01, OEA/SerL/V/II111 Doc 20 rev at 284 (2000) par 1.

²⁷³ *Jorge Odir Miranda Cortez et al v El Salvador*, Case 12.249, Report no 29/01, OEA/SerL/V/II111 Doc 20 rev at 284 (2000) par 1.

²⁷⁴ *Ibid.*

²⁷⁵ Article 10 of the Protocol of San Salvador, provides for the right to health.

²⁷⁶ *Jorge Odir Miranda Cortez et al v El Salvador*, Case 12.249, Report no 29/01, OEA/SerL/V/II111 Doc 20 rev at 284 (2000) par 35.

²⁷⁷ Article 26 of the Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html> (accessed 16/01/ 2013).

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.²⁷⁹

***YakyeAxa v Paraguay* (IACtHR, 17 June 2005)**

Facts of the case

The YakyeAxa and Sawhoyamaxa Indigenous Communities had been displaced from their traditional lands.²⁸⁰ They were unable to source water and food and were not provided with adequate health and education services.²⁸¹ They had been living in temporary homes alongside the Pozo Colorado-Concepción highway for over 10 years.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.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”.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.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.²⁸⁶

²⁷⁹ *Ibid.*

²⁸⁰ Case of the *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).

²⁸¹ Case of the *YakyeAxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Judgment of 17 June 2005 at par 50, 92.

²⁸² *Id* par 50, 40.

²⁸³ *Id* par 50, 62.

²⁸⁴ *Id* par 2.

²⁸⁵ *Id* par 120.

²⁸⁶ <http://www.right-to-education.org/node/667> (accessed 07/11/2012)

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.²⁸⁷ This usually includes pursuing a claim through the local court system. There are, however, exceptions to this rule.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.²⁸⁹

In both the case of *YakyeAxa Indigenous community v Paraguay* (judgment of 17 June 2005) and the case of *Sawhoyamaxa Indigenous community v Paraguay* (judgment of 29 March 2006), the Court found that the rights of the YakyeAxa and Sawhoyamaxa to judicial protection, to property, and to life had been violated.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.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.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.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.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.²⁹⁵ In each case it ordered the

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ <http://www.right-to-education.org/node/667> (accessed 07/11/2012).

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

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.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”.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.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.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.³⁰⁰ As such, the judgments have made little difference in practice to the lives of the YakyeAxa and Sawhoyamaxa.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.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.³⁰³

In November 2008 President Fernando Lugo signed a bill on the expropriation of the traditional lands of the YakyeAxa.³⁰⁴ This was due to be discussed by Congress in the session beginning in March 2009.³⁰⁵

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ <http://www.right-to-education.org/node/667> (accessed 07/11/2012).

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

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.³⁰⁶ The Court showed that the rights to life and to education can be violated in communities deprived of a means of livelihood.³⁰⁷ 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.³⁰⁸

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.³⁰⁹ When the struggle for the land began, Mr Albino Fernandez 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 1996.³¹⁰

The school is located within the current settlement of the YakyeAxa Community and there are 57 boys and girls regularly enrolled at this school.³¹¹ However, some children drop out of school because they fall ill or because they have no food or water and cannot endure studying.³¹² Others have no clothes or shoes and are ashamed to attend classes under those circumstances.³¹³ The parents of most of the boys and girls are unemployed.³¹⁴

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.³¹⁵ The little house where the school operates is made of palm leaves, and has a sod floor, two blackboards, and desks with chairs.³¹⁶ This

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *YakyeAxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Judgment of 17 June 2005, par 38(a) http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed 15/08/ 2012).

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.³¹⁷

The material used in the school is provided by the Governor's Office and by the "Instituto Paraguayo del Indígena".³¹⁸ The material is insufficient for the school year, so the members of the Community seek additional material through donation.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.³²⁰ The books are not in a language (Enxet) the children understand, and therefore teaching becomes impractical, and as a result transmission is hampered.³²¹

The elders impart the values and practices of their own culture.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.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.³²⁴

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

³¹⁷ *Ibid*

³¹⁸ *Ibid*

³¹⁹ *Ibid*

³²⁰ *Ibid*

³²¹ *YakyeAxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Judgment of 17 June 2005, par 38(a) http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed 15/08/ 2012).

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

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.*

³³² *YakyeAxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Judgment of 17 June 2005, par 38(a) http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed 15/08/ 2012).

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

³³⁹ The African Charter on Human and People's Rights: (adopted 27 June 1981, OAU Doc Cab/leg /67/3 rev 5, 21 ILM 58 (1982) entered into force 21 October 1986); see also <http://www.right-to-education.org/node/671> (accessed 05/05/2012).

³⁴⁰ *Id* art 17.

³⁴¹ *Id* art 2.

³⁴² Preamble of the African Charter on Human and People's Rights: (adopted 27 June 1981, OAU Doc Cab/leg/67/3 rev 5, 21 ILM 58 (1982) entered into force 21 October 1986); see also <http://www.right-to-education.org/node/671> (accessed 05/05/2012).

³⁴³ *Ibid*.

realisation of the right to development and civil and political rights cannot be dissociated from economic, social and cultural rights.³⁴⁴

(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.³⁴⁵ 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.³⁴⁶ Further, education of children must be directed at fostering respect for human rights and fundamental freedoms.³⁴⁷

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.³⁴⁸ 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.³⁴⁹ 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.³⁵⁰ The right to education also speaks to the promotion of the children's understanding of primary health care.³⁵¹ 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.³⁵² In addition, natural disasters, armed conflicts, exploitation, and hunger, add to the critical

³⁴⁴ *Ibid.*

³⁴⁵ Article 11(1) 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; see also Freeman M *Children's rights progress and perspectives: Essays from the International Journal of Children's Rights* (2011) at 397; see also Olowu D *Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child*; see also Van Bueren (1995) at 402.

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.³⁵³ The above-mentioned factors warrant special attention from States Parties to ensure that children's physical and mental immaturity is safeguarded.³⁵⁴

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.³⁵⁵ 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.³⁵⁶

The ACRWC also provides that higher education must be accessible to all on the basis of capacity and ability by every appropriate means.³⁵⁷ States Parties are obliged to take measures to encourage regular attendance at schools and the reduction of drop-out rates.³⁵⁸ 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.³⁵⁹

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.³⁶⁰ 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.³⁶¹

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.³⁶² 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.³⁶³

(c) The Committee of Experts on the Rights and Welfare of the Child

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.³⁶⁴ The ACERWC is the central body entrusted with developing jurisprudence relating to the rights and welfare of the child.³⁶⁵

The ACERWC consist of ten experts of high moral standing and recognised competence in the field covered by the ACRWC.³⁶⁶ The members of ACERWC are elected by States Parties from among their nationals.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.³⁶⁸ The members of the ACERWC are elected by secret ballot from a list of persons nominated by States Parties.³⁶⁹

Each State Party nominates one person from among its own nationals.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.³⁷¹ Four months

³⁶³ Article 11(6) ACRWC; see also Sloth-Nielsen J *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".

³⁶⁴ Article 43(1) ACRWC; see also Davel CJ (ed) *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).

³⁶⁵ Preamble of The African (Banjul) Charter on Human and People' Rights (adopted 27 June 1981, OAU Doc CAB/LEG/67/3rev5, 21ILM58 (1981) entered into force 21 October 1986).

³⁶⁶ Article 43(2) of the African (Banjul) Charter on Human and People' Rights (adopted 27 June 1981, OAU Doc CAB/LEG/67/3rev5, 21ILM58 (1981) entered into force 21 October 1986).

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*; see also Davel CJ (ed) *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."

³⁶⁹ *Id* art 43(3).

³⁷⁰ *Ibid.*

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).

³⁷⁸ Article 31(1) of the African Charter on Human and People; Part II, Chapter 1 Establishment and Organisation of the African Commission on Human and Peoples' Rights OAU doc CAB/LEG/67/3rev5, 21ILM 58 (1982).

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.³⁸³ The candidates must have the nationality of one of the States Parties to the ACHPR.³⁸⁴ When two candidates are nominated by a State, one of them may not be a national of that State.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.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.³⁸⁷

The members of the Commission are elected for a six-year period and shall be eligible for re-election.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.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.³⁹⁰

After the members' election, the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.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.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

³⁸³ *Ibid.*

³⁸⁴ *Id* art 33(2)

³⁸⁵ *Id* art 33(3).

³⁸⁶ *Id* art 35(1).

³⁸⁷ *Id* art 35(2).

³⁸⁸ *Id* art 36.

³⁸⁹ *Ibid.*

³⁹⁰ Article 37 of the African Charter on Human and People; Part II, Chapter 1 Establishment and Organisation of the African Commission on Human and Peoples' Rights OAU Doc CAB/LEG/67/3rev5, 21ILM 58 (1982).

³⁹¹ *Id* art 38.

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 *Ibid.*

³⁹⁹ *Id* art 42(1).

⁴⁰⁰ *Id* art 42(2).

⁴⁰¹ *Id* art 42(3).

⁴⁰² Article 42(4) of the African Charter on Human and People; Part II, Chapter 1 Establishment and Organisation of the African Commission on Human and Peoples' Rights OAU Doc CAB/LEG /67/3rev5, 21ILM 58 (1982).

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Id* art 42(5).

and Immunities of the Organization of African Unity.⁴⁰⁶ Provision is also made for the allowances of the members of the Commission in the Regular Budget of the AU.⁴⁰⁷

The Commission's mandates include the promotion of human and peoples' rights through research and education activities;⁴⁰⁸ the articulation of rules on legal questions; and cooperation with other African and international institutions concerned with human and peoples' rights;⁴⁰⁹ 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.⁴¹⁰

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.⁴¹¹ The Commission enjoys jurisdiction even if a Government has not formally recognised its competence to hear complaints.⁴¹² 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.⁴¹³

(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).⁴¹⁴

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,

⁴⁰⁶ *Id* art 43.

⁴⁰⁷ *Id* art 44.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ <http://www.right-to-education.org/node/158> (accessed 18/05/2012).

and any other relevant human rights instrument ratified by the States concerned.⁴¹⁵ 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.⁴¹⁶

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.⁴¹⁷ 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.⁴¹⁸ 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.⁴¹⁹ 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.⁴²⁰

(f) Reporting Mechanisms of the African Charter on the Rights and Welfare of the Child

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.⁴²¹ 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.⁴²² The reports must be made within

⁴¹⁵ Article 3 of the Protocol Establishing the African Court on Human and Peoples' Rights.

⁴¹⁶ Article 44 of the African Charter on Human and Peoples' Rights.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ 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.

⁴²² *Ibid.*

two years of the entry into force of the ACRWC for the State Party concerned.⁴²³ Thereafter, reports must be submitted every three years.⁴²⁴

Every report made under article 43 of the ACRWC must contain sufficient information on the implementation of the ACRWC.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.

**(g) The Interpretation of the right to education through case law in the AU
Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire(2000)
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).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.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.⁴²⁸

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

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.

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.

⁴²⁸ *Id* par 2.

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

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.

⁴³⁶ *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) Communications 25/89, 47/90, 56/91, 100/93 at par 11.

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.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.⁴⁴¹ Article 56 of the ACHPR requires that complainants exhaust local remedies before approaching the Commission.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.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.⁴⁴⁴ In this case, the government had received notice of the violation.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.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.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.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.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

⁴⁴⁰ *Id* par 15.

⁴⁴¹ *Id* par 35.

⁴⁴² *Id* par 36.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Id* par 36.

⁴⁴⁵ *Id* par 36.

⁴⁴⁶ *Id* par 37.

⁴⁴⁷ *Id* par 38.

⁴⁴⁸ *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) Communions 25/89, 47/90, 56/91, 100/93 at par 39.

⁴⁴⁹ *Ibid.*

Commission.⁴⁵⁰ 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.⁴⁵¹ This principle conforms to the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights.⁴⁵² 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.⁴⁵³

Article 5 of the ACHPR prohibits torture and inhuman or degrading treatment.⁴⁵⁴ 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.⁴⁵⁵ Article 6 of the ACHPR guarantees the right to liberty and security of person.⁴⁵⁶ The indefinite detention of those who protested against torture violated article 6 of the ACHPR.⁴⁵⁷ 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 4.⁴⁵⁸ Article 7 of the ACHPR specifies the right to have one's cause heard.⁴⁵⁹ The unfair trials constituted a violation of article 7.⁴⁶⁰

Article 8 of the African Charter protects freedom of conscience.⁴⁶¹ 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.⁴⁶² The arbitrary arrests of believers of this religion likewise constituted a contravention of article 6 above.⁴⁶³ The torture, executions, arrests,

⁴⁵⁰ *Id* par 40.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ *Id* par 41.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Id* par 42.

⁴⁵⁷ *Id* par 42.

⁴⁵⁸ *Id* par 43.

⁴⁵⁹ *Id* par 44.

⁴⁶⁰ *Id* par 44.

⁴⁶¹ *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) Communications 25/89, 47/90, 56/91, 100/93 at par 45.

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

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 33rd 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

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

Law Offices of Ghazi Suleiman v Sudan (2002) AHRLR 25 (ACHPR 2002) (Communication 220/98, decided at the 31st Ordinary Session, May 2002)

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 complainant 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

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Law Offices of Ghazi Suleiman v Sudan (2002) AHRLR 25 (ACHPR 2002) Communication 220/98, The Law Offices of Ghazi Suleiman v Sudan decided at the 31st ordinary session, May 2002, 15th Annual Activity Report Rapporteur: Rezag Bara at par 1.*

⁴⁷⁷ *Id* par 3.

⁴⁷⁸ *Law Offices of Ghazi Suleiman v Sudan (2002) AHRLR 25 (ACHPR 2002) Communication 220/98 at 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.⁴⁸¹

The complainant alleged a violation of the articles 6, 7(c) and 17(1) of the ACHPR.⁴⁸² During the 30th session, the rapporteurs introduced the communications and reviewed the facts and the status of each case.⁴⁸³ The Commission thereafter heard the oral submission of the respondent to the case.⁴⁸⁴ The Commission noted that the respondent did not respond to the questions raised by the complainant.⁴⁸⁵

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.⁴⁸⁶ 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.⁴⁸⁷

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,⁴⁸⁸ or if it is obvious that the procedure will be unduly prolonged.⁴⁸⁹ 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.⁴⁹⁰

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.

⁴⁸⁸ *Law Offices of Ghazi Suleiman v Sudan* (2002) AHRLR 25 (ACHPR 2002) Communication 220/98 at par 34.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Id* par 35.

nor independent.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.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.⁴⁹³ This was due to the fact that current administrative and legal solutions had become serious obstacles to the protection of the complainants' rights.⁴⁹⁴ Consequently, complainants who asked that their rights be protected before Sudanese courts came up against obstacles which made these avenues of redress ineffective.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.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.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.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.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 2000.⁵⁰⁰ Article 56(5) of the

⁴⁹¹ *Id* par 36.

⁴⁹² *Ibid.*

⁴⁹³ *Id* par 37.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Id* par 38.

⁴⁹⁷ *Law Offices of Ghazi Suleiman v Sudan* (2002) AHRLR 25 (ACHPR 2002) Communication 220/98 at par 38.

⁴⁹⁸ *Id* par 39.

⁴⁹⁹ *Ibid.*

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.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.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.⁵⁰³

Furthermore, the complainant gave no indication of instituting proceedings before the domestic courts.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.⁵⁰⁵

(h) Conclusion

The ACRWC affords a much more detailed and protective measures on education, with no corresponding provisions at the UN level.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.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.⁵⁰⁸

⁵⁰¹ *Id* par 41.

⁵⁰² *Ibid.*

⁵⁰³ *Id* par 42.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Id* par 43.

⁵⁰⁶ Sloth-Nielsen J *Children's rights in Africa: A legal perspective* (2008) at 38.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Sloth-Nielsen J *Domestication of children's rights in national legal systems in African context: Progress and prospects; Children's rights in Africa: A legal perspective* (2008) at 55.

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

Part 1: The Best Interests of the Child Principle at the United Nations level

(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

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."

³ Geneva Declaration of the Rights of the Child adopted 26 September 1924, League of Nations, principle 1 (hereafter the Geneva Declaration) <http://www.un-documents.net/gdrc1924.htm>, (accessed 09/04/2012).

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 *Id* principle 3.

⁹ *Id* principle 4.

¹⁰ *Ibid.*

¹¹ Freeman M *Commentary on the United Nations Convention on the Rights of the Child, Article 3 the best interests of the Child?* (2007) at 11.

¹² UN General Assembly Resolution 1386 (XIV) of 10 December 1959, principle 2.

¹³ *Id* principle 7.

¹⁴ Article 25(2) of the UN General Assembly *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (accessed 10 April 2012).

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.¹⁶ Included in the "adequate standard of living" are food, clothing, housing and medical care and necessary social services, and the right to security.¹⁷ In the event of unemployment, sickness, disability, or other lack of livelihood in circumstances beyond his control, adequate protection must still be provided.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.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.²⁰ The ICCPR also provides that there is to be no discrimination of any kind against all individuals.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

¹⁶ Article 25(2) of the UDHR.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Article 25 of the UDHR provides that "motherhood and childhood are entitled to special care and assistance."

²⁰ Article 18 and 18(4) of the ICCPR.

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.²²

(d) 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.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.²⁴

The ICESCR also provides for special protection due to mothers during a reasonable period before and after birth.²⁵ This special protection must be provided on behalf of children without any discrimination for reasons of parentage or other conditions.²⁶ The ICESCR further prohibits social and economic exploitation and the employment of children in health hazardous conditions.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.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) 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

²² Freeman M (2007) op cit at 16.

²³ Article 13 of the ICESCR.

²⁴ *Id* art 10.

²⁵ *Id* art 10(2).

²⁶ *Id* art 10(3).

²⁷ *Ibid.*

²⁸ *Ibid.*

legislative bodies, the best interests of the child shall be of primary consideration”.²⁹

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.³⁰ Although the best interest of the child principle is not more important than any of the three general principles,³¹ it may however, be argued that the recognition of the child’s best interests underpins all the other provisions in the UNCRC.³²

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.³³ Further, the scope of the best interests of the child principle purports to be comprehensive.³⁴ However, the best interest of the child principle’s application is limited only to actions which affect children.³⁵ This means that the best interest of the child principle does not extend to parents.³⁶

The UNCRC obliges State Parties to ensure that children have such protection and care as is necessary for their well-being.³⁷ 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.³⁸ The UNCRC obliges State Parties to take all appropriate legislative and administrative measures for the realisation of children’s rights.³⁹

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.⁴⁰ In relation to the right to education, the above provision implies that States Parties must provide educational facilities which

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).

³² Freeman (2007) op cit at 1.

³³ 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.

³⁴ Freeman (2007) op cit at 44.

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.⁴¹ Specific focus shall be granted to areas such as children's safety, health, suitability of their staff, as well as competent authorities.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.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.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.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.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.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.⁴⁸ However, the information concerned must not be provided if it would harm the well-being of the child.⁴⁹ States Parties must also ensure that the submission of such a request must contain no adverse consequences for the children and guardians involved.⁵⁰

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Id* art 9(1).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Id* art 9(3).

⁴⁸ *Id* art 9(4).

⁴⁹ *Ibid.*

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.⁵¹ Further, parents or legal guardians, have the primary responsibility for the upbringing and development of the child.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”.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.⁵⁴

Article 3(1) of the UNCRC might also play two further roles.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.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.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.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.⁵⁹ Further, the reports should indicate whether the best interests of the child principle

⁵¹ *Id* art 18(1).

⁵² *Ibid.*

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.

⁵⁴ *Id* at 92.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ CRC/C/AUS/CO/4, Consideration of reports submitted by States Parties under article 44 of the UNCRC. See also Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 92.

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 préparatoires* 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

⁶⁰ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 92.

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.

⁶⁴ Detrick S *A commentary on the United Nations on the Rights of the Child* (1999) at 92.

⁶⁵ *Id* at 89.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Detrick S *A commentary on the United Nations on the Rights of the Child* (1999) at 89.

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

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² CRC/GC/2002/02: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, par 19(i); see also 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 45.

Convention on Contact Concerning Children, and the European Convention on the Exercise of Children's Rights

(b) The European Union Charter of Fundamental Rights

The European Union Charter of Fundamental Rights⁷³ 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.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.⁷⁵ Children have the right to express their views freely,⁷⁶ and their views must be taken into consideration in any matters which concern them in accordance with their age and level of maturity.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.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.

⁷³ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01).

⁷⁴ *Id* art 24(2)

⁷⁵ *Id* art 24(1).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

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, *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

⁷⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5213 UNTS 221

⁸⁰ Freeman (2007) op cit at 20-21.

⁸¹ Freeman M *Commentary on the UNCRC* at 12; see also Fortin J *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 *Ibid.*

⁸⁴ Article 7 of the European Union Charter of Fundamental Rights.

⁸⁵ Freeman (2007) op cit at 12.

⁸⁶ *Ibid.*

⁸⁷ Article 7(7) of the European Social Charter.

⁸⁸ *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 recognise 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.⁹⁸ 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.⁹⁹

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.¹⁰⁰ The promotion of the best interests of the child extends to where children have an opportunity to exercise their rights in family proceedings.¹⁰¹

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.¹⁰² 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.¹⁰³

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.¹⁰⁴ Further, to grant children procedural rights and facilitate the exercise of the best interests principle by ensuring that children are, themselves or

⁹⁸ *Id* art 7(9).

⁹⁹ Article 7(10) of the European Social Charter.

¹⁰⁰ Preamble of Council of Europe, *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160;

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Article 1(2) of the European Convention on the Exercise of Children's Rights.

through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.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.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.¹⁰⁷

“Sufficient understanding” means that children would have received all relevant information pertaining to the specific issue that affects them.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.¹⁰⁹ However, such consultation cannot be conducted if it would be manifestly contrary to the best interests of the child.¹¹⁰ Furthermore, the judicial authority must allow the children to express their views¹¹¹ and give due weight to those views.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.¹¹³ However, the provision of such information must not be manifestly contrary to the best interests of the child.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.

¹⁰⁵ *Ibid.*

¹⁰⁶ Article 6(a) of the European Convention on the Exercise of Children’s Rights.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id* art 6(b).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Id* art 6(c).

¹¹³ *Id* art 10(a).

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.¹¹⁵ 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

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.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.¹²⁶ The judicial authority, where necessary, must obtain further information from other relevant bodies or persons.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

¹²⁵ *Id* art 7(c).

¹²⁶ Article 7(c) of the Convention on Contact concerning Children CETS no 192.

¹²⁷ *Ibid*.

children, have the right to special protection, care, and aid.¹²⁸ This special protection entails a duty on every person to aid, support, educate and protect minor children.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.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.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.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.¹³³ The ACHR recognises equal rights for children born in and out of wedlock.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.¹³⁵ The Additional Protocol also provides that children have the right to grow up under the protection and responsibility their parents.¹³⁶ Save in

¹²⁸ Article 7 of the American Declaration of the Rights and Duties Man.

¹²⁹ *Id* art 30.

¹³⁰ Article 7 of the American Declaration of the Rights and Duties Man.

¹³¹ *Ibid*.

¹³² Article 17(4) of the American Convention on Human Rights.

¹³³ *Id* art 19.

¹³⁴ *Id* art 17(5).

¹³⁵ Article 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

¹³⁶ *Ibid*.

exceptional or judicially recognised circumstances, a child must not be separated from his/her mother.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.¹³⁸ The best interest of the child determination is generally made by considering a number of factors related to the circumstances of the child.¹³⁹ These factors include the child's potential caregivers, the child's safety, and the child's well-being.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.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).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);¹⁴³ the mental and physical health needs of the child (five States and the District of Columbia);¹⁴⁴ the mental and physical health of the parents (six States and the District of Columbia);¹⁴⁵ and finally, the determination as to whether there is a presence of domestic violence in the home (eight States).¹⁴⁶

¹³⁷ *Ibid.*

¹³⁸ Child Welfare Information Gateway "Determining the best interest of the child: Summary of state laws" (March 2010) www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf, (accessed 23/09/2012).

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Child Welfare Information Gateway op cit.

¹⁴⁶ *Ibid.*

(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.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.¹⁴⁸ The consideration must be to the enjoyment of rights and freedoms which also implies the performance of duties on the part of everyone.¹⁴⁹ Therefore, the best interest of the child may be assessed in accordance with the above mentioned provisions.

¹⁴⁷ Preamble of the African Charter on Human and People's Rights adopted 27 June 1981, OAU Doc Cab/leg/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

¹⁴⁸ *Ibid.*

¹⁴⁹ Preamble of the African Charter on Human and People's Rights adopted 27 June 1981, OAU Doc Cab/leg/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986

(c) 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 eighteenth 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 Sloth-Nielsen J *Children's rights in Africa: The African regional system for the protection of children's rights* (2008) at 36.

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 RESPECTS 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

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.⁶ 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.⁷

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

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.¹⁵ The NHRIs must provide for the essential elements of such institutions and the activities which should be carried out by them.¹⁶

Where such NHRIs have already been established, the Committee shall call upon States Parties to review their status.¹⁷ 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.¹⁸

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.¹⁹ States Parties must provide relevant information pursuant to article 4²⁰ (measures and extent of implementation of the UNCRC) of the UNCRC.²¹ This information must include details of measures taken by States Parties to harmonise national laws and policy with the provisions of the UNCRC,²² and mechanisms planned at national or local level for co-ordinating policies relating to children and monitoring the implementation of the UNCRC.²³

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.²⁴ In addition, the Committee has identified a wide range of measures that

¹⁵ CRC General Comment no 2 (2002)/CRC/GC/2002/2 at par 154.

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.

²¹ Article 4 of the United Nations Convention on the Rights of the Child, 1989; 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 22nd Meeting (1st Session) on 15 October 1991 par 9.

²² *Ibid.*

²³ *Ibid.*

²⁴ 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 1.

are needed for effective implementation.²⁵ Included are the development of special structures, monitoring, training and other activities in government, parliament and the judiciary at all levels.²⁶

States Parties must describe the measures they have taken or that are foreseen, pursuant to article 42²⁷ (advocacy for children's rights) of the UNCRC.²⁸ In addition, States Parties must describe measures undertaken or foreseen, pursuant to article 44(6) (publication of reports), of the UNCRC.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.³⁰

The second sentence of article 4³¹ 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.³² This provision introduces the concept of "progressive realisation" of the rights in the UNCRC.³³

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

²⁵ 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 1.

²⁶ *Ibid.*

²⁷ Article 42 of the UNCRC, provides that "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."

²⁸ 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 22nd Meeting (1st Session) on 15 October 1991 par 10.

²⁹ Article 44(6) of the United Nations on the Rights of the Child, 1989 provides that to make their reports widely available to the public at large in their own countries.

³⁰ Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 485.

³¹ Article 4 of the UNCRC 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 co-operation."

³² Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) at 485.

³³ *Ibid.*

³⁴ Article 2(1) UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993 p 3 available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (accessed 15/03/2012) "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a

“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”.³⁵ 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.³⁶

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.³⁷

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.³⁸ 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.³⁹

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.⁴⁰ Moreover, article 3(1)⁴¹ aid in the implementation of children’s rights, because “public or private social welfare

view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

³⁵ 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 7.

³⁶ *Id* par 8.

³⁷ *Id* par 9.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ 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 12.

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.⁴²

The best interest of the child principle requires active measures throughout government, parliament and the judiciary.⁴³ Further, State Parties must, in reforming their legislative, administrative and judicial bodies or institutions, apply the best interest principle.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.⁴⁵ Implementation measures must be aimed at achieving the optimal development for all children.⁴⁶

The UNCRC highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights.⁴⁷ The active participation of children must apply equally to all measures adopted by States Parties in their implementation of the UNCRC.⁴⁸ Once-off or regular events like children’s parliaments can be stimulating in raising the general awareness about children’s rights.⁴⁹ However, article 12 of the UNCRC requires consistent and ongoing arrangements.⁵⁰ The involvement of and consultation with children must also avoid being tokenistic and aim to ascertain the authentic views of children.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.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.⁵³ The review needs to consider the UNCRC not only article by

⁴² 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 par 12.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

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.

⁴⁸ Article 12 of the UNCRC.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Id* par 18.

⁵³ *Ibid.*

article, but also holistically, recognising the interdependence and indivisibility of human rights.⁵⁴ Further, the review needs to be continuous rather than once-off.⁵⁵

States Parties need to ensure, by all appropriate means, that the provisions of the UNCRC are given legal effect within their domestic legal systems.⁵⁶ This remains a challenge in many States Parties.⁵⁷ 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.⁵⁸ 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.⁵⁹ In order for children’s rights to have meaning, effective remedies must be available to redress violations.⁶⁰ This requirement is implicit in the UNCRC and consistently referred to in the other major international human rights treaties.⁶¹ Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights.⁶²

Therefore, States Parties need to give particular attention to ensuring that there are effective child-sensitive procedures available to children and their representatives.⁶³ 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.⁶⁴ 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.*

⁵⁶ 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 19.

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.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.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.⁶⁷

The States Parties' strategies for children's rights implementation must be endorsed at the highest level of government.⁶⁸ Children's rights strategies need to be linked to national development planning and included in the national budget.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.⁷⁰

In examining States Parties' reports, the Committee has found it necessary to encourage further co-ordination of government to ensure effective implementation.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.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

⁶⁵ *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."

⁶⁶ *Id* par 27.

⁶⁷ *Ibid*; see also article 39 of the UNCRC.

⁶⁸ 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 31.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ *Id* par 37.

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".

UNCRC.⁷³ The Committee requires that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the UNCRC.⁷⁴

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.⁷⁵

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.⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹

⁷³ 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 44; see also article 2(1) and 3(2) of the United Nations Convention on the Rights of the Child, 1989.

⁷⁴ 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 44.

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".

The States Parties need to work closely with NGOs in the widest sense, while respecting their autonomy.⁸⁰ 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.⁸¹ 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.⁸²

The Committee welcomes the development of NGO coalitions and alliances committed to promoting, protecting and monitoring children's human rights.⁸³ 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.⁸⁴

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.⁸⁵ 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.⁸⁶ The media is also a valuable partner in implementing children's rights.⁸⁷

The Committee encourages States Parties to provide, and to use, technical assistance in the process of implementing the UNCRC.⁸⁸ 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.⁸⁹ States Parties

⁸⁰ General Comment no 14 (2000) of the Committee of Economic, Social and Cultural Rights at par 58.

⁸¹ General Comment no 14 (2000) of the Committee of Economic, Social and Cultural Rights at par 58.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Id* par 59.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ 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 59.

⁸⁸ *Id* par 63.

⁸⁹ *Ibid.*

are encouraged to identify their interest in technical assistance in their reports under the Convention.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”.⁹¹

Independent human rights institutions are complementary to effective government structures for children’s rights implementation.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.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.⁹⁴ It is essential that institutions remain entirely free to set their own agendas and determine their own activities.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.⁹⁶ The UNCRC is comparatively weak with respect to provisions on implementation by States Parties.⁹⁷ The UNCRC relies almost exclusively on States Parties’ reports, which are to be submitted on a regular basis.⁹⁸

⁹⁰ *Ibid.*

⁹¹ 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 65.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Id* par 68.

⁹⁷ Dillon S A *International children’s rights* (2010) at 52.

⁹⁸ *Ibid.*

It does not allow for State-to-State complaints, nor does it provide any avenue for individuals to bring complaints against a State.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.¹⁰⁰ The UNCRC does not have its own system for handling complaints.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.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.¹⁰³

The biggest limitation to full implementation of the UNCRC in this context is whether the UNCRC is self-executing or non-self-executing.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.¹⁰⁵ The UNCRC does not apply immediately because it is a non-self-executing treaty.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".¹⁰⁷

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Dillon S A *International children's rights* (2010) at 52.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0> (accessed 25/09/2012); see also Chari C and Presley T "Understanding the United Nations Convention on the Rights of the Child www.ego.thechicagoschool.edu/.../CRC%20presentation%20Workshop%20one.ppt (accessed 25/09/2012).

¹⁰⁷ *Ibid.*

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.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.¹⁰⁹ These include the fact that children’s developmental state makes them particularly vulnerable to human rights violations.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.¹¹¹

Children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights.¹¹² Children’s access to organisations that may protect their rights is generally limited.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.¹¹⁴

The Committee encourages every State to establish an independent human rights institution with responsibility for promoting and protecting children’s rights.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

¹⁰⁸ 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 3.

¹⁰⁹ *Id* par 5.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

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.

¹¹⁴ *Id* par 6.

¹¹⁵ *Id* par 7.

rights.¹¹⁶ 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.¹¹⁷

NHRIs should, if possible, be constitutionally entrenched and must at least be legislatively mandated.¹¹⁸ 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.¹¹⁹

The domestic legislation must include provisions setting out specific functions, powers and duties relating to children linked to UNCRC and its Optional Protocols.¹²⁰ 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.¹²¹

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.¹²² Government departments should be involved in an advisory capacity only.¹²³ NHRIs should have appropriate and transparent appointment procedures, including an open and competitive selection process.¹²⁴

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.¹²⁵ Further, they should have the power to intervene in court cases to inform the court about the human rights issues involved in the case.¹²⁶

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ 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 8.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Id* par 12.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Id* par 14(a).

¹²⁶ *Id* par 14(b).

NHRIs should be geographically and physically accessible to all children.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.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.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.¹³⁰ The NHRI's purposes include working closely with the media and undertaking or sponsoring research and educational activities in the field.¹³¹

The UN has a long-standing programme of assistance for the establishment and strengthening of national human rights institutions.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.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.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.¹³⁵

¹²⁷ *Id* par 15.

¹²⁸ *Ibid.*

¹²⁹ 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 15.

¹³⁰ *Id* par 19(i).

¹³¹ *Ibid.*

¹³² *Id* par 23.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Id* par 24.

5.6 Regional and International Co-operation

Regional and international processes and mechanisms can strengthen and consolidate NHRIs through shared experience and skills.¹³⁶ The NHRIs share common problems in the promotion and protection of human rights in their respective countries.¹³⁷ In this respect, NHRIs should consult and co-operate with relevant national, regional and international bodies and institutions on children's rights issues.¹³⁸

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.¹³⁹ International and regional mechanisms and exchanges are encouraged, as they provide NHRIs 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.¹⁴⁰

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

National institutions are vested with competence to promote and protect human rights.¹⁴¹ 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.¹⁴²

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.¹⁴³ National institutions shall make

¹³⁶ *Id* par 27.

¹³⁷ *Ibid.*

¹³⁸ 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 28.

¹³⁹ *Id* par 27.

¹⁴⁰ *Id* par 29.

¹⁴¹ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993 par 1.

¹⁴² *Id* par 2.

¹⁴³ *Id* par 3(a).

recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.¹⁴⁴ Further, the national institution may decide to publicise these opinions, recommendations, proposals and reports that falls under its mandate.¹⁴⁵

The national institution must examine the domestic legislation and administrative provisions in force, as well as bills and proposals.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.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.¹⁴⁸

National institutions must prepare reports with regard to human rights in general, and on more specific matters.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.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.¹⁵¹ Further, national institutions must encourage States Parties to ratify human rights instruments and to implement them.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.¹⁵³ The national institutions shall also co-operate with the United Nations and any other organisation in the United Nations system, the

¹⁴⁴ *Ibid.*

¹⁴⁵ *Id* par 3(a).

¹⁴⁶ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993 par 3(a)(i).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Id* par 3(a)(iii) and (ii).

¹⁵⁰ *Ibid.*

¹⁵¹ *Id* par 3(b).

¹⁵² *Id* par 3(c).

¹⁵³ *Id* par 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.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.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.¹⁵⁶

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.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.¹⁵⁸

The national institution shall have an infrastructure which is suited to the effective conduct of its activities, in particular adequate funding.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.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

¹⁵⁴ *Ibid.*

¹⁵⁵ *Id* par 3(f).

¹⁵⁶ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993 par 3(g).

¹⁵⁷ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993, Composition and Guarantees of Independence and Pluralism par 1(a).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Id* par 2.

¹⁶⁰ *Ibid.*

independence.¹⁶¹ The mandate may be renewable, provided that the pluralism of the institution's membership is ensured.¹⁶²

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.¹⁶³

Any person may access any information and any documents necessary for assessing situations falling within the competence of the national institution.¹⁶⁴ In addition, the national institutions must address public opinion directly or through any media, particularly in order to publicise its opinions and recommendations.¹⁶⁵ The members of the national institution must subject to due notice meet on a regular basis, as well as whenever it is necessary.¹⁶⁶

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.¹⁶⁷ National institutions must continually consult with other organisations responsible for the promotion and protection of human rights.¹⁶⁸

NGOs play an important role in expanding the work of national institutions.¹⁶⁹ National institutions help to develop NGOs devoted to promoting and protecting human rights.¹⁷⁰ The development centres on economic and social issues, the combating of racism, and protecting particularly vulnerable groups (especially

¹⁶¹ *Id* par 3.

¹⁶² *Ibid.*

¹⁶³ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993, Methods of Operation par (a).

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.¹⁷¹

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.¹⁷² Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions, or any other representative organisations.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷

¹⁷¹ *Ibid.*

¹⁷² United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993, Additional principles concerning the status of commissions with quasi-jurisdictional competence par (a).

¹⁷³ *Ibid.*

¹⁷⁴ United Nations General Assembly: Principles Relating to the Status of National Institutions, The Paris Principle, adopted by General Assembly resolution 48/131 of 20 December 1993, Additional principles concerning the status of commissions with quasi-jurisdictional competence par (a).

¹⁷⁵ *Id* par (b).

¹⁷⁶ *Id* par (c).

¹⁷⁷ *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

¹⁷⁸ Freeman M *Children's rights progress and perspectives: Essays from the International Journal of Children's Rights* (2011) at 397.

¹⁷⁹ *Ibid.*

¹⁸⁰ Viljoen F "The African Charter on the Rights and Welfare of the Child" in Davel C (ed) *Introduction to child law in South Africa* (2000) at 214-215.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Freeman M *Children's rights progress and perspectives: Essays from the International Journal of Children's Rights* (2011) at 399.

¹⁸⁴ *Ibid.*

formulate principles and rules aimed at promoting children's rights in Africa.¹⁸⁵ The Committee also positively influences the formulation of national policies.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.¹⁸⁷ NGOs are also a powerful force for creating awareness.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.¹⁸⁹

The media has an informative and educational role to play in the protection of children's rights.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.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.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.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.¹⁹⁴ Notwithstanding

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Id* at 397.

¹⁸⁹ Freeman M *Children's rights progress and perspectives: Essays from the International Journal of Children's Rights* (2011) at 403.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Id* at 401.

the implementation of the ACRWC at the regional level, it is vital for children's rights activism at domestic levels.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.¹⁹⁶ Since most African states are party to the ACHPR, its provisions can be applied in national courts through expansive interpretation.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.

¹⁹⁵ *Id* at 402.

¹⁹⁶ *Ibid.*

¹⁹⁷ *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

¹ Article 7(2) of the United Nations Convention on the Rights of the Child article 6 of the United Nations Convention on the Rights of the Child 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.

² *Ibid.*

³ *Ibid*; see also Children's Alliance Information Sheet, 2008. http://www.childrensrights.ie/sites/default/files/information_sheets/files/AllianceInfoQAUNCRC_0.pdf (accessed 20/06/2012)

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.⁶ 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.⁷

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

⁶ Grant E "Accountability for human rights abuses: Taking the universality, indivisibility, inter-dependency, and interrelatedness of human rights seriously" (2007) 32 *South African Yearbook of International Law* at 161.

⁷ *Ibid.*

society must work together to protect all children's rights irrespective of circumstances.

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