

**A comparative analysis of the implementation of the right to education in Africa: A case study of Democratic Republic of Congo and Nigeria**

Mini-dissertation submitted in fulfilment of the requirements for the LLM degree in Multidisciplinary Human Rights at the Faculty of Law, Centre for Human Rights, University of Pretoria

**By**

**JOLIE FIATA KINGIELA**

**16231504**

**Supervisor: Dr.TSHEPO MADLINGOZI**

07 December 2018

## **DECLARATION**

I declare that **‘the comparative analysis of the implementation of the right to education in Africa: A case study of Democratic Republic of Congo and Nigeria’** is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and are properly referenced.

Jolie Fiata Kingiela

Signed.....

Date.....

## **DEDICATION**

This dissertation is dedicated to my family, particularly to my husband Patrick Landu who has been with me throughout the whole journey of this Master's Degree.

This dissertation is also dedicated to my two sons Lens Winner Landu and Nathan Kingiela Landu, and to my beloved nephews and nieces. I am trusting that you too will bring a valuable contribution to this world. May this work inspire you to realise greatest things in the future. To all the children who suffer from violations of their fundamental right to education in Africa, particularly in DRC and Nigeria, may this study be an awakening of the human conscience to equip, protect, and defend you.

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I would like to extend my regards to the Centre of Human Rights for allowing me an opportunity to further my studies with their organisation. Importantly, I am grateful for the tremendous knowledge that I have acquired from this Master's Degree program.

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Finally to my lovely husband: your motivations, financial and moral support have taken me this far. I would have not made it without you. I am so grateful.

## **LIST OF ABBREVIATIONS**

ACHPR	African Charter on Human and Peoples' Rights
CSOs	Civil Society Organisations
DRC	Democratic Republic of Congo
ESCR	Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ICERD	International Convention on the Elimination of Racial Discrimination
NGOs	Non-Governmental Organisations
MDGs	Millennium Development Goals
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund

# Table of Contents

<b>DECLARATION.....</b>	<b>ii</b>
<b>DEDICATION.....</b>	<b>iii</b>
<b>ACKNOWLEDGEMENTS .....</b>	<b>iv</b>
<b>LIST OF ABBREVIATIONS .....</b>	<b>v</b>
<b>ABSTRACT.....</b>	<b>ix</b>
<b>CHAPTER ONE: INTRODUCTION .....</b>	<b>1</b>
1.1 Problem statement.....	1
1.2 Background.....	3
1.3 Literature review.....	6
1.4 Objectives of the study.....	8
1.5 Research questions.....	9
1.6 Research methodology.....	9
1.7 Significance of the study.....	9
1.8 Overview of chapters.....	9
<b>CHAPTER TWO: LEGAL PROTECTION AND MULTIDISCIPLINARY APPROACH TO THE RIGHT TO EDUCATION .....</b>	<b>11</b>
2.1 Introduction.....	11
2.2 Legal protection of the right to education.....	11
2.2.1 At the international level.....	11
2.2.1.1 Universal Declaration on Human Rights .....	12
2.2.1.2 International Covenant on Economic, Social and Cultural Rights.....	12
2.2.1.3 United Nations Convention on the Rights of the Child (UNCRC).....	14
2.2.1.4 International Convention on the Elimination of Racial Discrimination (ICERD).....	15
2.2.1.5 Convention on the Elimination of Discrimination against Women .....	15
2.2.2 At the regional level.....	16
2.2.2.1 African Charter on Human and Peoples’ Rights.....	16
2.2.2.2 African Charter on the Rights and Welfare of the Child.....	16
2.2.2.3 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa .....	17
2.2.3 At the domestic level.....	18
2.2.3.1 Democratic Republic of Congo.....	18
2.2.3.1.1 The Constitution of the Democratic Republic of Congo 2006.....	18
2.2.3.1.2 Framework law no. 14/004 of 11 February 2014 on national education .....	18
2.2.3.2 Federal Republic of Nigeria.....	19
2.2.3.2.1 The Constitution of the Federal Republic of Nigeria 1999.....	19

2.2.3.2.2 Compulsory, Free Universal Basic Education Act 2004.....	20
2.3 Multidisciplinary approach to education.....	21
2.3.1 Sociological approach.....	22
2.3.2 Anthropological approach.....	23
2.4 Conclusion .....	24
<b>CHAPTER THREE: THE NATURE OF THE OBLIGATIONS ON THE DEMOCRATIC REPUBLIC OF CONGO AND NIGERIA FOR THE EFFECTIVE REALISATION OF THE RIGHT TO EDUCATION.....</b>	<b>25</b>
3.1 Introduction.....	25
3.2 General obligation of the DRC and Nigeria in relation to right to education .....	25
3.2.1 Obligation to take measures to ensure enjoyment of right to education .....	25
3.2.1.1 Resource allocation and progressive realisation .....	25
3.2.1.2 Immediate obligations.....	27
3.2.2 Specific obligations to respect, protect, and fulfil.....	28
3.2.2.1 Obligation to respect the right to education .....	28
3.2.2.2 Obligation to protect the right to education .....	28
3.2.2.3 Obligation to fulfil the right to education .....	28
3.3 Other key obligations .....	29
3.3.1 Equality .....	29
3.3.2 International co-operation.....	29
3.3.3 Engaging with and respecting the rights of civil society .....	30
3.4 Obligations of actors other than state parties .....	31
3.4.1 Parents and communities .....	31
3.4.2 Non-Governmental Organisations (NGOs).....	32
3.5 Justiciability as a significant tool for effective protection of right to education: Drawing lessons from South Africa’s experience .....	32
3.6 Conclusion .....	35
<b>CHAPTER FOUR: THE IMPLEMENTATION OF THE RIGHT TO EDUCATION AND FACTORS THAT IMPEDE THE IMPLEMENTATION OF THIS RIGHT IN DRC AND NIGERIA.....</b>	<b>37</b>
4.1 Introduction.....	37
4.2 The core elements of the right to education.....	37
4.2.1 The availability of the right to education .....	37
4.2.2 The accessibility of the right to education .....	38
4.2.3 The acceptability of the right to education.....	38
4.2.4 The adaptability of the right to education .....	39
4.3 Factors that impede the implementation of the right to education in the DRC and Nigeria .....	39

4.3.1 Armed conflicts and war .....	39
4.3.1.1 Conflict and war in the DRC.....	39
4.3.1.2 Conflict and war in Nigeria.....	40
4.3.1.3 Impact of armed conflict and war in the field of education .....	40
4.3.2 Poverty .....	43
4.3.3 Bad governance.....	44
4.3.4 Mismanagement of public finances .....	44
4.3.5 High cost of education .....	45
4.3.6 Character of non-justiciability of the right to education before the courts .....	46
4.4 Conclusion .....	47
<b>CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS .....</b>	<b>49</b>
5.1 Conclusion .....	49
5.2 Recommendations.....	50
<b>BIBLIOGRAPHY .....</b>	<b>52</b>



## **ABSTRACT**

This dissertation is a comparative analysis of the implementation of the right to education in the Democratic Republic of Congo and Nigeria. The context is that of education in schools and other educational institutions.

The right to education is protected in numerous international and regional documents. This study will focus more on the International Covenant on Economic Social and Cultural Rights at the international level and the African Charter on Human and Peoples' Rights at the regional level. Article 17(1) of the African Charter states that every individual has the right to education. But article 13 of ICESCR provides more detail, which encourages state parties to make primary education free and compulsory for all. In addition, secondary education shall be made generally available and accessible for all, while higher education shall be made equally accessible for all.

The Constitution of Democratic Republic of Congo of 18 February 2006 and that of Nigeria of 1999 provide for and guarantee the right to education as the consequence of ratifying international and regional treaties.

This study has been motivated by the fact that despite the enforceability of the right to education under the DRC and Nigerian Constitutions, education is still not available or accessible to all; and primary education is not compulsory and free. These countries are facing almost the same challenges of implementing the right to education, as they are among African developing countries.

The challenges are due to several factors, some of which are poverty, bad governance and the mismanagement of finances, armed conflict and war, as well as the character of the non-justiciability of the right to education. Therefore, there is an increase in illiteracy and a weak economy in these countries. Because lifelong learning and education is a force that can drive a country to sustainable development; the best investment the DRC and Nigeria can give to their citizens is to educate them and give them a better life. This will result in the stability of both individuals and the country, otherwise the country itself is in danger.

To prevent this situation, the DRC and Nigerian governments must consider their international obligations to undertake steps for the full realisation of the right to education. They have to consider rendering this right justiciable and enforceable before the courts to allow individuals to seek reparation in cases of violation.

## CHAPTER ONE: INTRODUCTION

### 1.1 Problem statement

The constitutions of many African countries recognise the right to education, as they are parties to international and regional treaties. The Constitution of Democratic Republic of Congo of 18 February 2006 provides and guarantees the right to education in article 43.<sup>1</sup> The Nigerian Constitution of 1999 recognises education as a fundamental objective and directive principle of state policy in chapter II (Section 18).<sup>2</sup> However, this right is not realised in practice.

The implementation of the right to education remains a challenge in Africa particularly in DRC and Nigeria due to factors including: armed conflict and war, poverty, the high cost of education, bad governance, mismanagement of public finances and the character of the non-justiciability of the right to education before domestic courts.

In fact, since the era of colonisation until the present time, the DRC has never experienced durable peace. It is a vast country blessed with numerous minerals and resources such as diamonds, gold, cobalt, manganese, uranium and colton. These resources have inevitably attracted conflict and war, especially in the east of the DRC. In his analysis of the historical causes of conflict in the DRC, Nest argues that ‘the pattern of resource dependence established under Belgian colonial rule, combined with the absence of a democratically accountable regime during the independent era, caused the weakening and fragmentation of the Zairian state.’<sup>3</sup>

The DRC has lived with civil war that began in 1996 with the invasion by former president Laurent Kabila’s Alliance of Democratic Forces for the Liberation of Congo (AFDL).<sup>4</sup> Juma argues that ‘Congo has been at war with itself since its inception.’<sup>5</sup> This legacy is beholden to the successive opposition between groups that have exploited its natural wealth, but which has never found a way for pacific coexistence among themselves or with indigenous peoples.<sup>6</sup>

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<sup>1</sup> Constitution of Democratic Republic of Congo of 18 February 2006, article 43.

<sup>2</sup> Constitution of Federal Republic of Nigeria of 1999, section 18.

<sup>3</sup> E Lubunga ‘The impact of conflict in the Democratic Republic of Congo on women and their response to peace-building’ (vol. 2, no 2, 2016) 347-364. ISSN 2413-9467. Available at <http://dx.doi.org/10.17570/stj.2016.v2n2.a16> (accessed 23 March 2018).

<sup>4</sup> L Juma *Human Rights and Conflict transformation in Africa* (2003) Langa Research and Publishing Common Initiative Group 310.

<sup>5</sup> Juma (n 4 above) 310.

<sup>6</sup> Juma (n 4 above) 310

The second Congo war devastated the country in 1998.<sup>7</sup> This implicates seven foreign armies and is sometimes discussed or viewed as an ‘African World War’.<sup>8</sup> Despite the signing of peace accords in 2003, there was still fighting in the east of the country.<sup>9</sup> Many schools suffered pillaging and were destroyed during the war. As Ngadi asserts: “This has led to more than 4.6 million children out of school, including 2.5 million girls out of a total estimated 14.3 million girls nationwide.”<sup>10</sup> Accordingly, the years of armed conflict in the DRC have left an education system that is broken, with large numbers of children and youths not attending any educational institution.<sup>11</sup> The statistics compiled by Save the Children shows that ‘close to 7 million children are outside of an educational establishment’.<sup>12</sup>

In the DRC, boys and girls experience the same plethora of socio-economic obstacles to education.<sup>13</sup> However, according to the United Nations Educational, Scientific and Cultural Organisation, “71 percent of population lives below the poverty line and boys schooling takes priority over girls”.<sup>14</sup>

The Federal Republic of Nigeria has also, since its independence in 1960, experienced many civil conflicts between different ethnic groups and the two main religious groups, Muslims and Christians.<sup>15</sup> The situation is described thus: “In the 21st Century, Nigeria is dealing with sectarian communal violence between Muslims and Christians and with a bloody insurgency by a Muslim rebel group called Boko Haram”<sup>16</sup> that has abducted girls from schools. The kidnapping of these girls from school constitutes a clear violation of their rights to education. Indeed, Boko Haram’s *raison d’etre* is the prevention of Western or non-Islamic education given that when translated from Hausa, boko haram means “Western education is a sin”.

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<sup>7</sup> P Ngadi ‘Education in Democratic Republic of Congo’ (2016) *Legal Aid Board* available at <https://www.legalaidboard.ie/en/About-The-Board/Presse-Publications/Newsletter/Education-in-the-Republic-of-Congo.html> (accessed 26 March 2018).

<sup>8</sup> Ngadi (n 7 above).

<sup>9</sup> Ngadi (n 7 above).

<sup>10</sup> Ngadi (n7 above).

<sup>11</sup> G Wongan Nkhoma ‘Cursed by conflict: education in Democratic Republic of Congo’ (2012) *Open Society Initiative for Southern Africa* (OSISA) available at <http://www.osisa.org/education/blog/cursed-conflict-education-drc> (accessed 29 March 2018).

<sup>12</sup> Nkhoma (n 11 above).

<sup>13</sup> United Nations Educational, Scientific and Cultural Organisation ‘educate a child’ (2013) available at <https://educateachild.org/our-partners-projects/country/democratic-republic-congo> (accessed 29 March 2018).

<sup>14</sup> UNESCO (n 13 above).

<sup>15</sup> The History Guy: wars, conflicts and coups of Nigeria available at [https://www.historyguy.com/nigerian\\_wars\\_conflicts\\_coups.htm](https://www.historyguy.com/nigerian_wars_conflicts_coups.htm) (accessed 26 March 2018).

<sup>16</sup> The History Guy (n 15 above)

Consequently, we can note that conflicts and wars are factors that have a negative impact on all areas of a country, whether socially, economically or politically. For this reason, the present study focusses specifically on education. The analysis shows that in the DRC and Nigeria, armed conflicts and war are obstacles preventing individuals from benefitting from their full right to education. The implementation of the right to education by states becomes almost impossible in this context.

In light of the above problems, there is a dire need for the DRC and Nigerian governments to accomplish their obligations of achieving the right to education by intervening actively through their constitutional duties to implement this right for the benefit of the individuals living in DRC and Nigeria. In the DRC and Nigeria, the fees and other direct and indirect costs are the major obstacles for individuals to have access to education.

## **1.2 Background**

The right to education is a fundamental socio-economic right. Its importance is the fact that this right may bring transformation to the life of a person, and is especially relevant to Africa. This right is related to civil and political rights. The enjoyment of several civil and political rights such as freedom of information, freedom of expression is related to the level of education of a person.<sup>17</sup>

It is an enabling right which permits the exercise of other fundamental socio-economic rights such as the right to a standard of living adequate for the health and well-being of the person.<sup>18</sup> Education better enables individuals to prevent and manage health problems, and a substantial body of evidence demonstrates the impact of female education on child health and mortality rates.<sup>19</sup> The right to work as well as the right to participate in cultural life are linked to education in the sense that an illiterate person cannot lead a company or a political party unless the person learns relevant skills.

The right to education is regarded as a key to unlock other human rights. The accomplishment of this right depends on the realisation of other rights such as an adequate standard of living comprising the right to housing, clothing and food.<sup>20</sup>

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<sup>17</sup> M Nowak 'The right to education as human rights' in A Eide; Katarina Krouse & A Rosa (eds) *Economic, Social, and Cultural rights* 245

<sup>18</sup> Burgh (n 17 above).

<sup>19</sup> Burgh (n 17 above).

<sup>20</sup> K Hausler et al *Protecting education in insecurity and armed conflict: an international law handbook* (2010) 66 British Institute of International and Comparative Law.

Various treaties at the international level protect the right to education. These include article 26 of the Universal Declaration of Human Rights (UDHR),<sup>21</sup> article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>22</sup> and article 28(1) of the Convention on the Rights of the Child (CRC).<sup>23</sup> Moreover, at the regional level article 17(1) of the African Charter on Human and Peoples' Rights (ACHPR),<sup>24</sup> article 11 of the African Charter on the Rights and Welfare of the Child<sup>25</sup>, article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>26</sup> all relate to the right to education. The content of this right is that the state party shall make primary education free and compulsory, in addition to making education available and accessible to every child.<sup>27</sup>

According to Pranevičienė and Pūraitė,

“Various international organisations, (such as UNESCO, Economic and Social Council of United Nations) and forums (for example, World Education Forum in Dakar, Senegal, in 2000; World Conference on Education for All (EFA) in Jomtien (Thailand in 1990)) reaffirmed the human right to education and expressed the framework of obligations and implementation targets for all states”.<sup>28</sup> Actually the right to education, extended to all children, youth and adults; it is considered one of the most difficult social development projects.<sup>29</sup>

It is worth noting that education has to develop the human personality in totality and to strengthen the respect of human rights and fundamental freedom.<sup>30</sup> All member states that have ratified those international and regional treaties have to incorporate them into their domestic law as a logical consequence of the countries' commitment to adhere to those treaties.

In the context of the DRC, the Constitution of 18 February 2006 provides for and guarantees the right to education in article 43(1) that states: “everyone has the right to school education; it

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<sup>21</sup> Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly on 10 December 1948.

<sup>22</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR) adopted by UN General Assembly Resolution 2200A(XXI) of 10 December 1966 entered into force 3 January 1976.

<sup>23</sup> Convention on the Rights of the Child (CRC) adopted by UN General Assembly resolution 44/25 of 20 November 1989 entered into force 2 September 1990.

<sup>24</sup> African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3/rev. 5, 21 I.L.M 58 1982

<sup>25</sup> African Charter on the Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 1990

<sup>26</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ( Maputo Protocol), 11 July 2003, CAB/LEG/66.6 (Sept 13, 2000); 1 Afr Hum Rts L.J 40 (2001)

<sup>27</sup> UDHR article 26(1).

<sup>28</sup> B Pranevičienė & A Pūraitė 'Right to education in international legal documents' (2010) *Jurisprudencija: Mokslo darbu žurnalas* 121 (3):133-156 at 134.

<sup>29</sup> Pranevičienė & Pūraitė (n 28 above) 134.

<sup>30</sup> PG Chimombo 'issues in basic education in developing countries: an exploration of policy options for improved delivery' (Vol 8 no 1, 2005) 130 *Journal of International Cooperation in Education*.

is provided by teaching nationally.” In addition, article 43(5) provides that “Primary school is free and compulsory in public establishments.” Implementing the Constitution is the DRC framework law no. 14/004 of 11 February 2014 on national education, which also recognises the right to education.<sup>31</sup> Article 1 of this Act states: “this Act lays down fundamental principles relating to national education in accordance with Article 43 of the Constitution.”

Nigeria recognises education as a fundamental objective and directive principle of state policy in Section 18 of its Constitution of 1999. There are various State Edicts including the Child’s Rights Act 2003, the Compulsory, and Free Universal Basic Education Act 2004 that regulate education at federal and local level.

Section 15(1) of the Child’s Rights Act 2003 states that: “Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education”. Article 2(1) of Compulsory, Free Universal Basic Education Act 2004 provides for the free and compulsory education for all children of primary and junior secondary school age without discrimination.

However, practice shows that the implementation of the right to education is a problem in African countries especially in the DRC and Nigeria. Specifically, there is a dire lack of access to basic education; primary school is not free and compulsory; and there are many children who are out of school due to the inability of their parents to pay school fees.

With regard to this, we can say that many African countries including the DRC and Nigeria violate the implementation of the right to education. In the DRC, the violation of the right to education was demonstrated in the case of *Free Legal Assistance Group & Others v Zaire*.<sup>32</sup> Here, the African Commission found the violation of a number of rights, including the right to education. The Commission was compelled to declare that “The finding in the same case that the closure of universities and secondary schools constitutes a violation of the right to education under article 17 of the Charter also coincides with the related minimum duties of states and the principle against retrogressive measures.”<sup>33</sup> In Nigeria, in the case *SERAP v Federal Republic*

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<sup>31</sup> The DRC Framework law no.14/004 of 11 February 2014 of national education available at <http://www.leganet.cd/legislation/Droit%20Public/enseignement/Loi14.004.11.02.2004.htm.LOI-CADREno.14/004> du 11Fevrier 2014 (accessed 12 May 2017)

<sup>32</sup> *Free legal assistance group and others v Zaire* comm. no 25/89, 47/90, 56/91, 100/93 available at <http://www.escri-net.org/caselaw/caselaw.show.htm?doc-id=673100> (accessed 10 July 2017).

<sup>33</sup> Sisay Alemahu Yeshanew ‘Approaches to the justiciability of economic, social and cultural rights in the African Commission on Human and Peoples’ Rights: Progress and Perspectives’ (2011) 323 *African Human Rights Law Journal*.

of Nigeria and universal basic education commission<sup>34</sup>, the plaintiff's alleged a violation of the right to quality education.

The education system in the DRC has collapsed, submits Nkhoma, due to armed conflict resulting in large numbers of children and youth out of school.<sup>35</sup> Confirming this view is the fact that "The enrolment rates are still deplorable, at 40 percent overall for primary and secondary school, and attendance is even worse in rural areas of the east where ethnic conflict persists."<sup>36</sup> Access to education in the DRC is limited even in the biggest urban centres of the country because only about 30 percent of schools are public and even schools that claim to be open to all need financial supports from parents to survive themselves.<sup>37</sup>

The education system of Nigeria has suffered from a shortage of material and human resources such as lack of qualified teachers and a brain drain from the public sector due to political instability over the past decades.<sup>38</sup> As NUFFIC documents, "The Nigerian government therefore declared education as one of its priorities and has been working on the education system to provide access to all levels of education and improve the quality and efficiency of the entire system".<sup>39</sup> The right to education is a tool that empowers individuals to have the capacity of control over their journey of living and over the impact of the actions of the state over them.<sup>40</sup>

### 1.3 Literature review

Many authors have published articles about the right to education in Africa in general and particularly in the DRC and Nigeria. As a point of departure, Pierrot Ngadi, an activist and chairperson of Congolese Anti-Poverty Network, has critiqued the Congolese education system. He shows how the Congolese government failed to accomplish its obligation to protect,

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<sup>34</sup> *SERAP v Federal Republic of Nigeria and universal basic education commission ECW/CCJ/APP/08/08* available at <https://www.escri.net.org/caselaw/2010/socio-economic-rights-and-accountability-project-serap-v-federal-republic-nigeria> (accessed 23 October 2017).

<sup>35</sup> Nkhoma (n 11 above).

<sup>36</sup> Available at <https://www.northeastern.edu/cssh/internationalaffairs/undergraduate/peer-mentors/education-in-the-drc/> (accessed 29 March 2018).

<sup>37</sup> Available at <https://www.northeastern.edu/cssh/internationalaffairs/undergraduate/peer-mentors/education-in-the-drc/>.

<sup>38</sup> NUFFIC 'The Nigeria education system described and compared with the Dutch system' (2017), available at <https://www.nuffic.nl/en/home/copyright> (accessed 29 March 2018).

<sup>39</sup> The Nigeria education system (n 47 above).

<sup>40</sup> C Chitupila 'The right to education as a basis for human rights education: An interface between human rights and education' in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 163-185.

respect and fulfil the right to education of its citizens because of the armed confrontation and the high level of corruption in the country.<sup>41</sup>

Budoo's contribution is also very significant in demonstrating how states must allocate its resources to achieve the right to education. States have to adopt budgetary and legislative measures for the effectiveness of the right to education.<sup>42</sup>

Wongani Grace Nkoma in her article, "Cursed by conflict: Education in DRC", Nkoma raises a thought that attracts our attention saying: "the education systems are simply not providing the youth with skills they need to escape poverty – worse still, many are left out of the system altogether; and the situation in countries affected by conflict is even worse".<sup>43</sup>

Another valuable contribution is made by Hausler, Urban and McCorquodall who underline the importance of education and they show how the right to education is interrelated and interdependent with other human rights.<sup>44</sup>

Mashara's contribution towards this study is crucial in the fact that he compared the right to education protected in the UDHR and that protected under the ICESCR. He shows how the socio-economic rights including the right to education are more exposed in the ICESCR than those integrated in the UDHR<sup>45</sup>.

The examination of the problems and prospects concerning education in Nigeria forms the substance of Odiya and Omofonmwan's research. They demonstrate how education in Nigeria went through a myriad of problems comprising poor educational infrastructure, inadequate classrooms and a lack of teaching aids.<sup>46</sup>

Karimova, Giacca and Casey-Maslen<sup>47</sup> describe general aspects of the state's obligations under the International Covenant on Economic, Social and Cultural Rights. Specifically, they demonstrate how the right to education should be protected in the context of armed conflict or

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<sup>41</sup> Ngadi (n 7 above)

<sup>42</sup> A Budoo 'Adoption of a human rights approach to budgeting as a step to realise the right to education in Africa in A C Onuora Oguno et al (eds) *Education law, strategy policy and sustainable development in Africa Agenda 2063*' (2018) 31 Library of Congress.

<sup>43</sup> Nkhoma (n 11 above)

<sup>44</sup> K Hausler et al *Protecting education in insecurity and armed conflict: an international law handbook* (2010) British Institute of International and Comparative Law.

<sup>45</sup> L V Mashara *A Compilation of essential documents on the right to education* (2000) 1 vol 2 Centre for Human Rights

<sup>46</sup> LO Odiya & SI Omofonmwan 'Educational system in Nigeria problem and prospects' (2007) *Kamla-raj*.

<sup>47</sup> T Karimova et al *United Nations human rights mechanisms and the right to education in insecurity and armed conflict* (2014) Geneva Academy.



insecurity. They speak in a general manner but the DRC is among the examples quoted in their work.

Chitupila's<sup>48</sup> interesting perspectives are elucidated in the work "The right to education as a basic for human rights education: An interface between human rights and education". The pertinent issue addressed is how the right to education can be a basis for human rights. She shows the importance of the right to education as an empowerment right that allows individuals control over the passage of their existence and control over the effect of the state's action can have over them. In addition, the economically and socially marginalised can move out of poverty and participate meaningfully in their communities through education. The latter will strengthen them by giving them knowledge and the potential to overcome their inabilities.

This study, while recognising the efforts of the works of the writers mentioned above, amongst others, analyses the imperative of the implementation of the right to education in Africa particularly in the DRC and Nigeria.

#### **1.4 Objectives of the study**

The study aims at fulfilling the following objectives:

1. To investigate whether international treaties, regional treaties and national laws are effective instruments in guaranteeing the enjoyment of the rights to education in the DRC and Nigeria.
2. To assess the nature of the Congolese and Nigerian states' duties or obligations in implementing the right to education enshrined in their constitutions and legislation.
3. To analyse the factors that prevent the effective realisation of the right to education in the DRC and Nigeria.
4. To employ and apply a multidisciplinary approach encompassing sociological and anthropological approaches to solve the problem of the violation of the right to education.
5. To propose practical measures such as the enactment of legislation and other legal mechanisms designed to remedy the violation of the right to education. The purpose is to offer better protection of the right to education and to bring a positive change in the DRC and Nigeria.

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<sup>48</sup>C Chitupila "The right to education as basic for human rights education: an interface between human rights and education in F Viljoen (ed) (2012) Beyond the law: multidisciplinary perspective on human rights.

## **1.5 Research questions**

The study asks the following questions:

- Do individuals in African countries in general and in the DRC and Nigeria in particular really enjoy their right to education?
- What are the obligations of these countries as member states of international and regional conventions in ensuring the right to education?
- What are the factors or challenges that impede the implementation of the right to education in the DRC and Nigeria?

## **1.6 Research methodology**

The methodology of this study is mostly library research taking the form of a desktop literature review. Essentially, a comparative, critical and analytical method will be employed that allows for the analysis of the relevant legal framework and juxtaposing this against reality under the theme of the study. Ultimately, the purpose is the identification of the main problems associated with the violation of the right to education in the countries under discussion. A critical approach is apposite because it demands that we confront assumptions in order to delve deeper into the functioning of a specific society.<sup>49</sup> The assumption that the right to education is legislated for in the DRC and Nigeria is immediately mediated by the knowledge that civil conflict impairs the effective functioning of the state.

## **1.7 Significance of the study**

The content of the study will be limited to particular sources of information collected through library or internet research on the situation of the implementation of the right to education in Africa with a specific focus on the Democratic Republic of Congo and the Federal Republic of Nigeria.

## **1.8 Overview of chapters**

The study is structured in five chapters. The introduction that gives the overview of research topic and its aims presents chapter one, chapter two analyses the legal protection and multidisciplinary approach to the right to education. Chapter three examines the obligations of the DRC and Nigeria for effective realisation of the right to education. Chapter four deals with

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<sup>49</sup> R Cryer, T Hervey & B Sokhi-Bulley *Research Methodologies in EU and International Law* (2011) 71-73.

the implementation of the right to education and some factors that impede the implementation of this right in the DRC and the Federal Republic of Nigeria, whereas chapter five provides a conclusion and list of recommendations for effective realisation of the right to education.

## **CHAPTER TWO: LEGAL PROTECTION AND MULTIDISCIPLINARY APPROACH TO THE RIGHT TO EDUCATION**

### **2.1 Introduction**

The study and practice of human rights such as the right to education is dominated by legal analysis.<sup>50</sup> Indeed, the right to education is protected at international, regional and national levels in the form of binding treaties and statutes. This chapter seeks to extend the legal understanding of the human right to education by showing the contribution of a multidisciplinary approach. Before developing this approach, the study examines the legal protection of the right to education.

In this chapter, we can say that *prima facie*, by virtue of being parties to the international and regional instruments and the fact of incorporating the provisions of these treaties into domestic laws, the DRC and Nigeria can be said to have done well. However, it will be more important if they realise the provisions of these treaties in practice by taking into account the society in which the rights are exercised and the tradition and culture of the individuals. In order to contrast the legal dimension of the protection of the right to education against its multidisciplinary equivalents, it is necessary to elucidate the meaning and content of the right to education in law.

### **2.2 Legal protection of the right to education**

#### **2.2.1 At the international level**

The right to education is recognised at the international level in many binding and non-binding instruments including the Universal Declaration on Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966) and the United Nations Convention on the Rights of the Child (1989). These instruments are part of the United Nations treaty system and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which is an agency of the United Nations.<sup>51</sup> Pertinent, is the fact that fundamentally, the right to education is a socio-economic right.

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<sup>50</sup> M Freeman *Human rights: An interdisciplinary approach* (2002) 12.

<sup>51</sup> LV Mashara (n 45 above)

### **2.2.1.1 Universal Declaration on Human Rights**

The General Assembly of United Nations adopted and proclaimed the Universal Declaration on Human Rights on 10 December 1948.<sup>52</sup> The international community decided to establish a commitment to protect human rights and then in 1948, the UN set out to adopt the UDHR, which includes economic, social and cultural rights.<sup>53</sup> All member states are required to publish the text of UDHR and to cause it to be disseminated, read and exhibited mainly in schools and other educational institutions, regardless of the political situation of the countries or territories.<sup>54</sup>

The study underlines that the Universal Declaration on Human Rights was the first international instrument to express the right to education in its article 26, which provides for the right to education for everyone. The provision of education must be free and compulsory in elementary and fundamental stages and everyone must have equal access to higher education based on merit.<sup>55</sup> The underlying intention is for education to develop the human personality and to strengthen respect for human rights and fundamental freedoms.<sup>56</sup> It gives parents the priority to decide about the kind of education they desire for their children.<sup>57</sup> Although the UDHR is not a binding instrument, it is nonetheless considered morally binding.

The UDHR is good in the fact that it promotes understanding, tolerance and friendship between all nations, racial or religious groups and it will continue United Nations peacekeeping activities<sup>58</sup>.

### **2.2.1.2 International Covenant on Economic, Social and Cultural Rights**

Contrary to the UDHR, the ICESCR is a binding instrument, which encompasses a broader list of socio-economic rights than those included in the UDHR.<sup>59</sup> Considered a second generation and positive right, the state is obliged to intervene in order to ensure the fulfilment of the right to education. The right to education is referred to articles 13 and 14 of ICESCR.

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<sup>52</sup> UN General Assembly 'Universal Declaration of Human Rights' (1948, 217 A (III)) Available at <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 5 October 2018).

<sup>53</sup> KD Beiter *The protection of the right to education by international law: including a systematic analysis of article 13 of International Covenant on Economic, Social and Cultural Rights* (2006) 50 Martinus Nijhoff Publishers Leiden Boston.

<sup>54</sup> UN General Assembly (n 52 above) 1.

<sup>55</sup> Article 26(1) of UDHR.

<sup>56</sup> Article 26(2) of UDHR.

<sup>57</sup> Article 26(3) of UDHR.

<sup>58</sup> Article 26(2)(b) of UDHR

<sup>59</sup> Mashara (n 45 above) 2.

Article 13, basically, repeats the equivalent provision as found in the UDHR in obliging states parties to provide free and compulsory education in different forms of education.<sup>60</sup> It demands states parties to respect the liberty of parents to choose the kind of education they wish for their children to receive as well as the liberty of individuals to create educational institutions.<sup>61</sup> This article also promotes the liberty of parents to choose their children's school.<sup>62</sup>

The DRC and Nigeria, as parties to this instrument have to recognise that education be directed towards the full development of the human personality and the sense of one's dignity and it shall encourage the respect of human rights and fundamental freedoms.<sup>63</sup> They have to strengthen their education systems with the purpose of assisting every individual, especially those who have not completed the entire period of their primary education (the most fundamental education).<sup>64</sup>

The covenant encourages state parties to develop a system of school education at all levels; to establish an appropriate fellowship systems and to improve the material conditions of teaching staff.<sup>65</sup> It virtually goes without saying, but these aspects are of immense importance in the field of education for without them, the education sector would be paralysed.

Article 14 applies to those state parties, which, at the moment of ratification, were unable to provide free and compulsory education in their metropolitan territory and other territories within their jurisdiction. Therefore, it obliges those states to undertake appropriate measures in terms of a specific plan of action, within 2 years of becoming members.<sup>66</sup>

It is important to note that the Committee on Economic, Social, and Cultural Rights (Committee on ESCR) was created in order to govern the monitoring of the implementation of the ICESCR. It therefore has prime responsibility to oversee socio-economic rights, comprising the right to education.<sup>67</sup> The method by which it monitors socio-economic rights is ordinarily through the issuing of general comments.

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<sup>60</sup> Mashara (n 45 above) 2.

<sup>61</sup> Mashara (n 45 above) 2.

<sup>62</sup> Article 13(3).

<sup>63</sup> Article 13(2).

<sup>64</sup> Article 13(2)(d).

<sup>65</sup> Article 13(2)(e).

<sup>66</sup> Mashara (n 45 above) 2.

<sup>67</sup> Mashara (n 45 above) 3.

<sup>68</sup> Among the general comments adopted by this Committee, are general comment no 13, which speaks substantially about the provisions of article 13 of the ICESCR.

### **2.2.1.3 United Nations Convention on the Rights of the Child (UNCRC)**

In this convention, the right to education is provided in article 28. This article corresponds with article 13 of ICESCR.

It is interesting that the UNCRC does not absolutely copy the provisions of the international education rights law but develops it by adding a new dimension such as that “education should be child-centred and child-friendly in both a protective and an empowering way”.<sup>69</sup>

It is protective in the sense that education is considered to protect children against any system of cruel discipline in school, and is opposed to child labour, which can prevent the child’s development, and it holds certain special measures of protection guaranteeing the education of disabled children in particular.<sup>70</sup>

It is empowering in the sense that the provisions produce the power for more development, augmented self-determination and responsibility of the children and serve the guidance offered to the children rather than the parent’s role of deciding upon their children’s education.<sup>71</sup>

Article 28 of the CRC clearly proves this new dimension in demonstrating that the child is the bearer of the right to education and not referring to the traditionally recognised right of parents to consider their religious conviction when they choose the education of their children.<sup>72</sup>

It is important to note that article 28 of CRC has, nonetheless, a weak point in the sense that it does not always give hardest international protection to education.<sup>73</sup> The fact is, under the ICESCR, state parties have greater obligation at the three levels of education than under the CRC.<sup>74</sup> At the primary level, in terms of article 13(2)(a) of the ICESCR, state parties have the immediate obligation of ensuring free and compulsory education. Whereas, in article 28(1)(a)

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<sup>68</sup> Mashara (n 45 above) 3.

<sup>69</sup> M Verheyde *A commentary on the United Nation Convention on the Rights of the Child* (2006) 9 Martinus Nijhoff Publishers.

<sup>70</sup> Verheyde (n 69 above) 9.

<sup>71</sup> Verheyde (n 69 above) 9.

<sup>72</sup> Verheyde (n 69 above) 9.

<sup>73</sup> Verheyde (n 69 above) 10.

<sup>74</sup> Verheyde (n 69 above) 10.

state parties merely have the obligation to progressively realise (over an extended period of time) the right to education.<sup>75</sup>

At the level of secondary education, the obligation contained in the ICESCR in article 13(2)(b) requires states to develop diverse forms of secondary education which is stronger than the obligation contained in article 28(1)(b) of the CRC that simply encourages the development of various forms of secondary education.<sup>76</sup>

Moreover, with respect to higher education, the obligation enshrined in article 13(2)(c) of the ICESCR requires state parties to budget for the provision of free education. In contrast, article 28(1)(c) of CRC does not command states parties to introduce free higher education nor to have certain steps in place with a view to making to accessible to all..<sup>77</sup>

In regard to the discussion above, it is interesting to note that article 28 of the CRC may be redeemed by the saving clause enshrined in article 41 of the same convention which demands the application of the higher standard, whether it be the provision set in the national or international law if they are stronger than the provisions of the CRC.<sup>78</sup>

#### **2.2.1.4 International Convention on the Elimination of Racial Discrimination (ICERD)**

The ICERD demands that state parties eliminate racial discrimination in its all forms and ensure that everyone enjoys the full ambit of their economic, social, and cultural rights (including the right to education and training).<sup>79</sup>

The DRC and Nigeria as state parties to this convention have to guarantee the right to education to every student without discrimination based on race, colour, or nationality.

#### **2.2.1.5 Convention on the Elimination of Discrimination against Women**

The Convention on the Elimination of all forms of Discrimination against Women of 1979 also provides for women's right to education in article 10. This article states that state parties should take proactive measures to remove discrimination against women in ensuring the same educational opportunities as men.<sup>80</sup> These opportunities comprise of equal conditions for career and vocational guidance, for access to school and for the attainment of qualifications in all

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<sup>75</sup> Verheyde (n 69 above) 10.

<sup>76</sup> Verheyde (n 69 above) 10.

<sup>77</sup> Verheyde (n 69 above) 10.

<sup>78</sup> Verheyde (n 69 above) 10.

<sup>79</sup> Article 5(e)(v) of the ICERD 1965.

<sup>80</sup> Article 10 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).



kinds of educational institutions, with specific reference to access to the same curricula, the same examinations and teaching staff as men.<sup>81</sup>

It is worth noting that the CEDAW promotes the system of education that mixes both women and men. This is not limited to the classroom but goes further in other types of education such as functional literacy programmes of continuing education, sport and physical education, as well as educational information to assist in guaranteeing the health and well-being of families.<sup>82</sup>

### **2.2.2 At the regional level**

This study is limited to the African region. The right to education is recognised at the regional level in several regional human rights documents such as the African Charter on Human and Peoples' Rights (1981), African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

#### **2.2.2.1 African Charter on Human and Peoples' Rights**

The DRC and Nigeria have both incorporated the African Charter into their national laws. The African Charter provides for the right to education, for every individual, in article 17. It provides for this right without defining in detail the content of this right.<sup>83</sup>

It is necessary to note that article 17 of the Charter shall be interpreted by drawing inspiration from the provision of article 26 of UDHR and article 13 of ICESCR as stated in article 60 of African Charter, which provides:

“The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity [Constitutive Act of the African Union], the Universal Declaration of Human Rights ...”.

#### **2.2.2.2 African Charter on the Rights and Welfare of the Child**

The right to education is recognised in article 11 of the African Charter on the Rights and Welfare of the Child. It presents the object and duties of state parties with regard to accomplishing the full implementation of the child's right to education. It asks the state parties

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<sup>81</sup> Articles 10(a) and (b).

<sup>82</sup> Articles 10(e), (g) and (h).

<sup>83</sup> Article 17 of African Charter.

to consider the choice of parents/legal guardians of children to designate schools for their children.

The state parties have the duty to take all appropriate measures to guarantee that children be treated with humanity and respect because of their dignity. Moreover, state parties have a further duty to respond appropriately and give opportunities to children who drop out of school due to pregnancy without completing their education, to continue with it based on their own capacity.<sup>84</sup>

This article also includes the provision that permits the liberty of individuals and bodies to create educational institutions subject to certain requirements.<sup>85</sup>

### **2.2.2.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) also considers education as being particularly necessary for women and provides for this in article 12. It provides that state parties shall take all appropriate measures to remove discrimination against women and to ensure that equal opportunities are made accessible to women in the field of education and training.<sup>86</sup>

It is interesting that the Protocol corresponds with article 10 of CEDAW based on content. However, the Protocol does not express where this equality between women and men would be guaranteed as mentioned in article 10 of CEDAW.

Furthermore, the Protocol requires state parties to protect women, particularly the girl-child, against all forms of abuse including sexual harassment in schools and other educational establishments and provides for sanctions against such practices.<sup>87</sup>

This study observes that even while the DRC and Nigeria have ratified the Maputo Protocol and have integrated provisions of this Protocol into their national laws, for example, article 14 of the DRC's Constitution, there exists a disjuncture between the law and what occurs in practice. For example, although provision is made for equality between men and women by

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<sup>84</sup> Mashara (n 45 above) 5.

<sup>85</sup> Mashara (n 45 above) 5.

<sup>86</sup> Article 12(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>87</sup> Article 12(c) of the Protocol.

eliminating all forms of discrimination against women, men remain more advantaged than women concerning attendance at educational institutions.

### **2.2.3 At the domestic level**

The DRC and Nigeria recognise the right to education in their domestic law because of their formal acceptance of the international and regional treaties described above..

#### **2.2.3.1 Democratic Republic of Congo**

##### **2.2.3.1.1 The Constitution of the Democratic Republic of Congo 2006**

The Constitution of the DRC is the fundamental law governing the state. Since independence in 1960, it has been modified many times. The Congolese Constitution provides for socio-economic rights in chapter two, comprising the right to education in article 43(1). This provision proclaims that all persons throughout the national territory of the state have the right to a scholastic education.<sup>88</sup> Article 43(5) stresses that: “Primary education is compulsory and free in the public establishment”.<sup>89</sup>

However, compulsory and free primary education guaranteed by the Congolese Constitution is not realised in practice. Currently, Congolese primary education is not compulsory nor free and secondary and higher education is not accessible or available.

In 2003, the DRC was among the top five countries in the world with large numbers of students outside of formal schooling. UNICEF determined that 50 percent of primary school aged children were not attending school due to a lack of school fees.<sup>90</sup> The Congolese Constitution does not embrace the rights of individuals to revert to the courts for the violation of their right to education. This confirms that the right to education is not justiciable in the DRC.

##### **2.2.3.1.2 Framework law no. 14/004 of 11 February 2014 on national education**

The Congolese Framework Law on national education considers, on the one hand, the international documents that the DRC has ratified and on the other hand, the Constitution, in particular articles 43, 44 and 45 based on the right to education.

This framework law aims to create the important conditions for accessing school education by all, and thereby, the elimination of illiteracy.<sup>91</sup> It gives individuals the liberty to establish

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<sup>88</sup> Article 43(1) of Constitution of DRC.

<sup>89</sup> Article 43(5) of Constitution of DRC.

<sup>90</sup> Ngadi (n 7 above) 4

<sup>91</sup> Article 2 of Framework law no 14/004 of 11 February 2014.

national educational institutions and parents the liberty to place their children into an educational institution of their choice, irrespective of whether it is public or private.<sup>92</sup> It confirms the integrity and stability of the education of both boys and girls.<sup>93</sup>

This law also ensures compulsory and free primary education in public educational establishments;<sup>94</sup> and guarantees the right to equal education and equal opportunities for access to education for all, including people with disabilities.<sup>95</sup>

The Congolese Framework Law provides for the return to school of those who are out of school; encourages illiterate youths and adults to possess a basic knowledge of reading, writing, arithmetic and the environment.<sup>96</sup> Importantly, it combats discrimination and inequality in school education by allowing access to education for vulnerable and disadvantaged people in national education comprising of girls and women, orphans, displaced, pygmy people and disabled people.<sup>97</sup>

### **2.2.3.2 Federal Republic of Nigeria**

#### **2.2.3.2.1 The Constitution of the Federal Republic of Nigeria 1999**

The Constitution of Nigeria is the supreme law of the state. Its provisions have binding force on the authorities, and persons throughout the country. The rights incorporated in the second chapter of this Constitution comprise of the right to education. However, this right is declared non-justiciable and are simply objectives to guide government policies. To be sure, Nigeria's Constitution of 1999 does not ensure an enforceable right to education, but draws government's attention in chapter two as a Fundamental Objective and Directive Principle of State Policy.<sup>98</sup> Section 18 provides that government shall guide its policy with regard of guaranteeing the availability of equal and adequate educational opportunities at all levels.<sup>99</sup>

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<sup>92</sup> Article 3 of Framework law no 14/004 of 11 February 2014.

<sup>93</sup> Article 4 of Framework law no 14/004 of 11 February 2014.

<sup>94</sup> Article 12(1) of Framework law no 14/004.

<sup>95</sup> Article 12(2) of Framework law no 14/004.

<sup>96</sup> Articles 19(1) and (2) of Framework law no 14/004.

<sup>97</sup> Article 33 of Framework law no 14/004.

<sup>98</sup> AJ Isokpan & E Durojaye 'Impact of the Boko Haram insurgency on the child's right to education in Nigeria' *PER / PELJ* 2016(19) - DOI <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1299> at 6.

<sup>99</sup> Isokpan & E Durojaye (n 98 above) 6.

The Nigerian Constitution provides free, compulsory and universal primary education. Furthermore, it provides free secondary and university education and a free adult literacy programme.<sup>100</sup>

#### **2.2.3.2.2 Compulsory, Free Universal Basic Education Act 2004**

This law recommends the government of every state of Nigeria to provide compulsory, free and universal basic education for all Nigerian children of primary and junior secondary school age.<sup>101</sup> This Act is considered important because it serves as the foundation on which the continuation of higher education is constructed, and is therefore the centre of successful educational policies in Nigeria.<sup>102</sup>

Article 6 of this Act governs the hearing and determination of cases arising in terms of section two from the Magistrates' Court or any other state court and the imposition of a specified punishment.<sup>103</sup> Nigeria adopted a Universal Basic Education program as a strategy to join the education for all agenda and the Millennium Development Goals with respect to the education of children.<sup>104</sup>

By analysing the Congolese Framework Law on national education and the Nigerian Compulsory, Free Universal Basic Education Act, it is interesting to note that the two pieces of legislation have some similarities in providing for and guaranteeing compulsory and free primary education. They underline the obligations of teachers within the establishments, with sanctions to punish inadequate or incompetent behaviour among teachers and administrators towards children within the school. Nevertheless, the difference is at the level of the justiciability of the right to education. The Nigerian Compulsory, Free Universal Basic Education Act 2004 allows access to courts in the case of the violation of section two that deals with compulsory and free primary education. Specifically, Article 6 states: "The Magistrates' Court or any other state court of competent jurisdiction shall have jurisdiction to hear and determine cases arising under section two of this Act and to impose the punishment specified".<sup>105</sup> This means that if the public educational establishment or school imposes the

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<sup>100</sup> Isokpan & Durojaye (n 98 above) 6.

<sup>101</sup> Article 2(1) of the Compulsory, Free Universal Basic Education Act 2004.

<sup>102</sup> Isokpan & Durojaye (n 98 above) 6.

<sup>103</sup> Article 6 of the Compulsory, Free Universal Basic Education Act 2004.

<sup>104</sup> Isokpan & Durojaye (n 98 above) 7.

<sup>105</sup> Article 6 of the Compulsory, Free Universal Basic Education Act 2004.

payment of school fees, pupils or their parents have the right to seek the court, to bring the affair to court. This is not expressed in the Congolese Framework Law on national education.

The provisions of the international and regional documents that protect right to education does not have a practical impact on the DRC and Nigerian Constitutions because this right is not justiciable in the DRC and in Nigeria it is merely the objective and directive principle of state policy. These states are not complying with the international Covenant that protect the right to education.

Even in those the states where education is recognised as a human right and they wish to comply with the international agreement protecting this right, there is a failure to provide and improve education in human right terms.<sup>106</sup> This is the reason that many states ignore the requirements of the right to education. Too often, states deny this right by invoking the fact that the nature of the right is such that it is only progressively realisable, despite the fact that the right to education imposes important positive duties on states.<sup>107</sup>

### **2.3 Multidisciplinary approach to education**

The human right to education is protected under several international, regional as well as national laws. However, in practice, the right to education in the DRC and Nigeria is not realised. This is due to the non-consideration of society and the culture from legislators when it comes to making laws. They do not take into account the society in which that law will be exercised. As Freeman admits: “law will continue to have an important part to play in the field of human rights, but human rights cannot live by law alone”.<sup>108</sup>

It is indisputable that lawyers and activists of human rights will benefit by extending the legal approach by relying on contributions from other disciplines, such as sociology and anthropology.<sup>109</sup>

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<sup>106</sup> Beiter (n 53 above) 3.

<sup>107</sup> Beiter (n 53 above) 3.

<sup>108</sup> M Freeman ‘On the interactions between law and social science in the understanding and implementation of human rights’ in F Viljoen (ed) *Beyond the law: Multidisciplinary perspectives on human rights* (2012) Pretoria University Law Press.

<sup>109</sup> Freeman (n 108 above) 3.

### 2.3.1 Sociological approach

Sociology is the study of the relationship between men and their environment. Educational sociology is the study of the relationship between education and society in dealing with the problem that concerns both.<sup>110</sup>

According to Roucek “educational sociology is sociology applied to the solution of fundamental educational problems.”<sup>111</sup> More specifically, “Educational sociology represents an attempt to make the principles and methods of sociology available and applicable to education. In addition, it focuses upon special educational problems which depend for their solution on sociological principles”.<sup>112</sup> For example, the issue of inequality and violence in educational institutions. This issue does not necessarily require one to attend court to resolve the matter. The sociological approach can help to understand the reasons for numerous problems arising in educational establishments and find strategies to settle them.

The sociological approach to human rights, including the right to education, is powerful in demonstrating through a social process how rights are constructed and violated in specific situations in society.<sup>113</sup>

It has been said that “Rights can be constructed through the interplay of domestic and international forces and will be reinforced as long as otherwise powerless social actors find no other alternative but to engage in rights talk”.<sup>114</sup> Sociology can be thus considered the best-equipped discipline to examine the social forces that emphasise the beginning of the right to education and social struggles from which that right comes into existence.<sup>115</sup>

The sociologist’s first task is to familiarise themselves with lawyers, their claims and the social processes by which rights are constructed. This involves comprehending how rights are universally applicable albeit the social and cultural distinctiveness in the world.<sup>116</sup> Sociology

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<sup>110</sup> S Pattanaik & S Harichandan ‘Sociological foundation of education’ available at [dceutkal.ac.in/Syllabus MA-Education/Paper-2pdf](http://dceutkal.ac.in/Syllabus MA-Education/Paper-2pdf).

<sup>111</sup> Pattanaik & Harichandan (n 110 above) 13.

<sup>112</sup> FD Thrasher ‘The sociological approach to educational problems’ (vol.9, no 8, 1936) *The Journal of Educational Sociology* 469-483.

<sup>113</sup> J Menga ‘How sociology enriches human rights: The case study of Malawi’s first openly-gay couple’ in Viljoen (ed) (n 108 above) 98.

<sup>114</sup> D Short *Researching and studying human rights: Interdisciplinary insight* (2015) 8 SAS-Space.

<sup>115</sup> Short (n 114 above) 8.

<sup>116</sup> Short (n 114 above) 8.

also enlightens one about how state violation of the right to education is institutionalised and normalised.<sup>117</sup>

### **2.3.2 Anthropological approach**

Anthropologists are experts in studying local cultures, and they are able to clarify the existing gap between international human rights and the manner of living everyday life.<sup>118</sup> A relevant example is that of article 13(2)(b) of the ICESCR that requires state parties to join this Covenant and make secondary education available and accessible to all. In this case, anthropologists will show that in some cultures that are in inherent contradictions between the right to education and the provision that forbids girls from attending school in order to undertake household chores. Anthropologists therefore accept that access of education to all is limited.

Despite the international and regional instruments that prohibit discrimination against women in all domains including education (such as CEDAW and the Maputo Protocol), the right to education, which is a fundamental human right, is often denied to girls in certain African countries including the DRC and Nigeria. The late former Secretary General of the UN, Kofi Annan said that in Africa when families are about to make a choice, because of limited resources, of educating either a girl or a boy, they always chose a boy to attend school.<sup>119</sup>

Generally, rural Nigerian parents prefer to invest in the son's education rather than their daughter's.<sup>120</sup> "Many state and local governments do not take cognizance of the particularities of the girl-child in the provisions for education for the citizenry".<sup>121</sup> This is not a problem for Nigeria only. In the DRC, among the problems that rural girls are facing regarding education is the inconsistency of the application of government policies on education.<sup>122</sup>

According to UNICEF, this has resulted in non-access to education for many girls. Therefore, access to education for girls particularly in the Northern states of Nigeria remains low.<sup>123</sup> Cultural and religious misinterpretations are among the principle issues that prevent girls from

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<sup>117</sup> Menga (n 113 above) 98.

<sup>118</sup> Freeman (n 108 above) 10.

<sup>119</sup> G C Offorma 'Girl-child education in Africa' (Conference Paper) July 2009.

<sup>120</sup> G Isijeh & O Odoro 'Issues in girl-child education in Nigeria: implication for library and information support' (vol 9, no 2, 2011) *Ije Centre for Psychological studies and Services* 4139.

<sup>121</sup> Isijeh & Odoro (n 120 above) 4142.

<sup>122</sup> K Lubaba 'Traditional practices and girl education in rural DRC: Exploring the voices of Luba girls' (2017) (dissertation at Nelson Mandela Metropolitan University).

<sup>123</sup> Isijeh & Osayande (n 120 above) 4142.



attending school.<sup>124</sup> Because nearly 70 percent of the Nigerian population are living under the poverty line, girls have to work on the streets for the survival of the family.<sup>125</sup>

It is worth noting that this approach views human rights as an important instrument that serves as an ethical commitment to peoples and cultures that are threatened.<sup>126</sup> Freeman argues that “Notwithstanding anthropology’s emphasis on culture, it may go beyond the individualism of the Human Rights, discourse to excavate the structures that impede human rights implementation”.<sup>127</sup>

## **2.4 Conclusion**

This chapter concludes in noting that the international and regional treaties have an impact in the Congolese and Nigerian. For example, article 13(1) of ICESCR has been integrated into article 43 of the Constitution of the DRC and in section 18 of Constitution of Nigeria. However, these treaties have no impact when it comes to practice and implementation.

International and regional instruments as well as domestic laws are not effective in protecting and ensuring the enjoyment of the right to education. The individuals have not enjoyed their right to education as established in the Constitution. The reason for this is that the specific society in which the right is applied, is not considered. To be sure, most women and girls are affected by their African culture where women are not considered suitable for education, but rather to be housekeepers. Moreover despite the numerous provisions of the CEDAW and Maputo Protocol that protect the rights of women, discrimination against women and girls regarding access to education persists.

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<sup>124</sup> UNICEF ‘Girls education: Nigeria country office’ (2007) available at <https://www.unicef.org/wcaro/english/WCARO-Nigeria-Factsheets-GirlsEducation.pdf> (accessed 5 October 2018).

<sup>125</sup> UNICEF (n 128 above).

<sup>126</sup> Short (n 114 above) 10.

<sup>127</sup> Freeman (n 108 above) 13.

## **CHAPTER THREE: THE NATURE OF THE OBLIGATIONS ON THE DEMOCRATIC REPUBLIC OF CONGO AND NIGERIA FOR THE EFFECTIVE REALISATION OF THE RIGHT TO EDUCATION**

### **3.1 Introduction**

The fact that the DRC and the Federal Republic of Nigeria have acceded to the international and regional treaties referred to above, makes them bound by a series of obligations relating to the right to education guaranteed under these instruments.

As discussed above that the right to education has not yet been implemented in the DRC and Nigeria. Instead, the governments of these countries in most cases violate this right. Currently, Congolese and Nigerian individuals do not enjoy their right to education due to factors that constitute obstacles to its protection and realisation. Therefore, on the one hand, the Congolese and Nigerian states must respect their international obligations to redress that situation and on the other side, there must be responsibility and cooperation from other actors for the realisation of this right, including parents, communities and civil society organisations.

### **3.2 General obligation of the DRC and Nigeria in relation to right to education**

#### **3.2.1 Obligation to take measures to ensure enjoyment of right to education**

##### **3.2.1.1 Resource allocation and progressive realisation**

Article 1 of the African Charter requires states to take measures such as ‘legislative and other measures’ for the effective realisation of the rights contained therein. It is argued that this should be interpreted to mean the introduction of other measures that are considered as non-legislative steps, such as financial steps that African states including the DRC and Nigeria have to adopt to realise the rights protected under the African Charter.<sup>128</sup> In addition, the African Commission has approved rules and principles, which explain budgetary allocation of resources in conformity with article 45(1)(b) of the African Charter and comprises of the Pretoria Declaration on Economic, Social, and Cultural Rights of 2004. These rules and principles are considered as one of the steps to take for giving effect to the rights comprising the right to education.<sup>129</sup>

It is important to note that despite the fact that the African Charter does not precisely state that African states must adopt budgetary measures for the effectiveness of the rights therein, the

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<sup>128</sup> Budoo (n 50 above) 31.

<sup>129</sup> Budoo (n 50 above) 31.

interpretation given to the words ‘other measures’ means that the African Charter demands states to allocate effective resources.<sup>130</sup>

Under the African Charter, state parties have the obligation to take measures to guarantee the enjoyment of economic, social and cultural rights, including the right to education in article 1 and this right must be available, adequate, accessible or affordable, and acceptable.<sup>131</sup>

Article 1 of the African Charter on the Rights and Welfare of the Child, constrains state parties to take “necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.”<sup>132</sup> The African Children’s Committee has also included a requirement that a budgetary allocation be adopted as another measure to realise the children’s right to education at the domestic level.<sup>133</sup>

The fundamental obligation of state parties in terms of the ICESCR is to take steps with the purpose of progressively achieving the full realisation of rights, including the right to education.

The realisation of the right to education in a progressive manner, as mentioned in article 2(1) of ICESCR should not be understood as allowing state parties to negate their obligations of all meaningful content.<sup>134</sup> The progressive realisation of the right to education means that the obligations that state parties have are specific and continuing to move as actively and operatively with regard to the full realisation of this right.<sup>135</sup>

The Congolese and the Nigerian governments are under a general obligation in respect of the right to education contained in the African Charter to guarantee at a minimum the following key elements: the availability, accessibility and acceptability of this right.

The right to education as a second generation right is by its very nature positive and must be progressively realised. For example to implement this right, it requires finances from the Congolese and Nigerian governments to buy the land on which they will build the schools, buy

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<sup>130</sup> Budoo (n 42 above) 31.

<sup>131</sup> African Charter article 1.

<sup>132</sup> Budoo (n 42 above) 32.

<sup>133</sup> Budoo (n 42 above) 32.

<sup>134</sup> United Nations Committee on Economic, Social, and Cultural Rights (UNCESCR) ‘General Comment no 13: the right to education (article 13 of the Covenant) (1999), E/C.12/1999/10 available at <http://www.refworld.org/docid/4538838c22.html> (accessed 4 August 2018).

<sup>135</sup> UNCESCR General Comment no 13 (n 134 above).

books and other school materials. The enjoyment of this right is progressive; entailing that it will take time to put together those requirements.

### **3.2.1.2 Immediate obligations**

While article 2(1) of ICESCR presents the general obligations of progressive fulfilment, the ESCR Committee and scholars have demonstrated that it is not every aspect of a specific right that is progressively realisable.<sup>136</sup> The right to education is a right that has to be realised through a series of precise obligations that vary. In other words, this means it can be realised progressively or immediately depending to the context.<sup>137</sup>

According to the Committee on ESCR, article 13(2)(a) concerning free and compulsory primary education to all, and article 13(3) concerning the liberty of parents to choose the kind of education for their children are the provisions which seem to be applied immediately by judicial and other organs in several legal systems at national level.<sup>138</sup> It is interesting that these obligations still apply even in an economic crisis period and a situation of armed conflict.<sup>139</sup>

It is necessary to note that some provisions have been applied immediately. As such, the obligation to ‘take steps’ has the immediate effect to take reasonable steps and use ‘all appropriate means’.<sup>140</sup> These include, among others, “legislative measures such as the incorporation of the ICESCR into domestic law and provision of judicial remedies”, as well as administrative, financial, educational or social measures.<sup>141</sup>

It is very important to adopt legislative measures because in some cases, it can be difficult to condemn discrimination without the foundation of legislation for the necessary measures. For instance, with respect to the implementation of the right to education, in the nature of a socio-economic right, requiring progressive realization, the state must ensure that it allocates sufficient finances to build schools and buy school materials as mentioned above. However, to take steps is not subject to progressive realization. After ratifying the treaty, the state parties must be quick to define the kind of steps they have to adopt and those steps must be useful and concrete. States must just show their will to implement the right to education by making a plan

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<sup>136</sup> Karimova et al (n 47 above).

<sup>137</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) ‘General Comment no 3: the nature of states parties’ obligations (article.2, para. 1 of the Covenant)’ (1990) E/1991/23 available at <http://www.refworld.org/docid/4538838e10.html> (accessed 4 August 2018).

<sup>138</sup> UNCESCR General Comment no 3 (n 141 above).

<sup>139</sup> Karimova et al (n 47 above) 16.

<sup>140</sup> Karimova et al (n 47 above) 17.

<sup>141</sup> Karimova et al (n 47 above) 17.

to make primary school compulsory and free, to take legislative measures and other measures such as to guarantee access to public establishments without any discrimination is of the immediate application.

### **3.2.2 Specific obligations to respect, protect, and fulfil**

Similarly with all human rights, the right to education establishes three types of obligations on states parties such as the obligation to respect, protect, and fulfil. In addition, the obligation to fulfil integrates both an obligation to facilitate and an obligation to provide.<sup>142</sup>

#### **3.2.2.1 Obligation to respect the right to education**

The obligation to respect requires the DRC and Nigeria to refrain from measures that impede the enjoyment of the right to education.<sup>143</sup> They have to respect the freedom, autonomy and liberty of action of the students as holders of this right.<sup>144</sup> The violation of this right constitutes blatant disrespect for the right to education.

#### **3.2.2.2 Obligation to protect the right to education**

The obligation to protect requires both of the countries under the study to take measures that stop third parties from depriving individuals of the enjoyment of the right to education<sup>145</sup> by legislating and providing effective remedies.<sup>146</sup> The Nigerian government has failed to prevent Boko Haram from attacking children while they were in a place of learning.

#### **3.2.2.3 Obligation to fulfil the right to education**

The obligation to fulfil demands that the DRC and Nigeria allow and facilitate individuals and communities to enjoy the right to education.<sup>147</sup> It is interesting to note that, “As a general rule, DRC and Nigeria are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.”<sup>148</sup>

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<sup>142</sup> UNCESCR General Comment no 3 (n 137 above)

<sup>143</sup> UNCESCR General Comment no 3 (n 137 above)

<sup>144</sup> CA Odinkalu ‘The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights in V Gauri & D M Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 187 Cambridge University Press.

<sup>145</sup> UNCESCR General Comment no 3 (n 141 above).

<sup>146</sup> Odinkalu (n 144 above) 187.

<sup>147</sup> UNCESCR General Comment no 3 (n 137 above).

<sup>148</sup> UNCESCR General Comment no 3 (n 137 above).

It is important to note that DRC and Nigeria are the bearers of obligations towards education. A failure to fulfil these obligations is a violation of human rights for which they are accountable.<sup>149</sup>

### **3.3 Other key obligations**

#### **3.3.1 Equality**

Article 1 of the UDHR states that, “all human beings are born free in dignity and rights”. The principle of universality of human rights entails that all individuals shall enjoy their human rights equally in the same way.<sup>150</sup> Despite this declaration and principle, the inequality continues to exist among groups of individuals.

In most African traditional cultures, boys are considered more “valuable” than girls. Therefore, boys have priority for education whereas girls are considered destined for housekeeping.

It is worth stating that the Congolese and Nigerian states have the obligation to guarantee equality in accessing educational institutions for all citizens particularly for the vulnerable and disadvantaged groups by eliminating discrimination in all its forms.

The World Declaration on Education For All underlines that women and girls must be prioritized with respect to access to quality education. DRC and Nigeria have the obligation to remove every obstacle that may hinder women and girls’ active participation in education.<sup>151</sup>

#### **3.3.2 International co-operation**

The ICESCR specifies that state parties undertake to take steps through international assistance and co-operation (particularly economic and technical) to the maximum of their available resources with the purpose of the fulfilment of the realisation of the economic, social and cultural rights, including the right to education.<sup>152</sup>

Paragraph 56 of General Comment no 3 clarifies the importance of this international assistance and co-operation towards the right to education in referring to article 10 of the World

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<sup>149</sup> Beiter (n 53 above) 3.

<sup>150</sup> J Donnelly ‘The relative universality of Human Rights’ (vol 29, no 2007) *Human Rights Quarterly* 282.

<sup>151</sup> Article 3(3) of World Declaration on Education for all.

<sup>152</sup> Article 2(1) of ICESCR.

Declaration on Education for all that reveals the need for international solidarity in the area of education.<sup>153</sup>

Furthermore, the CRC underlines that states parties shall promote and strengthen international co-operation in issues relating to education, particularly with a view to achieving the amelioration of ignorance and illiteracy throughout the world and give access to scientific and technical knowledge as well as modern teaching methods.<sup>154</sup>

The DRC as well as Nigeria have the obligation to engage in international co-operation. They must ask for support from the world community of the richer nations in the case of a lack of resources for the implementation of the right to education.<sup>155</sup> Richer nations are called upon to assist poorer nations to solve educational problems. They are supposed to provide financial and technical resources in addition to their expertise so as to decrease the gap existing between educational facilities in industrialised and developing countries.<sup>156</sup>

### **3.3.3 Engaging with and respecting the rights of civil society**

A starting premise relating to engagement with CSOs is that such engagement is “by definition a political act” in transpires due to the acknowledgement that “CSOs are actors in their own right”.<sup>157</sup> Civil society emerges as a clear social actor in many parts of the world, but it is also very diverse in nature and composition. For this reason, their definitions vary considerably, depending on differing conceptual paradigms, historical origin and the context of the state.<sup>158</sup>

According to the World Bank, civil society is “the wide array of non-governmental and not for profit organisations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations”.<sup>159</sup> Civil society comprises of family and private sphere, and considered as a ‘third sector’ of society and differs from government and business.

There are many civil societies with a role to play in the educational sector, but this study has its particular interest in family (parents), communities and Non-Governmental Organisations.

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<sup>153</sup> KD Bieter *The protection of the right to education by international law* (2005) Martinus Nijhoff Publishers 381.

<sup>154</sup> Article 28(3) of CRC.

<sup>155</sup> Bieter (n 153 above) 381.

<sup>156</sup> Beiter (n 153 above) 43.

<sup>157</sup> de Weijer & Kilnes “Strengthening civil society? Reflections on international engagement in fragile states” (2012) European Centre for Development Policy Management.

<sup>158</sup> World Bank ‘defining civil society (2013) available at <https://go.worldbank.org/4CEFW046KO> (accessed 27 September 2018).

<sup>159</sup> World Bank ‘defining civil society (n 158 above)

Engaging with civil society demands ‘smart strategies’ which should be an art rather than a science.<sup>160</sup> These strategies include an understanding of the political economy and the context of conflict. This is essential to engaging with civil society.<sup>161</sup>

The authorities of most African states prevent the freedom of civil society. To redress this situation, the Congolese and Nigerian government have the obligation to engage with and respect the rights of civil society actors such as NGOs<sup>162</sup> so that in return these civil societies should strengthen their contribution to implementing the right to education.

### **3.4 Obligations of actors other than state parties**

The Congolese and Nigerian states need the active support and engagement of other actors to achieve their obligations with regard the right to education that includes parents, communities and civil society organisations.<sup>163</sup>

It is important to note that for the right to education to be durable and well established, the responsibility of parents and communities are required. Human rights are not merely a legal entitlement accomplished only from legislation and policy; “they are also standards and principles that directly affect the day-to-day relationship between individuals in their communities”.<sup>164</sup>

#### **3.4.1 Parents and communities**

Parents have the fundamental responsibility of giving children access to education. In the absence of parental commitment, the possibility of children acquiring access and sustaining an engagement in education is seriously reduced.<sup>165</sup>

Parents have various obligations to provide an environment in the early years that guarantees the preparation of a child for the beginning of school. Parents must also ensure that local traditions and customs do not stop their children from attending school.<sup>166</sup>

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<sup>160</sup> de Weijer & Kilnes (n 157 above) 26.

<sup>161</sup> de Weijer & Kilnes (n 157 above) 26.

<sup>162</sup> *Notes sur la situation des défenseurs des droits économiques, sociaux et culturels, 4e session du Comité des droits économiques, sociaux et culturels*. Available at [www.fidh.org/fr/regions/afrique/rdc/Note-sur-la-situation-des-droits](http://www.fidh.org/fr/regions/afrique/rdc/Note-sur-la-situation-des-droits) (accessed 18 August 2018).

<sup>163</sup> United Nations Educational, Scientific and Cultural Organisation ‘A human rights based approach to education for all: A framework for the realisation of children’s right to education and rights within education’ (2007) 87 United Nations Children’s Fund available at <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf> (accessed 16 August 2018).

<sup>164</sup> UNESCO (n 163 above) 87.

<sup>165</sup> UNESCO (n 163 above) 88.

<sup>166</sup> UNESCO (n 163 above) 89.



It is necessary that children do not spend their time only with the family, but also in the communities whose value, culture and level of commitment have an important effect on their existence.<sup>167</sup> Local communities have a role to play for making an appropriate environment that will achieve the right to education for every child.<sup>168</sup>

### **3.4.2 Non-Governmental Organisations (NGOs)**

NGOs play diverse roles in providing education. Certain NGOs are initially involved in advocacy aimed at persuading government to accomplish their responsibility to provide education for all.<sup>169</sup> Some support the improvement of the quality of government provision using the adoption of school programmes. Others are involved directly in education provision first to provide educational opportunities for children excluded from government establishments.<sup>170</sup> Among the children that are often identified as being most excluded from government provision there are street children, orphans, child soldiers, demobilised children in post-conflict areas, pastoralists, indigenous groups, ethnic, religious and language minority groups, the disabled, refugees, and child labourers.<sup>171</sup> NGO education providers target them.<sup>172</sup> NGOs have the responsibility to help those children who have dropped out of school to study in order for them to be useful in society.

It is important to recognise that NGOs are regarded as alternative agencies, which are helpful in promoting awareness, change and improvement in society. They are concerned with decreasing poverty and promoting sustainable development.<sup>173</sup> They are in a position to provide social services to different parts of society where the Congolese and Nigerian governments fail to provide such services as free education.<sup>174</sup>

### **3.5 Justiciability as a significant tool for effective protection of right to education: Drawing lessons from South Africa's experience**

Justiciability refers to the ability of rights enforced by a judicial or quasi-judicial branch as well as the creation of the procedures to litigate and remedy violations. The justiciability of the right

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<sup>167</sup> UNESCO (n 163 above) 90.

<sup>168</sup> UNESCO (n 163 above) 91.

<sup>169</sup> P Rose 'NGO provision of basic education: alternative or complementary service delivery to support access to the excluded?' (2009) Routledge 220 available at <https://doi.org/10.1080/03057920902750475> (accessed 27 September 2018).

<sup>170</sup> Rose (n 169 above) 220.

<sup>171</sup> Rose (n 169 above) 220.

<sup>172</sup> Rose (n 169 above) 220.

<sup>173</sup> J H Vishwakarma & S Sthapak 'A review paper on the role of NGO's in educational development' (Vol 2, 2017) *International Journal of Advanced Educational Research* 150-152.

<sup>174</sup> Vishwakarma & Sthapak (n 173 above) 150.

to education is one of the elements that show its effective protection. The judiciary plays a significant role in the protection of human rights where there has been a failure to defend basic socio-economic rights, such as the right to education. Where the legislative and executive institutions have completely failed to accomplish their duties, then the judiciary has the responsibility to intervene.<sup>175</sup>

Judicial and quasi-judicial branches in national as well as in international jurisdictions have always examined the compatibility, justifiability or reasonableness of states in complying with their obligations relating to socio-economic rights, which includes the right to education.<sup>176</sup> Therefore, the judiciary is a significant tool for evaluating the implementation of the right to education or lack of it at the domestic level.

It is necessary to note that the right to education means that if there are effective remedies that are available to redress a violation, they must be employed,<sup>177</sup> including appropriate reparation, such as compensation.<sup>178</sup>

Unfortunately, in the DRC and Nigeria, the right to education is not justiciable and not enforceable to courts. There is no way for individuals to reach the courts and tribunals in cases of violation of their right to education. With regard to this, the DRC and Nigeria have failed to fulfil their obligation to protect this right through their judicial or quasi-judicial organs.

There is no case law in either the Congolese or Nigerian jurisdictions that dealt directly with the right to education. However, in Nigeria many successful cases concerning education have been fulfilled through reference to civil and political rights.<sup>179</sup> The first example is the case of *Archbishop Okogie & Others v Attorney-General of Lagos State*.<sup>180</sup> In this case, the appeal court invoked the notion of no-justiciability of economic, social and cultural rights, which includes the right to education. It said that the state is to refrain from interfering with the freedom or any other constitutional right of the individual save as permitted by the Constitution.<sup>181</sup> The court confirmed the rights to private proprietorship of educational establishments at all levels in

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<sup>175</sup> Odinkalu (n 144 above) 185.

<sup>176</sup> Yeshanew (n 33 above) 325.

<sup>177</sup> United Nations General Assembly 'Report of the Special Rapporteur on the right to education, Kishore Singh: Justiciability of the right to education' (2013)6A/HRC/23/35 Available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.35\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.35_en.pdf) (accessed 01 October 2018).

<sup>178</sup> UN General Assembly (n 177 above) 6.

<sup>179</sup> Odinkalu (n 144 above) 219.

<sup>180</sup> Odinkalu (n 144 above) 219.

<sup>181</sup> Odinkalu (n 144 above) 219

associating the entitlements to economic activity, right to freedom of expression and information and the right to property.<sup>182</sup> It is necessary to understand that instead of dealing with the right of students and parents, this court implicated the protection of the interests and profits of the proprietor.<sup>183</sup> It has strictly established the private education providers' roles, but there is limited jurisprudential direction about the extension of state obligations to ensure access to education.<sup>184</sup>

With regard to what has been noted above, the DRC and Nigeria have to redress the situation of the justiciability of the right to education in their countries. They should do so by following the South African example. This is one African country where economic, social and cultural rights, which comprises the right to education, are justiciable for ensuring their implementation and protection. As such, these rights are not only on paper, but also in practice.

South Africa's Constitution provides for the enforcement of rights in section 38. Section 38 states that anyone has the right to approach a competent court, asserting infringement of a right in the Bill of Rights and the court may grant adequate relief comprising a declaration of rights, which includes the right to education.<sup>185</sup> Over many years, South Africa "has become a role model for the implementation and enforcement of constitutionally enshrined socio-economic rights."<sup>186</sup> Its Constitution promotes and protects the rights of the weak, persons subject to unfair discrimination, and the socially excluded.<sup>187</sup>

An example of the justiciability of economic, social and cultural rights in South Africa is the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.<sup>188</sup>

This case concerns the educational needs of children with severe and profound intellectual disabilities, which were not being appropriately met by the South African and Western Cape Governments. The court found that the state's policy violated several disabled children's rights comprising the right to education, the right to equality, the right to dignity, and the right to

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<sup>182</sup>Odinkalu (n 144 above) 219

<sup>183</sup>Odinkalu (n 144 above) 219

<sup>184</sup>Odinkalu (n 144 above) 219

<sup>185</sup> UN General Assembly (n 177 above) 8

<sup>186</sup>M Trilsch 'What's the use of socio-economic rights in a Constitution? Taking a look at the South African experience' in Urbersee 'Law and politics in Africa, Asia, and Latin America' (vol 42 no 4, 2009) 552-575 Nomos

<sup>187</sup>Trilsch (n 191 above) 552

<sup>188</sup> *Western Cape Forum for Intellectual Disability V. Government of the Republic of South Africa & Government of the Province of Western Cape*, 2011 5 SA 87 (WCC) Available at <https://www.escri-net.org/caselaw/2011/western-cape-forum-intellectual-disability-v-government-republic-south-africa> (Accessed 04 September 2018).

protection from neglect and degradation. It is important to note that the court concluded that there was no justification for the Governments to fail to provide the children with a basic education or for them not allow disabled children to go to special and other schools.

A second example is that of *Minister of Basic Education v Basic Education for All*.<sup>189</sup> This case concerned the failure by the Department of Basic Education (DBE) and Limpopo Department of Education (LDE) to guarantee access to textbooks in certain public schools in the Limpopo Province.

The above South African case law has been cited to show that the right to education in this country is justiciable and enforceable before domestic courts and this has to serve as a model for the governments of the DRC and Nigeria.

The DRC and Nigeria should be inspired by such cases to enshrine the right to education in their constitutions as justiciable before their national courts. In following this example, the right to education will be protected. Specifically, the rate of illiteracy will decrease in these countries, and therefore their economy will be strengthened because education contributes to the economic growth of the country.

Furthermore, South Africa is and remains a country that is dealing with various economic and social challenges and consequently, yet it is capable of achieving the obligation to provide education, thus indicating that it takes its obligations seriously and ensures the allocation of sufficient resources to this end.

### **3.6 Conclusion**

The DRC and Nigeria are member states of ICESCR at the international level and ACHPR at the regional level. They recognise the right to education, as well as the obligations and freedom contained in those documents in their respective Constitutions as consequence of being parties to those treaties. Therefore, regarding article 1 of ACHPR and article 2(1) of ICESCR they shall take measures to effect the right to education by guaranteeing the enjoyment of this right to their individuals, respecting, protecting their citizens' right to education from a third party.

In addition, the DRC and Nigeria must ensure equality and non-discrimination when implementing the right to education. As a matter of priority, they should make the right to education justiciable and enforceable before the domestic courts. Additionally, these

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<sup>189</sup> *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198. Available at [http://www.justice.gov.za/sca/judgments/sca\\_2015/sca2015-198.pdf](http://www.justice.gov.za/sca/judgments/sca_2015/sca2015-198.pdf) (Accessed 04 September 2018).

governments must strengthen their co-operation with international community and other countries while simultaneously respecting their commitment with civil society in order to implement this right. In the light of the foregoing, we can say that the DRC and Nigeria have failed to accomplish their obligation regarding the right to education of their citizens in the fact that they are unable to respect, protect or provide for this right in practice in spite of the fact that civil conflict does not absolve the state of its responsibility to guarantee human rights.

## **CHAPTER FOUR: THE IMPLEMENTATION OF THE RIGHT TO EDUCATION AND FACTORS THAT IMPEDE THE IMPLEMENTATION OF THIS RIGHT IN DRC AND NIGERIA**

### **4.1 Introduction**

The DRC and Nigeria have both ratified the ICESCR as members of the United Nations and the African Charter on Human and Peoples' Rights as members of African Union. They have ratified many treaties at the international level and regional level but in this chapter, the study is principally concerned with the ICESCR and African Charter. The DRC ratified the African Charter on 20 July 1987 whereas Nigeria ratified it on 22 June 1983.<sup>190</sup> Moreover, the DRC ratified the ICESCR on 1 November 1976 and Nigeria on 29 July 1993.<sup>191</sup> Both of these states have incorporated the provisions of these treaties into their domestic law or Constitution including the provision of the right to education.

This chapter investigates the effectiveness of the implementation of the right to education in the DRC and Nigeria. It also analyses certain factors that constitute challenges, obstacles and barriers to the implementation of this right in these states.

The Congolese and the Nigerian governments are under the obligation to implement the right to education to meet at least the key elements of this right, such as availability, accessibility, acceptability and adaptability. Article 13(2) of ICESCR requires state parties to make education available, accessible, acceptable and adaptable to all without discrimination. These form the core content of the right to education.

### **4.2 The core elements of the right to education**

#### **4.2.1 The availability of the right to education**

The service of the Congolese and Nigerian educational institutions and programs must be available within the jurisdiction of their states. This requires the construction of good infrastructure, the protection of the sanitation facilities for boys and girls, the provision of a healthy school environment and teaching materials.<sup>192</sup> The Congolese and Nigerian states have

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<sup>190</sup> C Heyns & M Killander (Eds) *Compendium of the African Union* (2016) Pretoria University Law Press.

<sup>191</sup> 'Ratification of the ICESCR' available at [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty) (accessed 04 August 2018).

<sup>192</sup> UN General Comment no 13 (n 138 above).

to guarantee the provision of quality education in pursuit of its goal of making education available.

#### **4.2.2 The accessibility of the right to education**

The Congolese and Nigerian government have to ensure that every individual has access to an educational institution and programs. This requires three dimensions, which comprises of non-discrimination, physical accessibility and the dimension of economic accessibility.<sup>193</sup> For instance, non-discrimination means that the state must ensure that the law forbids discrimination based on gender. The second dimension is to ensure that schools in the area are close to communities to facilitate attendance (physical accessibility). The third is that they have to remove school fees to allow free access to education for children who come from poor families (economic accessibility).<sup>194</sup>

It is important to note that General Comment 11 proceeds by distinguishing the various costs incurred through education.<sup>195</sup> The ICESCR stresses that the scope of free primary education goes beyond the prohibition of charging fees.<sup>196</sup> Parents are exempt from other direct costs, such as exam fees, textbooks, course material and all basic school material.<sup>197</sup> The CRC Committee agrees that direct costs, such as the maintenance of school buildings and the provision of books together with the learning materials must be made available free of charge and therefore are the responsibility of the state.<sup>198</sup>

#### **4.2.3 The acceptability of the right to education**

Acceptability requires that the form and subject of education, which includes methods of teaching and curricula, must be acceptable.<sup>199</sup> It is interesting that the Congolese and Nigerian governments have to ensure that the functioning of education is in a form that is acceptable to their people. Education will be unacceptable if the language of teaching is not familiar with students or is foreign to them.<sup>200</sup>

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<sup>193</sup> UNCESCR General Comment no 13 (n 138 above) 3.

<sup>194</sup> Budoo (n 42 above) 34.

<sup>195</sup> L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011 vol 4, no 6) *PER* 112.

<sup>196</sup> Arendse (n 195 above).

<sup>197</sup> Arendse (n 195 above).

<sup>198</sup> Arendse (n 195 above).

<sup>199</sup> UNCESCR general comment no 13 (n 134 above) 3.

<sup>200</sup> Budoo (n 42 above) 34.

#### **4.2.4 The adaptability of the right to education**

This means that education needs to be flexible to adapt to the standards of changing societies and communities and to meet the needs of students within their different social and cultural contexts.<sup>201</sup>

### **4.3 Factors that impede the implementation of the right to education in the DRC and Nigeria**

This section enumerates some factors that constitute a barrier to the implementation of the right to education including armed conflict and war, poverty, the high cost of education, bad governance and the mismanagement of public finances and the character of non-justiciability of the right to education before the courts.

#### **4.3.1 Armed conflicts and war**

This part first analyses the conflict and wars that took place in the DRC and Nigeria and second it is going to deal with the impact of those armed conflicts and wars on the right to education.

##### **4.3.1.1 Conflict and war in the DRC**

Most of the conflicts and wars ravaging the Congo are because of the mineral resources and especially in the eastern part of the country where conflicts between tribes and with neighbouring countries such as Rwanda, Burundi and Uganda occur. The history of the DRC reveals a persistent pattern of meddling by foreign nations as they fight for its wealth and that in turn has caused circumstances that are favourable for war.<sup>202</sup>

Furthermore, there are political conflicts among the political parties because of the extension of the presidential mandate. This leads to popular uprisings from civilians. It is important to note that Rwanda, Burundi and Uganda are fighting for the exportation of the DRC's mineral wealth because of their deprivation of diamond deposits. For instance, in the past few years, the DRC has exported diamonds worth millions of dollars.<sup>203</sup>

In fact, the conflicts and war in the Congo have been occurring since the colonial period. It had ceased and then started again in 1998, when the new rebel movements confronted the authority of President Laurent Kabila. The rebels promptly obtained control of a massive portion of the DRC and the conflict spread throughout the state, with and nine African states becoming

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<sup>201</sup> UNCESCR General Comment no. 13 (n 134 above) 3.

<sup>202</sup> Juma (n 4 above) 318.

<sup>203</sup> Lubunga (n 3 above) 354.



involved.<sup>204</sup> During this conflict, 30 000 people (mostly civilians) have been killed and a further three million are indirect victims of the conflict.<sup>205</sup>

It is necessary to say that the two delays to the Congolese election created ethnic and cultural fighting as well as religious movements and this has inevitably affected effective functioning of the educational sector.

#### **4.3.1.2 Conflict and war in Nigeria**

Nigeria has also experienced a period of armed conflict and wars that includes the Nigerian civil war (also referred to as the Nigerian-Biafran war (1967-1970)) and the religious-based conflict seemingly perpetrated by Muslims against Christians resulting in a bloody insurgency by the Muslim rebel group Boko Haram.

In fact, the Nigerian-Biafran war was a war that engaged the Federal Nigerian troops and the secessionist state of Biafra<sup>206</sup> due to the declaration of the Eastern region of Nigeria as an independent state, which was seen as an act of secession by the Federal Military of the Nigerian government.<sup>207</sup> This war interrupted access by the students of educational institutions.

#### **4.3.1.3 Impact of armed conflict and war in the field of education**

It is a known fact that the implementation of the right to education is based on the existence of adequate financial resources. Regarding this, the state must also prepare a budget for the educational sector. When a country is in conflict due to war, its economy is down and the state will not be able to realise human rights such as the right to education. During this period, there have been school closures and insecurity. For example, in the DRC and Nigeria some school materials have been looted and this negatively affects the rights of children in school.

It is significant that conflict has negatively affected the retention rate of students in the Congolese education system.<sup>208</sup> During this period, the proportion of children starting first grade was about 25% between 1995 and 2001. An improvement was observed thereafter, when the retention rate reached 40% in 2007 and 75% in 2010.<sup>209</sup> The effects of conflict have touched

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<sup>204</sup> World Bank 'The Democratic Republic of Congo' available at [www.worldbank.org/archive/website00286B](http://www.worldbank.org/archive/website00286B) (Accessed 1 August 2018).

<sup>205</sup> World Bank (n 204 above).

<sup>206</sup> 'The Nigerian-Biafran War' available at <https://www.ascleiden.nl/content/webdossiers/nigerian-biafran-war> (accessed 26 November 2018).

<sup>207</sup> M Abubakar & A Atofarati 'The Nigerian civil war, causes, strategies, and lessons learnt' (1992) available at <https://www.africamasterweb.com/Biafranwarcauses.htm> (accessed 1 August 2018).

<sup>208</sup> Nations Unies Commission Economique pour l'Afrique 'conflits en Republique Democratique du Congo: causes, impact et implication pour la region du Grands Lacs' (2015) Commission economique pour l' Afrique.

<sup>209</sup> Nations Unies Commission Economique pour l' Afrique (n 208 above) 85.

the province of North Kivu the most, where only 5.3% of students who started their first year or grade one arrived at grade five.<sup>210</sup>

The negative effects of the conflicts on Congolese education can be clearly explained by considering the age groups between 6 and 14 years of age. The proportion of those who were born between 1992 and 1995 who should have started school in 1998 and 2001 (years characterised by conflicts), but did not, is greater (57%) than that of those born between 1987 and 1991 and who had to start school between 1993 and 1997 (35%).<sup>211</sup> Therefore, conflict that began in 1996 has deprived more than half of all children of access to education.<sup>212</sup>

During the time of the conflict, the deliberate targeting of schools has left an indelible mark in the life of many children, which has caused them to fear attending the education institutional. Furthermore, many parents are terrified of sending their children to school, particularly in areas where clashes can still explode.<sup>213</sup>

An analysis from 'Save the Children' demonstrates that conflict is the largest obstacle to accessing education for many children because the conflict has already seriously weakened the economic status of several households.<sup>214</sup>

Concerning Nigeria, it is worth noting the overwhelming effects of armed conflict. The humanitarian crisis has had a big toll on educational growth in Nigeria. The conflict affected states of the federation and thousands of children were forced to leave school. In most instances, these children were fervently recruited as child soldiers and sometimes used as defense during combat.<sup>215</sup>

It is evident that the attack of the insurgent group Boko Haram in the North Eastern region of Nigeria has had a negative impact on the life of the children who have witnessed killings and been forced to live as refugees far away from their homes, families and schools.<sup>216</sup>

In 2013, the insurgents penetrated a government school killing 42 students and teachers and burning down the school. In February 2014, a federal government college was attacked and 59

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<sup>210</sup> Nations Unies Commission Economique pour l' Afrique (n 208 above) 85.

<sup>211</sup> Nations Unies Commission Economique pour l' Afrique (n 208 above) 85.

<sup>212</sup> Nations Unies Commission Economique pour l' Afrique (n 208 above) 85.

<sup>213</sup> Nkhoma (n 11 above).

<sup>214</sup> Nkhoma (n 11 above).

<sup>215</sup> A Ikechi Nuogo 'Barriers to equality of access to education opportunity in Nigeria: Philosophical perspective' (vol.6 no 4, 2015) *Journal of Education and Practice*.

<sup>216</sup> Isokpan & Durojaye (n 98 above) 10.

students murdered and many buildings in this school were burnt. Thereafter, in April 2014, there was an abduction of 200 girls from a school residence. The abduction of these girls represented the kidnapping attributable to Boko Haram.<sup>217</sup> In November 2014, there was the bombing of a secondary school by the insurgents who killed 47 pupils and many others were injured.<sup>218</sup> The armed conflict has the consequence of preventing general progress in education and reinforcing inequality in the country.<sup>219</sup>

It is important to note that during the conflict and war, the violation of human rights has a direct consequence on the educational sector.<sup>220</sup> Children that face these armed conflicts have little chance of realising their learning potential due to the trauma, insecurity and displacement made by these conflicts.<sup>221</sup> An example is the kidnapping of girls in Nigeria by Boko Haram rebels. Such attacks during the warring period has enormous consequences not only on the educational sector but also on the life of students, teachers and other educational personnel such as killing, abduction, sexual abuse, and the forced recruitment of school children and teachers into the army.<sup>222</sup>

There are many ways that an armed conflict can affect education,<sup>223</sup> such as the closure of schools because they were the victims of the attacks, as well as the fear that students and teachers have about attending schools during this period.<sup>224</sup> This atmosphere of conflict and war reduces access to learning and the ability to increase knowledge.

More generally, the destruction of schools sometimes fits into a broader strategy of destabilisation of certain regions and the disorganisation of communities. In the DRC, for example, schools and other basic service facilities are destroyed when villages are attacked. In addition, schools sometimes experience indirect damage when the armed forces do not provide sufficient protection. The estimates of the number of schools damaged and destroyed in the conflicts are very diverse.<sup>225</sup>

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<sup>217</sup> Isokpan & Durojaye (n 98 above) 11.

<sup>218</sup> Isokpan & Durojaye (n 102 above) 11.

<sup>219</sup> UNESCO *'la crise cache: les conflits armes et l' education'* (2011) 150 available at [www.unesdoc.unesco.org/images/0019/001917/191794f.pdf](http://www.unesdoc.unesco.org/images/0019/001917/191794f.pdf) (accessed 30 July 2018).

<sup>220</sup> UNESCO (n 229 above) 159.

<sup>221</sup> UNESCO (n 229 above) 159.

<sup>222</sup> Isokpan & Durojaye (n 98 above) 7.

<sup>223</sup> Isokpan & Durojaye (n 98 above) 8.

<sup>224</sup> Isokpan & Durojaye (n 98 above) 8.

<sup>225</sup> UNESCO (n 163 above) 160.

War destroys lives, but it also undermines livelihoods, exacerbates health risks, and compromises economic growth and diverts already scarce public resources to armament.<sup>226</sup> Efforts to accelerate progress towards education for all is doubly suffering, violent conflict aggravating the poverty – with its attendant consequences for child labour and household spending devoted to education – and depriving the system’s investment in schools whose need is most dire.<sup>227</sup>

It is not debatable that in the DRC and even in Nigeria, conflicts are seriously affecting the education sector. During the conflict and war time, many educational institutions are looted and destroyed. These conflicts cause under-development, and an economic crisis that can lead to the lack of resources. Therefore, the DRC and Nigerian governments have little power to implement the right to education.

#### **4.3.2 Poverty**

Poverty in Africa is a hard reality that has resulted in half of the population living on less than one dollar a day.<sup>228</sup> The HIV/AIDS epidemic has aggravated Africa’s poverty. Governments have been pushed to redirect resources to fight against this epidemic instead of using these resources for the implementation of significant human rights such as the right to education.<sup>229</sup>

It is not only national poverty that impedes the implementation of the right to education but also the personal poverty of parents. This crisis weakens the concept of education.

It is necessary to note that more recently, the postponement of the Congolese elections planned for 2016 has caused a shameful political environment. Most citizen live in poverty and have restricted access to basic services such as education.<sup>230</sup> Although recent budgetary supplements for public investment is still low, religious organisations govern the majority of schools, but there is still a lack of supervision and overall administration of the system of schools by the government.<sup>231</sup>

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<sup>226</sup> UNESCO (n 163 above) 160.

<sup>227</sup> UNESCO (n 163 above) 163.

<sup>228</sup> C Mbazira ‘Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides’ (2006) *African Human Rights Law Journal* 333-357.

<sup>229</sup> Mbazira (n 228 above) 334.

<sup>230</sup> G Groleau ‘Improve management and accountability: Conditions for better access and quality of primary education in the Democratic Republic of Congo’ (2017) 1 International Rescue Committee.

<sup>231</sup> Groleau (n 230 above) 1.

### 4.3.3 Bad governance

Governance is a very important element for the education sector because the implementation of the right to education as a second generation right requires the intervention of the state because if the latter engages in poor governance it will affect this sector.

It is interesting to note that if interventions such as the construction of educational institutions and teacher training are necessary, they are not enough on their own to improve the result of learning without taking into account good governance from the state <sup>232</sup> The DRC is characterised by poor governance that can be confirmed by the lack of transparency on the side of government regarding corruption. The practice of corruption in the DRC is worse than in Nigeria.<sup>233</sup>

Likewise, weak governance has a detrimental impact on the Nigerian educational system in all areas.<sup>234</sup> Corruption by Nigeria's government officials has destroyed the education sector for decades.<sup>235</sup> It is arguable that good governance demands that sufficient funds have to be available for all education programmes.<sup>236</sup>

### 4.3.4 Mismanagement of public finances

The DRC is allocating fewer resources to the priority sectors such as education because of poor governance of the country, which explains serious budget overruns.<sup>237</sup> The efforts undertaken in the reform of this sector has not yet produced significant progress.<sup>238</sup>

The Nigerian experience reveals that the budgetary allocation to education is poor and inadequate<sup>239</sup> because of the mismanagement of government. The mismanagement of public finances from the state entails that instead of allocating the budget to important sectors such as education, they allocate towards useless areas.

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<sup>232</sup> Groleau (n 230 above) 1.

<sup>233</sup> Groleau (n 230 above) 3.

<sup>234</sup> AJ Kola et al 'The lack of good governance in Nigeria and its impact on functional science education' (vol.6, no 9 2017) *International Journal of Development and Sustainability* 1036-1047.

<sup>235</sup> Kola et al (n 234 above) 1043.

<sup>236</sup> Kola et al (n 234 above) 1043.

<sup>237</sup> Radio Okapi '*Gestion des Finances publiques: la RDC toujours dans la zone rouge, selon la Banque mondiale*' (2012) available at <https://www.radiookapi.net/actualite/2012/03/30/gestion-des-finances-publiques-la-rdc-toujours-dans-la-zone-rouge-selon-la-banque-mondiale/#.U3jNv14aLIU> (accessed 14 August 2018).

<sup>238</sup> Radio Okapi (n 237 above).

<sup>239</sup> Kola et al (n 234 above) 1044.

#### 4.3.5 High cost of education

The high cost of education or schools is among the main obstacles that impede the right to education for children in both the DRC and Nigeria. It is evident that even where primary education is free in the majority of states of the federation, the extra expenses for school materials such as uniforms, textbooks and transport fares to school cause financial obstacles and prevents many parents from sending their children to school.<sup>240</sup>

This is unique amongst African countries that in the DRC parents finance almost all of the education costs at all its levels, from pre-primary to higher education and in all kinds of educational institutions such as government institutions, publicly aided institutions under the governance of church institutions and private (unaided) institutions.<sup>241</sup>

In practice, the high cost of school fees remains the biggest barrier for children enrolling for school. It constitutes a factor that is more frequent in agrarian areas, where the livelihood opportunities are more limited.<sup>242</sup> A relevant metric to evaluate the financial encumbrance from the costs of primary education is the share of global education charges covered by parents corresponding to that covered by the public sector.<sup>243</sup> The evidence demonstrates that across the DRC, 73% of households are run by children who have abandoned studies due to a lack of money as the principal reason.<sup>244</sup> It also shows that in the DRC, 57% of households earn less than 540 000 Congolese Francs (\$556) and 81% earn less than 1 080 000 Congolese Francs (\$1112) per year.<sup>245</sup> For example when taking into account that the average woman has up to seven children, this clearly explains the reason for the inability of many Congolese families to educate all or even some of their children.<sup>246</sup>

As discussed previously, the Congolese State is influenced by feeble management and poor governance. This certainly affects the achievement of a good education system.<sup>247</sup> Moreover, the relatively high school fees are due to the lack of public resources allocated to the education

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<sup>240</sup> Ikechi (n 205 above) 150.

<sup>241</sup> A World Bank Country Study 'Education in the Democratic Republic of Congo: Priorities and options for regeneration' (2005) The International Bank for Reconstruction and Development/ the World Bank.

<sup>242</sup> Groleau (n 230 above) 4.

<sup>243</sup> Groleau (n 230 above) 24.

<sup>244</sup> Groleau (n 230 above) 4.

<sup>245</sup> Groleau (n 230 above) 4.

<sup>246</sup> Groleau (n 230 above) 24.

<sup>247</sup> Groleau (n 230 above) 4.

sector.<sup>248</sup> A corollary of this is an increase in the number of unpaid teachers.<sup>249</sup> This factor leads immediately to comparatively low access and quality of education.<sup>250</sup>

#### **4.3.6 Character of non-justiciability of the right to education before the courts**

The expression ‘justiciability’, broadly understood as the ability of a right to be a matter of examination before courts and tribunals or before another (quasi) judicial entity.<sup>251</sup> The right to education is justiciable when a judge can view it in a concrete set of circumstances and in addition when this review determines the importance of the right.<sup>252</sup> However, in the DRC as well as in Nigeria this right is not justiciable.

The Congolese Constitution does not express any way the justiciability of the right to education and the embryonic Congolese judiciary is weak in structure and ability.<sup>253</sup> Nigeria’s Constitution recognises the provisions related to the socio-economic rights comprising the right to education as a non-justiciable fundamental objective and directive principle of state policy in chapter two of the Constitution.<sup>254</sup> It has been demonstrated that Nigerian courts have retained these rights to be non-justiciable.<sup>255</sup>

The Nigerian judiciary has prohibited itself from interfering through a combination of both judicial and self-established constraints.<sup>256</sup> Odinkalu articulates these constraints as “the doctrinal exclusion of economic and social rights from the scope of judicial powers, narrow and exclusionary rules of standing to sue, a crippling epidemic of interlocutory appeals, and prolonged delays in court proceedings”.<sup>257</sup>

For instance, in the *SERAC* case, the Nigerian courts have done well to recognise the state obligation to respect, and protect by refraining from intervening in the enjoyment of education, by taking measures to protect the rights of holders against political, economic and social

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<sup>248</sup> Groleau (n 230 above) 4.

<sup>249</sup> Groleau (n 230 above) 25.

<sup>250</sup> Groleau (n 230 above) 4.

<sup>251</sup> K Arambulo *Giving meaning to economic, social, and cultural rights: A continuing struggle* (2001) 114 University of Pennsylvania Press.

<sup>252</sup> Arambulo (n 251 above) 114.

<sup>253</sup> Juma (n 4 above) 356

<sup>254</sup> Odinkalu (n 144 above) 193.

<sup>255</sup> Odinkalu (n 144 above) 201

<sup>256</sup> Odinkalu (n 144 above) 218

<sup>257</sup> Odinkalu (n 144 above) 218

interference. Nevertheless, they failed to recognise an enforceable legal obligation from the state side to promote access to education as a right of the individual.<sup>258</sup>

It is important to note that the issue of standards and quality of available education has not yet drawn the attention of the Nigerian judicial.<sup>259</sup> Despite the fact that the African Charter develops the concept that civil and political rights cannot be separated from economic, social, and cultural rights, in practice the socio-economic rights, which comprises of the right to education has not materialised.<sup>260</sup>

It is not arguable that various arguments to reinforce the view that socio-economic issues including the right to education are not justiciable.<sup>261</sup> This rejection may be partially linked to a failure of recognising poverty, disease and most illiteracy as human rights problems.<sup>262</sup>

Another argument of no-justiciability of the right to education is the fact of having cost implications concerning its implementation.<sup>263</sup> In addition, the right to education imposes the state to provide well-being to the individual.<sup>264</sup>

This character of non-justiciability of the right to education constitutes a barrier for its realisation. There is no way in these countries for students to sue the courts in case of the violation of their rights to education.

#### **4.4 Conclusion**

The paper concludes that numerous factors challenge the implementation of the right to education in the DRC and Nigeria among others there are armed conflicts and war, bad governance, mismanagement of the public finance, high cost of education, poverty...

These countries have to make an effort to overcome these challenges in order to implement this right and allow every individual within the country to enjoy his/her right to education. This is possibly when the DRC and Nigeria create mechanisms that will permit all the holders of this right without any discrimination, to have access to education. This can be achieved by making primary school free and compulsory, reducing the cost of education to allow even poor families

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<sup>258</sup>Odinkalu (n 144 above) 219

<sup>259</sup>Odinkalu (n 144 above) 220

<sup>260</sup> C Mbazira 'A path to realising economic, social, and cultural rights in Africa? A critique of the new partnership for Africa's development' (vol 4, no 1, 2004) 34-52 African Human Rights Law Journal.

<sup>261</sup>Mbazira (n 260 above) 38

<sup>262</sup>Mbazira (n 260 above) 38

<sup>263</sup>Mbazira (n 260 above) 39

<sup>264</sup>Mbazira (n 260 above) 39



to send their children to school. In addition, stop armed conflicts and war in order to maintain peace all over their territories.

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

### **5.1 Conclusion**

The dissertation undertook a comparative analysis of the implementation of the right to education in Africa focusing on a case study of the Democratic Republic of Congo and Nigeria. The study looked for legal protection of the right to education in the DRC and Nigeria and the main search was regarding the challenges that prevent the implementation of this right and the kind of obligations these countries should have toward the full effect of the right to education.

The right to education is so crucial in the life of a person; it can unlock many opportunities in an individual's existence. It is the key to losing other human rights such as the right to work and the right to health.

The DRC and Nigerian Constitutions guarantee the right to education as well as provided in other domestic laws of these countries. This is because of their ratification of international treaties including ICESCR and regional instruments such as ACHPR. Although this right is not realised in practice.

The comparative analysis shows that the DRC and Nigeria are facing almost the same challenges to implement the right to education due to certain factors such as comprising the high cost of education, poverty, character of non-justiciability of this right, armed conflicts and war, bad governance, and mismanagement of public finances.

To improve this situation, the DRC and Nigerian Government must consider their international obligations to undertake steps for the realisation of the right to education. To respect, protect and fulfil this right in their countries. They have to consider rendering this right justiciable and enforceable before the courts to allow individuals to seek reparation in cases of violation. Take into consideration other key obligations such as ensure equality, non-discrimination, and make the right to education accessible to all, strengthening their engagement with civil societies.

These obligations must continue to be applicable even during the situation of armed conflict of which there is an economic crisis and lack of resources. To do so in this case, they have the legal obligation to ask for international assistance or to co-operate with other rich countries for the achievement of this right.

As states parties to the international and regional instruments that promote and protect the right to education, and as this right is incorporated in the Constitutions of both of the countries

(article 43 of DRC's Constitution 2006 and section 18 of the Nigerian Constitution 1999), these countries should realise this right in practice.

In addition, they should give the right to education the same level of protection given to other socio-economic rights such as the right to property and health as well as to civil and political rights, since this is indispensable in conforming to states duties below articles 1 and 2 of the African Charter.

## **5.2 Recommendations**

### **To Congolese and Nigerian Governments**

-They should have good governance. This requests transparency, no corruption in the manner of governing the country because there is a relationship between good governance and functioning of education; the educational sector cannot function well where resources and power are not well used.

-DRC and Nigeria should manage public finances efficiently. They should appoint experts in allocating the budget to important sectors such as the educational sector, which will help sustained development in the country. They shall make an effort to combat the mismanagement of the public resources.

-They should make the right to education justiciable by enforcing it before the domestic courts. They have to ensure that this right has the full legal effect at national level. This is the best way to protect this right.

-They should edict the legislation and legal mechanism of remedying the violation of the right to education. It is the duty of the National Assembly and Senate to make it possible and it will reinforce the protection of this right.

-They should permit an individual complaint mechanism before the African Court to strengthen the development of adequate jurisprudence on Human Rights especially the right to education.

-They should respect the provisions of the right to education contained in the international and regional treaties that provide free and compulsory primary education in public institutions.

### **To international / regional community**

Clarify the article 17 of the African Charter on Human and People Rights about the right to education in précising its content (Regional community). The international and regional

community should put pressure on states parties especially the DRC and Nigeria that the right to education is really justiciable or enforced in their domestic courts; otherwise, they must take measures to punish those that do not respect their legal obligations.

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