

**SEEKING AN EFFECTIVE NATIONAL SUPERVISORY INSTITUTION ON THE
IMPLEMENTATION OF CHILDREN'S RIGHTS IN AFRICA**



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DECLARATION

I **Flora Ojomah Ogbuitepu** do hereby declare, certify and affirm that this research is my own work and that to the best of knowledge, has not been submitted or is currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof.

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DEDICATION

To family

Dear friends

And most importantly to children

Whose rights are been violated daily

To the avoidable abuse of their rights I dedicate this research.

LIST OF ABBREVIATIONS

Geneva Declaration	Geneva Declaration of the Rights of the Child
CRC	Convention on the Rights of the Child
African Children Charter	African Charter on the Rights and Welfare of the Child
Committee on CRC	Committee on the Convention on the Rights of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
NHRIs	National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
CESCR	Covenant on Economic, Social and Cultural Rights
Vienna Convention	Vienna Convention on the Law of Treaties
SAHRC	South Africa Human Rights Commission
CHRGG	Commission for Human Rights and Good Governance
UHRC	Uganda Human Rights Commission
MWCA	Ministry of women and children affairs
NGOs	Non- Governmental Organisations
Socio economic rights	Economic, Social and Cultural Rights
APRM	African Peer Review Mechanism
Committee on ESCR	Committee on Economic, Social and Cultural Rights

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CHAPTER 1

1.1 Introduction

*There can be no keener revelation of a society's soul than the way in which it treats its children.*¹

Nelson Mandela

1.2 Background

It can be argued that the definition of a child as a human being below the age of 18 years is a western construct due to the fact that in Africa the duration of childhood is much shorter than that of the West.² Thus, in some African societies childhood ends at the age of 14 or 16 depending on the cultural implications in that society.³ It must be pointed out here that there is no universal definition of childhood due to the fact that the definition of a child is culture specific. Having laid down the differences in the definition of childhood between Africa and the West, it is necessary to discuss the concept of children's rights.

The idea of children's rights dates back to the mid-nineteenth century, with the emergence of the first International instrument recognising the status of children in the society.⁴ The Geneva Declaration of the Rights of the Child (Geneva Declaration) was adopted by the Fifth Assembly of the League of Nations in 1924.⁵ However, the Geneva Declaration had a number of shortcomings commencing with the absence of a provision on implementation mechanism for children's rights coupled with the fact that it was not a legally binding instrument.⁶ The Geneva Declaration also omitted to address children's civil and political rights, but was solely concerned with children's care and protection rights.⁷ Despite, these shortcomings, the Geneva Declaration established the basis for the promotion of children's

¹<http://www.compassion.com/child-advocacy/find-your-voice/famous-quotes/default.htm> (accessed 16 August 2010).

² T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 73.

³ A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 20.

⁴ L M Spitz 'Implementing the UN Convention on the Rights of the Child: Children's Rights under the 1996 South African Constitution' (2005) 38 *Vanderbilt Journal of Transnational Law* 855.

⁵ As above.

⁶ Spitz (n 4 above) 857.

⁷ As above.

rights at the international community. Thus, the Convention on the Rights of the Child had its origin from the Geneva Declaration.⁸

The Convention on the Rights of the Child (CRC),⁹ has distinct features,¹⁰ which makes it unique among other human rights instrument that constitute the United Nations human rights system.¹¹ Save for two countries, the instrument has gained universal ratification.¹² This presupposes the awareness of states on the need to protect, promote and fulfil the rights of a Child.

The main purpose of the CRC is to safeguard the civil, political, economic, social and cultural rights of children. In addition, the CRC seeks to guarantee the promotion of children's rights by the state and guard children against the flaws and domination of the state,¹³ while enhancing and supporting the responsibility of the parents and legal guardians as the major caregivers.¹⁴ With regards to the obligations of states under the CRC, the CRC established a committee on the rights of the child (Committee on CRC) to monitor states compliance with the provisions of the CRC.¹⁵ Beyond this, state parties have an obligation to achieve the purpose for which the CRC was adopted. This assertion stems from the fact that state parties have an obligation under the CRC to ensure and respect the rights in the CRC as well as take measures to ensure the implementation of the rights.¹⁶

It is contended that the provisions of the CRC comprehensively protects the rights of the child. However, the socio-economic, cultural and developmental circumstances of most

⁸ As above.

⁹ Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) (CRC) Text available in T V Banning et al *Human Rights Instruments* (2004)34.

¹⁰ A record of 60 States participated in the signing of the CRC. CP Cohen 'The rights of the Child: Implications for change in the care and protection of Refugee Children' (1996) 3 *International Journal of Refugee Law*675 -676(As cited by T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 1.

¹¹ Kaime (n 2 above)1.

¹² All Countries have ratified CRC with the exception of USA and Somali.

¹³ J Todres et al *The UN Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification*(2006) 10.

¹⁴ As above.

¹⁵ Todres (n 13 above) 15.

¹⁶ The reason that can be proffered for this argument is the principle of obligation of result and obligation of means under international law as discussed in Editorial Comments The Obligation of the parties to give effect to the Covenant on Civil and Political Rights (1979) 73 *American Journal of International Law* 462.

African children prompted member states of the African Union to adopt a Charter on children's rights that speaks directly to the situation of the African child.¹⁷

Thus, the African Charter on the Rights and Welfare of the Child (African Children's Charter) came into existence.¹⁸ The African Children's Charter was the first regional binding instrument that recognises the child as a rights bearer.¹⁹ The African Children's Charter, which has similar provisions with the CRC, is intended to take into account the historical experiences of the African child.²⁰

The obligations of African States to protect the rights of a child are emphasised by their ratification of the CRC and the African Children's Charter. It is saddening to note that despite these beautifully written instruments on the protection and enforcement of children's rights, there continues to be massive violations of children's rights.²¹ Violations range from poverty, hunger, lack of decent shelter, illiteracy, and child labour, child sale to children trafficking, abduction, sexual exploitation and sexual abuse.²² It can be said that children are the most vulnerable group in the world and therefore deserve a greater form of protection which transcends theory or mere provisions in the instruments to actual practice.

This research is therefore on the need for states to go beyond mere ratification of instruments on children's rights to the effective implementation of such instruments at the national level. One of the main ways this can be achieved is by the creation of national institutions for the sole purpose of supervising the protection of children's rights. The above institutions should also be responsible for supervising the protective mechanisms put in place to ensure children's rights are duly protected. Hence it is necessary to investigate whether such children's-right specific supervisory institutions exist in Africa and what form such institutions should take if they are to be effective.

¹⁷ Preamble to the African Charter on the Rights and Welfare of the Child, 1990.

¹⁸ African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 Addis Ababa, Ethiopia (entered into force 29 November 1999).

¹⁹ D M Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

²⁰ Kaime (n 2 above) 3.

²¹ African Peer Review Mechanism (APRM): Country Review Report No. 5 Republic of South Africa. September 2007.

²² Kaime (n 2 above).

1.3 Statement of the research problem

It is not in doubt that children are the most vulnerable group and therefore incapable of triggering mechanisms for the protection and supervision of their rights. Thus, over the years state parties to the CRC and African Children's Charter have submitted periodic reports with a view to implementing the provisions of the CRC and the African's Children's Charter and in fulfilment of article 43 of the CRC and the African Children's Charter.²³ However, from the concluding observations on the Committee on CRC and the recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), it appears that state parties have not fully lived up to their obligations with regard to their duties under article 4 of the CRC and article 1 of the African Children's Charter.

This is in view of the fact that despite ratification of the CRC and the African Children's Charter, there continue to be violations of children's rights in African countries. In most African countries the establishment of national human rights institutions mandated with the promotion and protection of human rights has not entirely assisted in monitoring the implementation of children's rights. More importantly, children due to their vulnerability are unable to advocate for mechanisms that will protect and supervise the implementation of their rights.

The question then is what is the framework in place at the national level overseeing or implementing the rights of children? There are the human rights institutions, judicial institutions and Ministry of Women and Children's Affairs in some African countries. But these are perceived to be insufficient in the midst of the violations of children's rights on the one hand and the government's ability to enforce the implementation of children's rights on the other hand. This is in view of the fact that there are specific difficulties pertaining to the implementation of children's rights which the above mentioned institutions cannot fulfil. Failure to carry out such duties is as a result of a lack of mandate and the overburden of these institutions. While some scholars have praised the efforts of state parties in the reporting process,²⁴ there appears to be a gap in the implementation of children's rights. The question that must be asked is what is the appropriate framework for the implementation of children's rights in Africa?

²³ CRC 1989, art 43 provides that a committee shall be established for the sole purpose of assessing the progress of state parties with regards to their obligations under the CRC. See African Children's Charter 1990, art 43 provides for state parties to submit reports to the ACERWC on measures adopted to give effect to the provisions of the Charter.

²⁴ African countries that participated in the first state report to the ACERWC have been recommended for their efforts in B D Mezumur & J Sloth-Nielsen 'An ice breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596.

1.4 Research questions

- a. What obligations do African states have in relation to implementation of children's rights under the relevant international instruments?
- b. Does the existing human rights institutions and any other mechanism mandated with the protection of children's rights at the national level supervises the implementation of children's rights?
- c. What measures should be put in place to effectively supervise the implementation of children's rights at the national level?

1.5 Significance of the study

It can be argued that the debate on the protection of children's rights has been going on for years. Accordingly, Children being the most vulnerable group of persons need protection from their parents and the state as well. This is in view of the fact that in spite of the various international instruments protecting the rights of children, violations of these rights are still a common feature of most African states. These ongoing violations of children's rights can be reduced to the barest minimum if the laws promoting children's rights can be effectively implemented at the national level of most African countries. In addition, another significance of this study lies in the fact that children's rights will be greatly promoted and protected in Africa.

1.6 Literature Review

There is no doubt that numerous articles, books and papers have been written and presented on children's rights in Africa by numerous authors such as Amanda Lloyd,²⁵ and Dejo Olowu.²⁶ Topics covered by these authors are mostly on the African Children's Charter. However, only few authors have averted their minds to the implementation of children's rights both at the international and national level.

²⁵ Lloyd (n 3 above)11.

²⁶D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127.

Viljoen,²⁷ proposes that African states observance to the seven major treaties of the UN, to which the CRC is part of, surpasses that of other continent. He also argued that the African states adherence to the CRC has exceeded that of their compliance under the African Children's Charter.²⁸ However, Viljoen pointed out the fact, that the partial domestication of the CRC and the failure on the implementation of concluding observations hinders the full outcome of the CRC in most African states.²⁹

In a similar vein, Sloth Nielsen and Mezmur³⁰ are of the view that the commitment of African states to the promotion and furtherance of children's rights lies in the fact that most African states are either in the process of undertaking law reform or have completed law reform of children's law. They also pointed out, that the extent to which the CRC and the African Children's Charter will affect the lives of children is determined on how African states implement the provisions of the above instruments and take on domestic measures to fulfil their treaty obligations.³¹ They also noted the fact that an area of research which is materialising is how laws upon completion of the law reform can be implemented drawing inspiration from best practices.³²

Sloth Nielsen and Mezmur³³ appreciated the role of the judiciary in promoting children's rights. They also asked questions varying from whether a committed body such as children's commission carry adequate political and economic power to mainstream children's rights, or whether supervision is better located in specific government departments? And whether the human rights commission and similar bodies have been helpful to the overall monitoring project?

Spitz,³⁴ in adopting a different approach to the implementation of the CRC and using South Africa as a case study wrote that the effectiveness of the CRC on children's lives requires observance and implementation by the state parties. She felt it was essential to go beyond

²⁷ F Viljoen *International Human Rights Law in Africa* (2007) 91.

²⁸ Viljoen (n 27 above)144.

²⁹ As above.

³⁰ J Sloth -Nielsen & B D Mezmur 'Surveying the research landscape to promote Children's legal rights in an African context' (2007) 2 *African Human Rights Law Journal* 331.

³¹ Sloth-Nielsen & Mezmur(n30above)332.

³² Sloth-Nielsen & Mezmur(n30above)335.

³³ n 30 above,350-351.

³⁴ Spitz (n 4 above)887.

constitutionalisation of children's rights to legislative reforms and increased participation of community based organisation.³⁵

However, none of these authors wrote on the need to go beyond the domestication of these instruments by African states in the protection of children's rights. They also did not write on the weaknesses and strengths of the human rights institutions amongst others in protecting and enforcing the rights of children at the national level. Thus, this study analyses the above assertions and attempts to answer the above questions as posed by Sloth- Nielsen and Mezmur. This study also posits that there may be a need, depending on the incompetence of the existing institutions for the establishment or amendment of a children's-right specific supervisory institution to monitor the implementation of children's rights in Africa.

1.7 Research Methodology, Limitation and Delineations

The research will adopt a qualitative methodology. The study will consult works of academics, nongovernmental organisation (NGOs) reports, newspaper reports, information from internet sources, country reports to the Committee on CRC and the ACERWC and where necessary interviews will be conducted. Reference will also be made to relevant international instruments on the subject and general comments from relevant supervising human rights mechanisms. Thus, the study will also make use of primary and secondary sources of information.

The term Africa does not mean a discussion of all 53 African countries, but a discussion on a few selected African countries such as South Africa, Tanzania, Uganda, Nigeria, Ghana and Kenya to illustrate or put life to the argument.

The discussion of the activities of NHRIs with regards to children's rights in some selected African countries is limited to the materials which were accessible.

1.8 Research Structure

The three chapters will be speaking on the three research questions after chapter 1. Thus, the proposed structures of the chapters are as follows:

Chapter 1 will encompass the background to the study, problem statement, significance of the study and literature review. Chapter 2 will be on obligations of African states under the CRC and the African Children's Charter in relation to the implementation of children's rights.

³⁵ As above.

Chapter 3 will be on an analysis of the available mechanisms that aids the protection of children's rights at the national level. Chapter 4 will be on exploring the measures that can be put in place to effectively supervise the protection of children's rights at the national level. Chapter 5 will be on conclusion and recommendations.

1.9 Assumption underlying study

My starting point on this research is based on the assumption, that African states must have an appropriate institution at the national level for the supervision of children's rights.

CHAPTER 2

OBLIGATIONS OF AFRICAN STATES IN RELATION TO THE IMPLEMENTATION OF CHILDREN'S RIGHTS UNDER THE CRC AND THE AFRICAN CHILDREN'S CHARTER

*Investing in children is not a national luxury or a national choice. It's a national necessity.*³⁶

Marian Wright Edelman

2.1 Introduction

It is an undeniable fact that when states ratify a Convention they confirm their readiness to be bound by the Convention to which they are parties.³⁷ Every international human rights convention has an obligation attached to it, which a state party ought to fulfil in order to effectively implement human rights as enshrined in the Convention.³⁸ In other words, the obligations of state parties are of ultimate importance to the implementation of human rights at the national level. Focusing on the CRC and the African Children's Charter, it can be said that the adoption of both instruments by state parties demonstrates the recognition of the rights of children and eliminates the perception that children are merely properties of their parents, guardians or anyone else. Accordingly, state parties have an obligation to engage all sectors of the society in order to effectively achieve full implementation of children's rights.³⁹

This chapter analyses the obligations of African state parties to the CRC and the African Children's Charter with regards to the implementation of children's rights.

2.2 Obligations of State Parties to the CRC in relation to the Implementation of Children's Rights

The ratification of the CRC by African states automatically imposed African states with the obligation to implement the provisions of the CRC. Thus, African state parties to the CRC have the obligation to take action to guarantee the rights of children within their territory.⁴⁰ Beyond this obligation African state parties to the CRC also have an obligation to protect children from

³⁶ <http://www.betterworld.net/quotes/children-quotes.htm> > (accessed 14 August 2010).

³⁷ Art 2 of Vienna Convention on the Law of Treaties 1969 (Vienna Convention) defines ratification as an act whereby a state establishes on the international plane its consent to be bound by a treaty.

³⁸ For instance art 2 of the Covenant on Civil and Political Rights (CCPR) imposes obligations on state parties to respect and ensure the rights of individuals as provided in the Covenant within its territory.

³⁹ UN Committee on CRC (Committee on CRC): General Comment No 5 (2003) Para 1.

⁴⁰ As above.

the violations of their rights by private persons such as parents, teachers, legal guardians or even third parties.⁴¹

The obligations of state parties under the CRC can be generally divided into two major headings. First, state parties have the obligation to undertake all suitable measures for the implementation of the rights recognised in the CRC.⁴² Secondly, state parties also have the obligation to respect and guarantee children's rights as provided in the CRC.⁴³ It is important to point out the fact that the obligations of state parties in relation to the implementation of children's rights are underpinned by the four cardinal notions namely, non discrimination,⁴⁴ the best interests of the child,⁴⁵ the right to life, survival and development and respect for the opinions of the child.⁴⁶ It is therefore necessary to discuss article 4 of the CRC below in order to effectively examine state parties' obligations with regards to the implementation of children's rights. Thereafter the relationship between article 4 and other articles of the CRC with regards to state parties' obligations will be discussed.

2.2.1 Article 4 of the CRC and state parties' obligations

The foundation of the general obligations of state parties in relation to the implementation of children's rights lies in article 4 of the CRC. It can be argued that article 4 of the CRC has two dimensions with regards to the implementation of children's rights. The first part of article 4 specifically provides 'state parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention...' The first part of article 4 has at least two possible interpretations, first, it can be interpreted to mean the implementation of civil and political rights.⁴⁷ This is in view of the fact that the second part of article 4 specifically mentioned state parties' obligations with regards to the implementation of economic, social, and cultural rights (socio economic rights).⁴⁸

⁴¹ Humankind owes the child the best it has to give

<http://www.amenstyusa.org/document.php?lang=e&d=BO275B42f3> (accessed 28 September 2010).

⁴² Art 4 of CRC.

⁴³ As above.

⁴⁴ Art 2 of CRC.

⁴⁵ Art 3 of CRC.

⁴⁶ Art 6 of CRC.

⁴⁷ Chirwa (n 49 above) Chirwa, suggested that the CRC made a distinction between civil and political rights and socio economic rights with regards to the obligations of state parties in relation to the implementation of the CRC.

⁴⁸ Art 4 of CRC provides '...with regard to economic, social and cultural rights, state parties shall undertake such measures as to the maximum extent of their available resources...'

Another interpretation that can be proffered to the first part of article 4 is that it encompasses the implementation of all rights. This interpretation owes its accuracy to the first part of article 4 which does not specifically mention any type of right, but mentioned 'rights' as recognised in the CRC. Thus, both civil and political rights and socio economic rights are recognised in the CRC. It is therefore appropriate to adopt the healthier interpretation of the first part of article 4 that there are no division of rights in the CRC with regards to legal implementation of children's rights.⁴⁹

The second part of article 4 deals with state parties undertaking such measures to the availability of their resources and within the framework of international co-operation for the realisation of socio economic rights. The legislative, administrative and other measures as well as measures to the availability of resources as state parties' obligation with regards to the implementation of the CRC shall be discussed below.

i. Legislative measures

It must be re-emphasised here that legislative measures are not meant to be implemented by state parties with regards to only civil and political rights, but also with regards to socio economic rights.⁵⁰ In other words legislative measures as an obligation of state parties apply to all rights and principles in the CRC. In this regard the Committee on CRC in its general comment No 5 has stressed the importance of recognizing all rights as justifiable, be it socio economic rights or civil and political rights.⁵¹ Thus, state parties to the CRC have an obligation to guarantee that national laws make provision for remedies in adequate detail to enable remedies for non-compliance of all rights to be effective.⁵²

The obligation of state parties to take legislative measure as provided by article 4 of the CRC is an immediate obligation, it must be pointed out here that the provision of article 4 of the CRC is comparable to that of article 2⁵³ of the International Covenant on Civil and Political

⁴⁹ R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* (2002) 63.

⁵⁰ M Rishmawi *A commentary on the UN Convention on the Rights of the Child: Article 4 : The Nature of State Parties Obligations* (2006) 26.

⁵¹ As n 39 above, Para 25.

⁵² Rishmawi (n 50 above) .

⁵³ Art 2 of ICCPR provides for state parties to undertake necessary measures within its constitutional process to adopt such legislative measures as may be necessary to give effect to the rights recognised in the present Covenant.

Rights (ICCPR) and article 2(1)⁵⁴ of the Covenant on Economic, Social and Cultural Rights⁵⁵ (CESCR). The Committee on CRC has stated that in international human rights law there are articles that are similar to article 4 of the CRC, these articles have also set out the overall implementation obligations of state parties such as article 2 of the ICCPR and article 2(1) of the CESCR.⁵⁶

While the Committee on CRC did not insist on any specific administrative or legislative measure for the implementation of children's rights,⁵⁷ it has stated in its general comment No 5 the need for national legislation and policies to be compatible with the CRC.⁵⁸ In effect, state parties to the CRC have an obligation to ensure that their national laws do not conflict the principles and provisions of the CRC, and in the event of a conflict between the national law and the CRC, the provisions of the CRC will prevail in view of article 27 of the Vienna Convention of the Law of Treaties.⁵⁹ State parties to the CRC also have a duty to ensure that all national legislation is reviewed strictly to ensure compliance with the CRC.⁶⁰ In addition, state parties have an obligation to guarantee that the review of national legislation must also be done holistically giving effect to the interdependence and the indivisibility of human rights,⁶¹ and that domestic administrative guidance related to the CRC is also reviewed.⁶² It can be deduced from the above discussion that law reform is crucial to the effective and constant implementation of children's rights.

State parties also have an obligation to ensure that the CRC is given legal effect at the national level, in other words the CRC must be domesticated⁶³ or the extent of the applicability of the CRC must be simplified in cases where the principle of self execution applies depending

⁵⁴ Art2 (1) of CESCR provides that state parties shall undertake steps to its maximum available resources with the aim of achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means including the adoption of legislative measures.

⁵⁵ Rishmawi (n 50 above)27.

⁵⁶ As above.

⁵⁷ Hodgkin & Newell(n 49 above)53.

⁵⁸ As n 39 above, Para 18.

⁵⁹ As n 39 above, Para 20 See art 27 of the Vienna Convention which provides that a party may not invoke the provisions of its internal law as a justification for failure to perform a treaty.

⁶⁰ As n 39 above, Para 18.

⁶¹ As above.

⁶² As above.

⁶³ Meaning that the CRC can be invoked in national courts and applied by domestic authorities.

on the legal system of state parties.⁶⁴ Where a state party is a federation it must demand its subsidiary governments to legislate within the structure of the CRC.⁶⁵

Finally on legislative measures, the Committee on CRC urges state parties to enact laws that are more effective to the realisation of children's rights than those included in the CRC.⁶⁶ It means that the CRC like every other international human rights instrument provides the minimum standard with regards to the protection of children's rights.

ii. Administrative and Other measures

It is practically impossible for the Committee on CRC to state in details, the exact measures each and every state party to the CRC ought to take to guarantee effective implementation of the CRC. The reason is not farfetched and lies in the fact that each state party to the CRC has a wide range of differences in their administrative systems.⁶⁷ Despite this shortcoming the Committee on CRC in its guidelines for initial report has placed emphasis on the need for state parties to have a planned or existing system for the co-ordination of policies relating to children at the national or local level.⁶⁸ In addition, the Committee on CRC believes it is mandatory for state parties to provide co-ordination between the central government and other levels of government and also between the government and civil societies.⁶⁹

The essence of such co-ordination is to guarantee that the obligations of state parties are not only given effect to in large government departments but cut across all departments of government.⁷⁰ It can therefore be argued that the co-ordination of policies relating to children and the supervision of implementation of the CRC at the national level is an obligation of state parties.

The Committee on CRC has also proposed a variety of strategies to state parties for the successful implementation of the CRC. It can then be said that state parties to the CRC have an obligation to develop a unified, effective and rights based national strategy based on the CRC for the implementation of children's rights.⁷¹ This is further emphasised by the Committee on

⁶⁴ As n 39 above, Para 20.

⁶⁵ As above.

⁶⁶ As n 39 above, Para 23.

⁶⁷ Hodgkin & Newell(n 49 above) 56.

⁶⁸ Hodgkin & Newell(n 49 above) 54.

⁶⁹ As n 39 above, Para 37.

⁷⁰ As above.

⁷¹ As n 39 above, Para 28.

CRC which advocates for not only a national policy or plan of action echoing the World summit goals (as promoted at the First World Summit for Children held in 1990) but also echoing the implementation of the CRC.⁷² Closely linked to national strategy is the obligation of state parties to establish a permanent government mechanism due to the fact that the process of implementation is a continuous one.⁷³

State parties also have an obligation to conduct a self monitoring of the implementation of the rights as provided by the CRC and also to evaluate its progress in the implementation of the CRC. The Committee on CRC has frequently recommended the establishment of independent human rights institutions or children commissioner to effectively monitor the implementation of the CRC at the national level.⁷⁴ Finally, on administrative measures, it can be said that the establishment of an independent human rights institution for monitoring the implementation of children's rights at the national level is an obligation of state parties.

iii. Measures to the Availability of State parties resources

As earlier stated the wording of the second part of article 4 of the CRC is similar to that of article 2(1) of the CESCR. The slight difference can be identified in the failure of article 4 of the CRC to mention the progressive realization of socio economic rights like its counterpart article 2(1) of the CESCR. However, the Committee on CRC has expressly introduced the concept of progressive realization of socio economic rights in the implementation of the CRC by state parties.⁷⁵ It is generally agreed that a lack of resources by some state parties to the CRC can impede the full implementation of socio economic rights. Thus, state parties have an obligation to implement socio economic rights to the maximum extent of their available resources.⁷⁶ This obligation once again strongly re-affirms the concept of progressive realization of socio economic rights. In addition, state parties to the CRC must ensure the highest effort invariable and deliberate to the implementation of socio economic rights by giving the maximum available resources to its fulfilment.⁷⁷

⁷²Hodgkin & Newell(n 49 above) 67.

⁷³Hodgkin& Newell(n 49 above) 68 where the Committee on CRC recommended the establishment of national mechanism at the federal, state and local level for the implementation of children's rights.

⁷⁴ Hodgkin& Newell(n 49 above) 77.

⁷⁵ Rishmawi (n 50 above)28.

⁷⁶ As n 39 above, Para 7.

⁷⁷ Rishmawi (n 50 above)28 .

The Committee on Economic, Social and Cultural Rights is of the view that state parties have a minimum core obligation to ensure the satisfaction of the minimum essential levels of socio economic rights at the very least.⁷⁸ Accordingly, state parties must make all efforts to use the available resources they own to fulfil those minimum obligations as a matter of importance.⁷⁹ State parties therefore have an obligation to ensure the largest possible enjoyment of socio economic rights even where the available resources are grossly inadequate.⁸⁰ Finally, the resources in question here surpass financial resources and extend to human and organisational resources in the implementation of socio economic rights.⁸¹ State parties cannot therefore rely on the unavailability of financial resources as its failure to undertake measures in the implementation of the socio economic rights of children.

The discussion on article 4 in relation to state parties' obligations in the implementation of children's rights cannot paint a complete picture of state parties obligations without making reference to other articles of the CRC which shall be discussed below.

2.2.2 The relationship between Article 4 and other articles of the CRC in relation to state parties obligations

Apart from the four cardinal notions that underpin the implementation of the CRC, namely non discrimination, the best interests of the child, the right to life, survival and development and respect for the opinions of the child,⁸² state parties also have obligations scattered in most articles of the CRC. However, article 4 relates naturally to all the substantive articles of the CRC, because article 4 deals generally with state parties' obligations.⁸³ Further, article 4 has been grouped with article 42 and 44(6) of the CRC in the general guidelines regarding the form and content of initial reports.⁸⁴ State parties therefore have an obligation to make the principles and provisions of the CRC widely known to both adults and children alike.⁸⁵ State parties also have an obligation under article 44(1) of the CRC to submit reports to the Committee on CRC on the measures they have adapted to give effect to the rights recognised in the CRC and the improvement made on the satisfaction of those rights.

⁷⁸ Committee on ESCR: General Comment No 3 (1990) Para 10.

⁷⁹ Hodgkin & Newell(n 49 above) 62.

⁸⁰ Hodgkin & Newell(n 49 above) 62 See also Committee on ESCR : General Comment No 3(1990) Para 20 & 21.

⁸¹ Hodgkin& Newell(n 49 above) 63.

⁸² Rishmawi (n 50 above)22.

⁸³ As above.

⁸⁴ Committee on CRC: General Guidelines Regarding the form and Content of Initial Reports 1996.

⁸⁵ Art 42 of CRC.

The phrase used in article 4 of the CRC is similar to that used in other articles of the CRC relating to administrative and legislative measures. For instance article 3(2) of the CRC demands state parties to undertake such protection that is mandatory for the child's wellbeing while respecting the rights and duties of the parents or guardians by adopting administrative and legislative measures.⁸⁶

Finally, state parties have an obligation to implement the provisions of the CRC not only with regards to article 4 but also with regards to other articles of the CRC. The reason that can be advanced for this conclusion is the fact that most articles of the CRC have state parties obligations attached to it. Overall, state parties to the CRC have an obligation to protect the rights of the child from all types of violation, even in cases where such violations are perpetrated by private individuals such as parents, teachers or third parties.⁸⁷

Having concluded on the obligations of African state parties under the CRC, it is not out of place to discuss the obligations of state parties under the African Children's Charter in relation to the implementation of children's rights below.

2.3 Obligations of state parties to the African Children's Charter in relation to the Implementation of Children's rights

Many reasons have been advanced by different scholars on the reasons for the adoption of the African Children's Charter,⁸⁸ when there is already a comprehensive universal instrument on the protection of children's rights.⁸⁹ The reason that is closely linked to our discussion is that advanced by Wako,⁹⁰ who believes that the rationale behind the drafting of the African Children's Charter was to enhance the protection of African children.⁹¹ In other words the widely acclaimed and effective CRC was found ineffective with regards to peculiar problems of the African child. Thus, it can be said that the African Children's Charter was not adopted to

⁸⁶ Art 3(2) of CRC.

⁸⁷ Humankind owes the child the best it has to give

<<http://www.amenstyusa.org/document.php?lang=e&d=BO275B42f3>> (accessed 28 September 2010).

⁸⁸ Kaime (n 2 above) 23 discussed the different views held by Muthoga, Viljoen and Wako with regards to the reason behind the adoption of the African Children's Charter by African states.

⁸⁹ The CRC is seen not only as a unique instrument due to its near universal ratification, it is also seen as a comprehensive instrument encompassing all the rights of children for the first time in an international document.

⁹⁰ S A Wako 'Towards an African Charter on the Rights of the Child' paper delivered at the Workshop on the Draft Convention on the Rights of the Child, Nairobi, (May 1988) As cited in T Kaime (n 2 above) 23.

⁹¹ Kaime (n 2 above) 23.

replace the CRC by African states, but it was adopted to complement the CRC by providing protection for situations that are peculiar to the African continent.

The overall obligations of state parties to the African Children's Charter can be said to be of two types. First, state parties to the African Children's Charter have an obligation to recognise the rights, duties and freedoms provided by the African Children's Charter. Second, state parties also have a duty to take mandatory steps in line with their constitutional processes and with the provisions of the African Children's Charter, to adopt such legislative or other measures to give effect to the provisions of the Charter.⁹²

The African Children's Charter places a lot of obligations on state parties with regards to the implementation of the Charter.⁹³ This is evident from the fact that the African Children's Charter makes no demarcation between civil and political rights and socio economic rights in relation to the implementation of rights.⁹⁴ Therefore the question of state parties' obligation in relation to progressive realisation of socio economic rights does not arise. Accordingly, with regards to the overall implementation of the rights of children in the African Children's Charter, state parties have an obligation to adopt legislative and other measures to give effect to all the rights and principles enshrined in the African Children's Charter.

It is not in doubt that there is very little literature or explanation on the obligations of state parties under the African Children's Charter. However, the concluding observations of the Committee on CRC as discussed earlier can be used as a model on the obligations of state parties under the African Children's Charter. This assertion is based on a number of reasons, first with the exception of Somalia, all other African states have ratified the CRC as opposed to 37 states which have ratified the African Children's Charter,⁹⁵ it is therefore not wrong to turn to the jurisprudence of the Committee on CRC. Secondly, until recently the ACERWC had not considered state parties report.⁹⁶ Thirdly, there are no concluding observations of the ACERWC on the obligations of state parties with regards to the implementation of children's rights. There is therefore no reason to delve into a repetitive exercise with regards to the

⁹² Art 10f African's Children's Charter.

⁹³ Olowu(n 26 above)128.

⁹⁴ Chirwa (n 19 above) 157.

⁹⁵ See List of Countries which have signed and ratified the African Children's Charter <http://www.africa-union.org/official_documents/Treaties_Conventions_Protocols/List/African_Charter_on_the_rights_and_Welfare_of_the_Child.pdf>(accessed 2 September 2010).

⁹⁶ B D Mezumur & J Sloth-Nielsen 'An ice breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 597.

obligations of state parties in relation to the implementation of children's rights under the African Children's Charter. Hence, only some outstanding obligations of state parties under the African Children's Charter will be discussed.

The African Children's Charter makes it an obligation on state parties to take all appropriate measures including legal, administrative, social and educational measures to protect a child from all forms of abuse, be it physical, mental or maltreatment.⁹⁷ It can therefore be deduced that state parties to the African Children's Charter have an obligation to protect children from violations of their rights by private persons. Further, by virtue of article 43(1) of the African's Children's Charter, state parties have an obligation to submit to the ACERWC reports on the measures they have adopted to give effect to the rights in the African Children's Charter.

In sum, the obligations of state parties under the African Children's Charter are generally provided for in article 1 of the African Children's Charter and in other articles scattered across the Charter. Further, the obligations of state parties under the African Children's Charter do not affect their obligations in other international instrument which are more beneficial to the realisation of children's rights.⁹⁸ Finally the obligations of state parties under the African's Children Charter are unique in its own way to the needs and rights of the African Child.

2.4 Concluding Notes

It can be concluded that in the 21st century state parties' obligations as provided by the CRC have been expanded by the Committee on CRC, giving life, purpose and meaning to state parties' obligations. Thus, African state parties to the CRC have numerous obligations with regards to the implementation of the rights provided for in the CRC. This includes adopting legislative measures, administrative measures and other measures such as the establishment of an effective independent human rights institution to oversee the implementation of Children's rights. This is in view of the inadequacy of the existing human rights institutions such as attaching low priority to children's rights.

State parties also have other obligations with regards to the implementation of socio economic rights. Thus, state parties have an obligation to take measures to the maximum availability of its resources be it financial, human and organisational resources to implement socio economic rights in the CRC. Therefore the obligations of state parties to the

⁹⁷ Art 16 of African Children's Charter.

⁹⁸ Chirwa(n 19 above)158.

implementation of all the rights in the CRC cannot be excused on the ground of the nature of the rights.

The African Children's Charter cannot be left out in this discussion as state parties to the African Children's Charter also have multiple obligations in relation to the implementation of children's rights. This includes legislative, administrative and educational measures and also the protection of children's rights from violations by private persons such as their parents, teachers or third parties. Although, the ACERWC has not laid out the details of state parties obligations, African states can always look up to the concluding observation of the Committee on CRC to give meaning to the obligations as provided in the African Children's Charter.

CHAPTER 3

THE EXISTING ENFORCEMENT MECHANISMS AS STALEMATES IN THE SUPERVISION OF CHILDREN'S RIGHTS AT THE NATIONAL LEVEL

*Children need systems that are inclusive and driven by them, systems that will enable them to respond to their feelings and needs at any time.*⁹⁹

Jeroo Billimoria

3.1 Introduction

The preceding chapter has discussed the obligations of state parties to the CRC and the African Children's Charter with regards to the implementation of children's rights. While there appears to be very little debate regarding the nature of state obligations under international instruments in relation to the rights of children, the location of institutional responsibility for the supervision and protection of such rights at the national level is not so obvious. By way of introduction to this chapter, there was a report in a national daily newspaper in Nigeria on the issue of an Egyptian minor who is married to a Senator in Nigeria and remained married to the Senator even when the Nigerian authorities and the Egyptian authorities became aware of the marriage.¹⁰⁰

The question then is: which institution has the responsibility to protect the rights of the child from such forms of exploitation? The Ministry of women affairs and social development in Nigeria failed to institute legal action on behalf of the child blaming its failure on lack of evidence.¹⁰¹ The National Human Rights Commission in Nigeria only brought a petition to the National Assembly which paved way for an investigation by the Senate.¹⁰² The Egyptian Embassy took no action blaming its failure on the fact that the issue was not reported to the Embassy, while claiming at the same time to be aware of the issue through newspapers.¹⁰³ The court could do nothing, because no action was instituted before it, on behalf of the child.

⁹⁹ <http://www.betterworld.net/quotes/children-quotes.htm> (accessed 1 September 2010).

¹⁰⁰ 'Egypt: Why we've not acted on Yarima's Marriage to Minor' *This day* 29 April 2010. <http://www.thisdayonline.com/nview.php?id=172127> (accessed 29 April 2010).

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ As above.

It is clear from the previous chapter that one of the obligations of state parties is the establishment of an independent human rights institution to oversee the implementation of children's rights. It is not in doubt that most African state parties to the CRC and the African Children's Charter have National Human Rights Institutions (NHRIs) mandated to promote and protect human rights.¹⁰⁴ It can be argued that the enforcement mechanisms in place, such as NHRIs and the department of women and children's affairs while promoting and protecting other human rights are not adequately protecting the rights of children. Bearing in mind the case of the Egyptian minor married to a Senator in Nigeria it is necessary to examine the extent to which these existing mechanisms have promoted and protected children's rights in Africa.

The question being raised is 'does the above mechanisms monitor the implementation of children's rights?' This chapter discusses the mandate of the NHRIs with regards to supervising the implementation of children's rights in African states. Thereafter, it examines specific government departments tasked with the affairs of children to assess its effectiveness in monitoring the implementation of children's rights.

3.2 The Role of NHRIs with regards to the Protection and Supervision of Children Rights at the National level

In the main, most of the NHRIs in African countries are established by the constitution or legislation, to promote and protect human rights. NHRIs in African countries differ from state to state in terms of their mandate and their method of establishment, nevertheless all NHRIs in African countries comply with the Principles relating to the Status of National Human Rights Institutions 1993(Paris Principles) as their main guidance.¹⁰⁵

It can be deduced from the Paris Principles that the role of NHRIs with regards to children's rights is the promotion and protection of the rights of a child.¹⁰⁶ In addition to the above mandate, NHRIs also have a role to ensure the coordination of national legislation, rules and practices with the CRC and the African Children's Charter and to ensure the effective

¹⁰⁴ In Africa, about 31 countries have a National Human Rights Institution. See C M Peter 'Human Rights Commissions in Africa- Lessons and Challenges' in A Bosl & J Diescho (eds) *Human Rights in Africa, Legal Perspectives on their Protection and Promotion*(2009)352.

¹⁰⁵ C M Peter 'Human Rights Commissions in Africa- Lessons and Challenges' in A Bosl & J Diescho (n 104 above) 352-353.

¹⁰⁶ Paris Principles. Para 1.

implementation of both instruments.¹⁰⁷ The above roles are not exhaustive and are therefore an over view of the roles of NHRIs with regards to children's rights, because NHRIs also have other roles such as its advisory role in order to effectively protect children's rights at the domestic level.

The Committee on CRC has stated in its general comment No 2 that state parties to the CRC have an obligation to establish an independent human rights commission to promote and protect children's rights. And in cases where a state party already has an independent human rights institution, then it should review its mandates or laws to include the implementation of the CRC.

Most African countries already have NHRIs,¹⁰⁸ established to promote and protect human rights. The issue that raises concern is: have those NHRIs incorporated the implementation of children's rights as part of their mandate? Thus, it is necessary to discuss below the mandates of NHRIs in African countries like South Africa, Tanzania and Uganda as case studies with regards to the supervision of the implementation of children's rights. The essence of this discussion is to examine the extent to which NHRIs have protected, promoted and supervised the implementation of children's rights among the protection of other rights.

3.2.1 Mandate of South Africa Human Rights Commission (SAHRC) in relation to the Promotion, Protection and Supervision of Children's rights

The SAHRC is established by the Constitution of the Republic of South Africa (South African Constitution) with the mandate to promote respect for human rights and a culture of human rights.¹⁰⁹ It is also mandated to safeguard the development and attainment of human rights and finally to monitor and assess the observance of human rights in South Africa.¹¹⁰ The pitfall of broad mandates such as the SAHRC's mandate without particular reference to children's rights is that children's rights cannot be adequately protected by the SAHRC. While the South African Constitution has a provision on children's rights, it did not include specific functions, powers and duties relating to children's rights that are connected to the CRC and its Optional

¹⁰⁷ Paris Principles. Para 3(b).

¹⁰⁸ Ghana, Nigeria, South Africa, Cameroun, Burkina Faso, Benin, Chad, Malawi, Ethiopia have Human Rights Institutions. See Peter (n 104 above)352.

¹⁰⁹ Sec 184 of the Constitution of the Republic of South Africa.

¹¹⁰ As above.

Protocol.¹¹¹ It is contended that this hitch hinders the effective protection of children's rights due to the fact that children have extra justifications attracting special protection of their rights.¹¹²

In practice, the SAHRC has not adequately monitored the implementation of children's rights or protected children's rights as a whole. The SAHRC does not have an office or department established by law and specifically mandated with the supervision of the implementation of children's rights. In addition, the presence of an explicit procedure to address complaints emanating from children with regards to the abuse of their rights is nonexistent in the SAHRC.¹¹³ Thus, the SAHRC uses the same procedure to address the complaints on the violations of children's rights as well as all human rights, despite the fact that such procedure is not well suited for children, thereby reducing children's accessibility to the system.

It is not in doubt that the SAHRC has carried out a number of work in relation to children's rights, such as the 2004 investigation of the allegation of child sexual abuse in Askham School,¹¹⁴ school racism study and child participation study.¹¹⁵ However, what is in doubt is if these works are as a result of an organised and conscious effort on the part of the SAHRC in relation to children's rights or if these works were randomly executed in the course of the protection of human rights without wholly concentrating on children's rights. This assertion is in view of the fact that in 2007 the African Peer Review Mechanism (APRM) report on South Africa revealed a number of violations of children's rights,¹¹⁶ even with the existence of the SAHRC. Therefore, it cannot be concluded from the few cases undertaken by the SAHRC with regards to children's rights that the SAHRC has adequately protected the rights of children as these cases mentioned are few compared to the number of violations that have continued to be perpetrated on children's rights.

¹¹¹ Committee on CRC :General Comment No 2 Para 8.

¹¹² As n 111 above, Para 5.

¹¹³ Concluding Observations of the Committee on CRC : South Africa, 2000.

¹¹⁴ Notice 1803 Of 2004 The South African Human Rights Commission: Inquiry into the Khomani San <http://www.info.gov.za/view/DownloadFileAction?id=59945> (accessed 17 September 2010).

¹¹⁵ Human Rights Commission < http://www.southafrica.info/public_services/citizens/your_rights/sahrc.htm > (accessed 17 September 2010).

¹¹⁶ As n 21 above.

Generally, the SAHRC does not have a duty to draft and present state party report on behalf of South Africa to the Committee on CRC and the ACERWC.¹¹⁷ The question that tugs at one's mind is: if SAHRC cannot draft a report on behalf of South Africa then how and who will measure its performance with regards to monitoring the implementation of children's rights?

The performance of SAHRC can be assessed in the following ways: first, the SAHRC must report directly to the public and the parliament on the situation of children's rights.¹¹⁸ Secondly, the SAHRC must prepare and submit its report on the position of children's rights to the Committee on CRC and the ACERWC.¹¹⁹ Thirdly, the SAHRC must discuss with the Committee on CRC and the ACERWC in its pre session working group on the authenticity of South Africa's report.¹²⁰ In actuality, the SAHRC has not assessed its performance in monitoring the implementation of children's rights. The unawareness of the SAHRC with regards to assessing its performance simply reveals that the SAHRC has not adequately monitored the implementation of children's rights.

The above discussion exposes a wide gap in the promotion, protection and supervision of children's rights by the SAHRC. This gap has left a lot more to be desired in the supervision and protection of children's rights, such as ensuring that the impact of laws and policies on children is carefully considered from advancement to implementation.¹²¹ The SAHRC has the function of providing advice to public and private bodies with regards to their interpretation and application of the CRC.¹²² The SAHRC also has the function to assess its performance in monitoring the implementation of children's rights. Finally, the SAHRC has the function to institute legal proceedings on behalf of children or offer legal assistance to children,¹²³ and to provide expertise in children's rights to the court in suitable cases as *amicus curiae*. It can be argued that with the enormous duties of the SAHRC with regards to the promotion and protection of human rights as a whole, the SAHRC cannot effectively carry out the above functions in relation to children's rights. This contention strengthens the argument that children being a vulnerable group need a special institution endowed with the responsibility to protect their best interest.

¹¹⁷ As n 111 above Para 21.

¹¹⁸ As n 111 above Para 18.

¹¹⁹ As n 111 above Para 20.

¹²⁰ As above.

¹²¹ As n 111 above Para 19(i).

¹²² As n 111 above Para 19(e) .

¹²³ As n 111 above Para 19(p).

In sum, the SAHRC is yet to achieve the desired accomplishment in the area of promotion, protection and monitoring of the implementation of children's rights in South Africa. This is in view of the fact that if South Africa desires to be counted as one of the African countries that is living up to its obligations in the CRC and ACERWC, its SAHRC must be able to effectively protect and monitor the implementation of children's rights in practice as stipulated by the Committee on the CRC in its general comment No 2.

3.2.2 Mandate of the Commission for Human Rights and Good Governance of the United Republic of Tanzania (CHRGG) in relation to the Protection, Promotion and Supervision of Children's rights

The CHRGG was established in 2000 when it was integrated into the 1977 Constitution of the United Republic of Tanzania. However, it only became active in 2001 with the enactment of a precise legislation to provide for its different roles.¹²⁴ The CHRGG is mandated with the duty to investigate any human rights abuses or maladministration,¹²⁵ to promote within the country the protection and preservation of human rights,¹²⁶ to receive allegations and complaints in the violation of human rights,¹²⁷ to institute legal proceedings in court with the aim of seeking redress in court for violations of human rights.¹²⁸

Generally, matters relating to the rights of children should fall under the broad mandate of the CHRGG. In addition, issues relating to rights of people with disabilities and sexual minority rights and all other human rights also fall under the broad mandate of the CHRGG. Accordingly, children's rights are not effectively protected and promoted as there is no incorporation of the CRC in the mandate of the CHRGG.¹²⁹

In practice, the CHRGG has divided its work into divisions each headed by a Director, among the divisions there is none on children's rights.¹³⁰ However, there has been the

¹²⁴ C M Peter 'Human Rights Commissions in Africa- Lessons and Challenges' in A Bosl & J Diescho (n 104 above) 363.

¹²⁵ Sec 15 (1) Commission of Human Rights and Good Governance Act, (CHRGGA) 2001.

¹²⁶ Sec 6(1)(a) CHRGGA, 2001.

¹²⁷ Sec 6 (1)(b) CHRGGA, 2001.

¹²⁸ Sec 6(1)(e) CHRGGA, 2001.

¹²⁹ As n 114 above, Para 8 which requested that the mandate of the NHRIs to incorporate the CRC and its Optional Protocol

¹³⁰ Tume Ya Haki Za binadamu Na Utawala Bora

<http://www.chragg.go.tz/aboutus.php?option=com_content&task=view&id=5&Itemid=6> (accessed 18 September 2010). The CHRGG has about six divisions amongst these are the divisions on legal services division, human rights

establishment of a children's desk by the CHRGG in 2006 to promote, protect and monitor the supervision of children's rights in line with the Committee on CRC's general comment No 2.¹³¹ The Children's desk has accomplished some success with regards to the promotion, protection and supervision of children's rights ranging from the one hundred and five complaints it has received from children and from adults on behalf of children.¹³² There is the publication and distribution of reports on public hearing of child abuse and fliers,¹³³ and the public enquiry on violence and abuse against children in eleven districts.¹³⁴

However, the independence of the children's desk is in doubt as its powers and functions are not provided for in law but rather in instructions.¹³⁵ This in itself is an impediment to the overall protection and supervision of children's rights. It is also not clear if the children's desk actually received and heard the complaints or if the complaints were heard like any other complaints against the violation of human rights. The children's desk officer is not easily accessible to children,¹³⁶ and the children's desk has not instituted legal proceedings on behalf of children. Further, the children's desk is only available in Mwanza, Lindi and Zanzibar¹³⁷ and thereby not available in all parts of Tanzania.

The children's desk has not assessed its performance with regards to the supervision of the implementation of children's rights as there is no record of reports by the children's desk to the public and the parliament on the situation of children's rights in Tanzania. However, the children's desk has submitted a report on its activities to the Committee on CRC, while conceding that this is an achievement on the part of the children's desk, the report failed to monitor government's compliance with its obligations under the CRC.

It must be pointed out that in 2009 the violations of children's rights continued to be on the increase in Tanzania, ranging from denial of basic necessities such as food and clothes to

investigation division, public education and training division, personnel and administration division, administrative justice division and research and documentation division.

¹³¹ Commission for Human Rights and Good Governance: Children Desk Report For CRC Committee Members and Special Rapporteurs for the Optional Protocol (2009) 3.

¹³² As n 131 above 5.

¹³³ As n 131 above 6.

¹³⁴ As n 131 above 7.

¹³⁵ UNICEF: *Independent Institutions Protecting Children's Rights No 8 June 2001*13.

¹³⁶ National Network of Organisation working with Children: NGOs Report to the Optional Protocol on the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography in Tanzania (2008) 39.

¹³⁷ As n 131 above.

rape, sexual abuses, working in hazardous sites, killings, lack of support and negligence.¹³⁸ Thus, it appears that the activities of the CHRGG with regards to children's rights have not made an impact on children. So grave is the situation of children's rights in Tanzania that according to the Legal and Human Rights Centre's media survey of 2009 the rights of the child in Tanzania had the highest number of violations in comparison to other rights.¹³⁹ This situation further re affirms the need for the creation of an independent institution aimed at supervising and protecting the rights of children against violations by the public and the private sector.

In conclusion, it is not in doubt that the CHRGG has had some levels of achievement in terms of the protection of children's rights.¹⁴⁰ But more needs to be done in the area of supervision of children's rights such as providing expertise in children's rights to the court as *amicus curiae*,¹⁴¹ also instituting legal proceedings on behalf of children or providing legal services.¹⁴² There is the need to co-ordinate organisations working in the area of children's rights. There is also the need to ensure that the impact of laws and policies on children is carefully considered from advancement to implementation.¹⁴³ In addition, awareness need to be created on the existence of the children's desk in Tanzania as it will fulfil the purpose of advancing public understanding and awareness of the significance of children's rights.¹⁴⁴ This is in view of the fact that the United Republic of Tanzania has ratified the CRC and therefore has a duty to fully implement it. The CHRGG has a duty to independently supervise Tanzania's compliance and advancement towards implementation of the CRC.¹⁴⁵ The CHRGG also has a duty to assess its performance with regards to the protection and supervision of the

¹³⁸ Legal and Human Rights Centre: Tanzania Human Rights Reports incorporating specific parts of Zanzibar (2009)85.

¹³⁹ As above.

¹⁴⁰ Children's desk has organised programmes for children, contributed books on children's rights and raised awareness on the protection of children's rights. See n 131 above 5,6&7.

¹⁴¹ For instance the government has been unable to prosecute the violators of children's rights with regards to sale and trafficking of children. The children's desk can team up with the government to prosecute such cases, by providing expertise or recommendations on how the system can be improved. As n 136 above 10.

¹⁴² As n 111 above Para,19 (p) &(r).

¹⁴³ As n 111 above Para, 19(i).

¹⁴⁴ As n 111 above, Para 19(i)where the Committee on CRC made it as part of the activities of NHRIs to raise public understanding of the children's rights. See n 137 above 12 where it was stated that one of the challenges facing the children's desk is a lack of awareness of the children desk.

¹⁴⁵ As n 111 above Para 25.

implementation of children's rights. These duties have not been fully achieved in recent years by the CHRGG with regards to children's rights.

3.2.3 Mandate of the Uganda Human Rights Commission (UHRC) in relation to the Protection, Promotion and Supervision of Children's rights

The UHRC is established by the Uganda Constitution of 1995, it has various departments and committees entrusted to carry out its work.¹⁴⁶ The UHRC is mandated by the Constitution of Uganda to investigate at its own initiative or on the complaints of any one the violations of human rights.¹⁴⁷ It is also mandated to establish a continuing programme of research, education and information to enhance the respect of human rights,¹⁴⁸ recommend to parliament effective measures to promote human rights,¹⁴⁹ and finally to monitor the government's compliance with its obligations under international treaties and conventions on human rights.¹⁵⁰

It can be implied that the UHRC has the mandate to investigate complaints on the violation of children's rights and has done so in a number of cases.¹⁵¹ The UHRC also has a mandate with regards to children's rights to recommend to parliament effective measures to promote children's rights. Accordingly, the UHRC has been more effective in the protection of children's rights as it has made recommendations to the Uganda parliament with regards to the facilities of the remand home where children are detained.¹⁵² The UHRC also raised the issue of children being detained with adults and the issue of babies being in detention with their detained mothers in the face of inadequate facilities to care for them.¹⁵³ It can also be said that the UHRC has monitored government's compliance with regards to the implementation of the CRC. This statement is reaffirmed by the study carried out by the UHRC on child neglect in

¹⁴⁶ C M Peter 'Human Rights Commissions in Africa- Lessons and Challenges' in A Bosl& J Diescho (n 104 above)358.

¹⁴⁷ Article 52(1) of the Ugandan Constitution as cited by C M Peter 'Human Rights Commissions in Africa- Lessons and Challenges' in A Bosl& J Diescho (n 104 above) 360.

¹⁴⁸ As above.

¹⁴⁹ As above .

¹⁵⁰ As above .

¹⁵¹ 10th Annual Report to the Parliament of Uganda of the Uganda Human Rights Commission (2007) 13 and 11th Annual Report to the Parliament of Uganda of the Uganda Human Rights Commission(2008) 15. Where it was stated that the complaints against the violations of children's rights constituted 22.1% of the total complaints.

¹⁵² As n 151 above 38.

¹⁵³ As n 151 above 39-40.

2005 but incorporated in its 2008 report to the Uganda parliament.¹⁵⁴ It is therefore not in doubt that a higher degree of attention has been given to children's rights by the UHRC.

The UHRC does not have a specific unit for children's rights, but it merges children's rights with the other categories of vulnerable groups. Thus, it has a desk mandated to deal with vulnerable groups.¹⁵⁵ The merging of children's rights with other categories of vulnerable groups undermines the promotion, protection and supervision of children's rights. This is in view of the fact that children are the most vulnerable group of persons, because their rights are not only violated by the state but also by private persons such their parents, teachers and third parties, it is therefore difficult for such a desk to adequately monitor and protect the rights of children together with the rights of other vulnerable groups.

It must be pointed out too, that the UHRC's mandate also applies to every other human rights, thus making it difficult to fully concentrate on children's rights. In addition, due to the concealed nature of the violations of children's rights, it will be difficult for the UHRC to address issues of violations that occur in homes and in the private sector. Therefore parents or guardians who violate children's rights will continue to do so.

It is interesting to point out here that the UHRC has not stated in its recent reports,¹⁵⁶ the measures taken if any to combat the problem of street children. In recent years in Uganda, the massive violations of children's rights can be attributed to the neglect of street children.¹⁵⁷ Can it be concluded that the violations of these children's rights by parents, guardians or people in the private sector does not attract the same attention of UHRC by virtue of the fact that it has numerous responsibilities?

Thus, the failure on the part of UHRC to co-ordinate NGOs in this area or design programmes aimed at addressing this issue leaves more to be desired, such as advocating for and facilitating meaningful participation by children's rights NGOs in the development of domestic legislation.¹⁵⁸ This statement stems from the fact that the Children Act Cap 59 excludes the government of Uganda from the duty of maintenance of children, thus, the slow

¹⁵⁴ As n 151 above 71- 80.

¹⁵⁵ Interview with Senior Human Rights Officer of the Uganda Human Rights Commission: Ms Melody Ginamia via e- mail on 20 September 2010.

¹⁵⁶ The issue of street children was not stated in its 10th and 11th Annual Report to the Parliament of Uganda.

¹⁵⁷ Afro Consultancy Ltd: An Appraisal of the Magnitude of the Street Children Problem in Uganda (2008)34.

¹⁵⁸ As n 111 above Para 19(k).

response of the government to issues of medical attention and street children.¹⁵⁹ There is also the failure on the part of the UHRC to maintain relationships with NGOs responsible for the promotion and protection of children's rights.¹⁶⁰ The APRM report of Uganda 2008 still noted the violations of children's rights in Uganda.¹⁶¹

In sum, UHRC seems to be faring well in the area of the protection, promotion and supervision of children's rights. However, some work still needs to be done in the area of reviewing the adequacy and effectiveness of law and practice relating to the protection of children's rights in order to address violations of children's rights. The UHRC has a duty to ensure the creation of a special desk for children, thereby separating them from other vulnerable groups in order to effectively protect and monitor the implementation of their rights.

In conclusion on the discussion of the mandates of NHRIs in African countries using South Africa, Tanzania and Uganda as case studies, it can be said that children's rights are not adequately protected by these NHRIs. The deficiencies in the promotion, protection and supervision of children's rights ranges from a lack of specific department on children's rights in SAHRC to a lack of awareness of the SAHRC with regards to the supervision and protection of children's rights. It was also discovered from the discussion that SAHRC has only carried out a few numbers of studies and investigations on the violation of children's rights. It can be concluded that the SAHRC has not adequately protected and supervised the implementation of children's rights at the national level.

It can be concluded with regards to the discussion on CHRGG that the children's desk has accomplished some achievements which is perceived to amount to nothing in the face of the rise in the violation of children's rights in Tanzania. In addition, the violations of children's rights in Tanzania could have been reduced to the barest minimum rather than be on the increase if the children's desk was provided for in law rather than in instructions. Finally, the UHRC has not adequately protected the rights of all children, it seems to have totally neglected street children. It be concluded from the discussion that the failure on the part of UHRC to cater for the rights of all children lies in the merger of the children's units with other vulnerable groups.

¹⁵⁹ As n 157 above 20.

¹⁶⁰ European Network of Ombudspople for Children(ENOC): ENOC's Standards for Independent Children's Rights Institution (2001) 4 .

¹⁶¹ APRM: Country Review Report No 7 Republic of Uganda. January 2009.

A discussion on the relevant government ministries charged with children's affairs will be undertaken below in order to assess its effectiveness in monitoring the implementation of CRC.

3.3 A Toothless Bull Dog? An analysis of the effectiveness of Government Ministries tasked with Children Affairs in Monitoring the Implementation of Children's rights

Most of the government ministries in African Countries tasked with children affairs are usually merged either with women or people with disabilities.¹⁶² The reason that can be advanced for this merger could be the fact that all three groups have one thing in common and that's because they are all vulnerable. However, children are the most vulnerable in these groups and should be given the ultimate attention which they deserve. Generally, the ministry of women and children affairs (MWCA) is not independent of the government, because the MWCA is a department in the government. The MWCA is usually not established by the constitution of a state or legislation, therefore, the MWCA's mandates and powers are defined by the government unlike the NHRIs whose mandates and powers are specifically provided for by the constitution or the legislation establishing it.

The mandate of the MWCA in African countries vary from state to state, however this discussion draws inspiration from various African countries such as Ghana, Kenya and Nigeria to deduce the mandate of the MWCA. Thus, the MWCA is mandated by the government with regards to children to promote the rights of children,¹⁶³ to commence policies, projects and programs for the provision of services towards the progress, survival, safety and involvement of children,¹⁶⁴ to ensure that children's vigour is used in advancing national development through constructive activities,¹⁶⁵ to guarantee the codification of laws to protect women and

¹⁶² In Nigeria it is called Ministry of Women affairs and Social development , in South Africa it is known as Ministry For Women, Youth, Children and Persons with disabilities, In Ghana it is called the Ministry of Women and Children's affairs. In Kenya it is known as Ministry of Gender, Children and Social development.

¹⁶³ This is the case in Ghana where the Ministry of women and children affairs is mandated to initiate, co-ordinate and monitor gender responsive issues as well as promote the rights of children.

¹⁶⁴ Press Briefing by the Honourable Minister of Women Affairs <http://www.nigeriafirst.org/docs/wapress.htm> accessed 21 September 2010 where the mandate of the Ministry of Women and Children Affairs was made known.

¹⁶⁵ As above .

children,¹⁶⁶ and amongst others to protect the rights of all children through the execution of all significant policies, co- ordination, supervision and delivery of services.¹⁶⁷

The MWCA cannot supervise government's implementation of the CRC and the African Children's Charter because it is part of the government, so the MWCA does not have the lee way to operate in a manner it deems necessary to adequately monitor all mechanisms charged with the responsibility to protect children's rights.¹⁶⁸ They are therefore governed by the government's visions, policies and ideas with regards to children. The MWCA cannot institute legal action on behalf of children against the government, in fact it does not have the mandate to institute legal actions on behalf of children, to carry out inquiries on matters relating to children's rights, to conduct investigations in matters of violations of children's rights on complaint or on the MWCA's initiatives.

The MWCA does not have the power to support children taking cases to court or intervene in court cases in order to inform the court about the children's rights issues involved in the case. It does not have the power to review the accessibility of complaints procedures for children and recommend ways to enhance accessibility. It does not have the right to report independently and frankly to the public at large and the parliament on the state of children's rights.¹⁶⁹ It cannot reassess and give details on the government's implementation and monitoring of children's rights because it is part of the government, so the government can dictate the methods of supervision of the implementation of children's rights.

The above clearly illustrates that the MWCA is no match to an independent children's rights institution with regards to the supervision of children's rights. In spite of this drawback the MWCA cannot be totally written off, as it has contributed its quota with regards to the implementation of children's rights as provided in the CRC and the African's Children Charter. In Kenya, the MWCA has achieved considerable success with regards to the protection and promotion of children's rights. For instance in Kenya, over 60,000 cases of children is reported to the district children's office on a yearly basis as being in need of concern and safeguard.¹⁷⁰ In Nigeria, the department of child development is one of the programme departments in the

¹⁶⁶ As above .

¹⁶⁷ Government of Kenya: Ministry of Gender, Children and Social Development <http://www.gender.go.ke/index.php/About-Us/mission-vision-functions.htm> (accessed 20 September 2010).

¹⁶⁸ The Ministers are in charge of the ministries of women and children affairs in African countries.

¹⁶⁹ As n 111 above Para 1.

¹⁷⁰ As n 167 above.

Federal ministry of women and social development and it has achieved some measures of success with regards to the protection of children's rights.¹⁷¹ For instance the child department provides adoption guidance and counselling services, it also devises programmes aimed at covering the educational lacuna between the boy and the girl child.¹⁷²

In answering the question posed by Julia Neilsen and Mezmur, supervision of the implementation of children's rights is not better located at the government department which is in this case the MWCA. The experiences of Nigeria, Kenya and Ghana ministries of women and children affairs depict that the MWCA cannot adequately supervise the implementation of children's rights because it is mandated with the duty to formulate policies and strategies for the implementation of children's rights. In addition, NGOs will not have the necessary conviction which it needs to co-operate with the ministry in the co-ordination of children's rights, because NGOs will perceive the MWCA to be partial to the government.

In conclusion, the MWCA can be counted as one of the mechanisms endowed with the responsibility to promote and protect children, be it their rights or welfare. This is an achievement with regards to the promotion and protection of children's rights at the national level. But the same cannot be said with regards to the supervision of the implementation of children's rights at the national level. Accordingly, the MWCA are important agents for the promotion and protection of children's rights, but they cannot be the sole agencies for the overall supervision of children's rights in any country.

The factor that can account for the failure of the MWCA to supervise the implementation of children's rights lies in the fact that the MWCA does not have the mandate to supervise the implementation of children's rights, rather its mandate lies in the implementation of children's rights. It is therefore in charge of designing policies, strategies, plans, programmes and activities aimed at effectively protecting and promoting children's rights. At best, the MWCA can play a complementary role to an independent child's right specific institution. The question that tugs at one's mind now is if the MWCA is aimed at creating policies and programmes, who supervises the effectiveness of these policies and programmes to ensure that children's rights are totally protected?

¹⁷¹ Federal Ministry of Women Affairs : Department of Child development.

¹⁷² As above.

3.4 Concluding Notes

In conclusion, there exists in some African countries NHRIs which have promoted, protected and supervised children's rights, but has not done so adequately, due to factors such as an overburden of its mandate by the constitution or legislation creating it. This seems to be the case with the SAHRC which does not have a specific mandate with regards to the protection and supervision of the implementation of children's rights. The SAHRC has not carried out a number of activities in the area of protection and supervision of the implementation of children's rights ranging from instituting legal actions on behalf of children to creating awareness on children's rights. The failure to establish a specific department to cater for the needs of children and a child specific procedure to enable children have easy access to the SAHRC to make complaints on the violation of their rights has impacted negatively on the protection of children's rights by the SAHRC. Finally on the SAHRC, it was also discovered that the SAHRC has failed to assess its performance in monitoring the implementation of children's rights.

There's also the issue of the legislation not specifically incorporating children's rights in the mandate of NHRIs as recommended by the Committee on CRC in its general comment No 2. This seems to be the case with the CHRGG which has a children's desk but its credibility is in doubt since it is not established by law. In addition, it is not easily accessible and available to children across Tanzania due to the fact that it only has about three offices in Tanzania. Thus, it was discovered that the violations of children's rights in Tanzania is still on the increase, therefore, revealing the gap in the absence of an appropriate institution to supervise the implementation of children's rights.

Finally on NHRIs, it was discovered that the UHRC has made quite a remarkable success in protecting and supervising the implementation of children's rights and has also assessed its performance by annually reporting to the parliament on the situation of children's rights in the Country. It was also discovered that the merging of the children's unit with other vulnerable groups might reduce the effectiveness of the department in monitoring the implementation of children's rights. Thus, the UHRC has not adequately protected all children such as street children whose rights are still been violated.

The MWCA has also proved to encounter hitches in the area of the overall protection and supervision of children's rights. It is believed that the MWCA will flourish better in protecting and promoting children's rights as seen in the case of Nigeria and Kenya and not in the overall supervision of the implementation of children's rights. It can be concluded that the MWCA

can play a better role in complementing a child specific institution charged with the overall supervision of children's rights.

In spite of the existence of NHRIs, MWCA amongst others, violations of children's rights continue to exist and in most countries are on the increase.¹⁷³ Finally, it can be concluded from the above loop holes that the existing enforcement mechanisms are stalemates in the supervision of children's rights at the national level.

¹⁷³ 'The Nigerian child' *Thisday* 20 November 2009 where it was stated that in Nigeria the violations of children's rights are still on the increase ranging from street hawking, child molestation to house helps. See Legal and Human Rights Centre(n 138 above) where it was stated that in Tanzania the violations of human rights is on the increase.

CHAPTER 4

SEALING THE LACUNA: AN APROPRIATE INSTITUTION FOR THE SUPERVISION OF THE IMPLEMENTATION OF CHILDREN'S RIGHTS AT THE NATIONAL LEVEL

*I won't give up until the exploitation of all children has ended and all children have their rights*¹⁷⁴

Craig Kielburger

4.1 Introduction

The inability of NHRIs and MWCA to effectively supervise the implementation of children's rights creates a gap in the overall protection of children's rights at the national level. While not out rightly condemning both mechanisms as been insignificant in the protection of children's rights, the previous chapter has revealed the fact that there exists a gap in the overall supervision of the implementation of children's rights which has resulted in the failure to effectively protect the rights of children. The vulnerability of children and the hidden violations of their rights by private persons reinforce the need and the importance of having a separate independent body to protect the rights of children.

This chapter discusses the need and justifications for establishing an independent children's rights institution, it also discusses the features of an independent children's rights institution. It finally analyses the role which a children's rights institution must play in other to effectively supervise the implementation of children's rights at the national level.

4.2 Seeking an Independent Children's Rights Institution

The CRC and the African Children's Charter do not specifically require state parties to establish an independent institution for children's rights. But the Committee on the CRC has persistently emphasised on the important duty such an institution has to play in the protection, promotion and supervision of the rights of children. The thrust of this research is on the need for state parties to the CRC and the African Children's Charter to establish an independent institution for the overall protection of children's rights. The preceding chapter has established concrete reasons on why the rights of the child need to be protected by an independent child specific institution. These reasons are further strengthened by the Committee on CRC general guidelines for periodic reports (guidelines). In its guidelines, the

¹⁷⁴ <http://www.betterworld.net/quotes/children-quotes-3.htm> (accessed 20 September 2010).

Committee on CRC request for information on 'any independent body established to promote and protect the rights of the child, such as an ombudsman or commissioner.'¹⁷⁵

Indeed, the protection of human rights is important for every human being, but there are groups within the society which encounter more difficulties than others with regards to protection of their rights.¹⁷⁶ Children are the group of persons which needs special protection of their rights, because they are the most vulnerable group in the society.

The ability of children's rights to gain the primacy they deserve lies heavily in the establishment of an independent children's rights institution.¹⁷⁷ The establishment of an independent institution for children's rights will promote and protect children's rights and above all will supervise the implementation of the CRC and the African's Children's Charter by the mechanisms mandated to implement both instruments. Independent children's rights institution can be established as separate bodies or as a fundamental part of a human rights commission.¹⁷⁸ Strong reasons exists which favours the establishment of an independent children's rights institution as a separate institution. These include the assurance that children's rights are protected and not being neglected by giving much attention to adult programmes.¹⁷⁹ In addition, most violations of children's rights are committed by parents, guardians, teachers and other adults who have responsibility for children.¹⁸⁰ Thus, an institution focused solely on the protection of children's rights is more capable of dealing with such violations, than an integrated institution.¹⁸¹ However, notwithstanding these advantages a state can adopt any of the two modes, as long as consideration is given to the exceptional status and needs of children.¹⁸²

It must be pointed out that the concept of independent institutions for children's rights is a developing concept in Africa, therefore African states must establish a model to suit their governmental and legal systems and also take into account the existing mechanisms that

¹⁷⁵ As n 84 above.

¹⁷⁶ UNICEF (n 135 above) 3.

¹⁷⁷ UNICEF (n 135 above) 1.

¹⁷⁸ European Network of Ombudspople for Children(ENOC): ENOC's Standards for Independent Children's Rights Institution (2001) 2.

¹⁷⁹ UNICEF(n 135 above) 9.

¹⁸⁰ As above.

¹⁸¹ UNICEF (n 135above) 10.

¹⁸² ENOC (n 178 above) 2.

perform some work in the area of children's rights.¹⁸³ Although the availability of existing institutions in Africa must be taken into consideration, there are strong contentions that exist for the creation of an independent children's rights institution.

These contentions are that NHRIs exist in Africa that does not exclude children from their services, but they seldom address themselves to the concerns of children. And in cases where NHRIs address the concerns of children they fail to take into consideration that the problems facing adults and children are quite different.¹⁸⁴ It is also contended that the CRC was adopted in acknowledgment of the fact that children as a group needs special protection under international law if their rights are to be realized.¹⁸⁵ Further to the above arguments, the action or inaction of government affects children the most, because they are dependent on public services such as education, health and child care services.¹⁸⁶ They are therefore excessively exposed to difficulties such as poverty, street hawking, house helps, street begging, poor housing and environmental pollution.

It is also contended that children are more open to exploitation and abuses from parents, legal guardians and the government due to their defencelessness. In the words of Eglantyne Jebb 'it is children who pay the heaviest price for our short sighted economic policies, our political blunder, our wars.'¹⁸⁷ Children also need special mechanisms to respond to their needs and remedy their rights in cases of violations. However, most of the complaints mechanisms in place are unsuitable for children because they were established to cater for the needs of adults, thereby limiting children's access to complaints mechanism and the legal systems.¹⁸⁸

In addition to the above arguments, children's rights will not gain the primacy they deserve if independent children's rights institutions are not established to seal the vacuum between the provisions in the CRC and the African's Children's Charter and the actual

¹⁸³ ENOC (n 178 above) 2 Where it was stated that the concept of an independent institution was an evolving concept in Europe as a whole, so existing institution had to be taken into account in establishing an independent children's rights institution. But in Africa, even though the existing institution must be taken into consideration, the situation of the African child provokes the need for a specific institution to protect their rights.

¹⁸⁴ UNICEF (n 135 above) 4.

¹⁸⁵ Kaime (n 2 above) 1.

¹⁸⁶ UNICEF (n 135 above) 3.

¹⁸⁷ T Hammarberg 'The UN Convention on the Rights of the child and how to make it work' (1990) 12 *Human Rights Quarterly* 98.

¹⁸⁸ UNICEF (n 135 above) 3.

implementation of children's rights in all aspects of their lives.¹⁸⁹ These arguments strengthen the case for the establishment of an independent children's rights institution to monitor and protect the rights of children.

Finally, violations of children's rights are perpetrated by the state, parents, legal guardians and many powerful people in children's lives they therefore need an institution mandated to protect them from such violations.¹⁹⁰

In conclusion, the creation of a child's rights institution will create awareness on the existence and importance of children's rights to the child, parents and the society at large. It is necessary to discuss below the major features that independent children's rights institutions must possess.

4.3 Features of an Independent Children's Rights Institution

There are major features which an independent children's rights institution must possess to achieve the desired result in the protection of children's rights as opposed to the existing enforcement mechanisms. The mere establishment of an independent children's rights institution without conferring it with some major features will make the children's rights institution no different from the enforcement mechanisms discussed earlier. In fact, the loop holes discovered in the existing enforcement mechanisms can be attributable to the absence of the major features that a children's rights institution must possess. It is therefore contended that in order for an independent children's rights institution to effectively monitor, promote and protect children's rights it must possess the following major features.

i. Established By Law

To gain credibility, an independent children's rights institution must be established by law or the Constitution. The law must include the functions and powers of the independent children's rights institution which must be linked to the CRC.¹⁹¹ The establishment of the independent children's rights institution by the legislation guarantees its long term existence and its legal powers.¹⁹² For instance, the Norwegian Ombudsman for children has its functions,

¹⁸⁹ For instance the National Commission for protection of Child's Rights India searches for an in depth access to households and communities. See National Commission for Protection of Child Rights <http://ncpcr.gov.in/> (accessed 20 September 2010).

¹⁹⁰ UNICEF(n 135 above)4.

¹⁹¹ As n 111 above, Para 3.

¹⁹² International Council on Human Rights Policy *Assessing the Effectiveness of National Human Rights Institutions*(2005) 13.

powers and duties provide for in Act No. 5 of March 6 1981 relating to the Ombudsman for children.¹⁹³

There is no gainsaying the fact that the establishment of independent children's rights institution by law will attract the necessary authority it needs to monitor the government's implementation of the CRC.¹⁹⁴ The failure to establish the children's desk of the CHRGG by law accounts for its short comings on accessibility and lack of clarity on its mandate. The vulnerable group unit of the UHRC also has its deficiency with regards to its establishment as its powers and duties are not defined by law. This is also the case with the MWCA whose functions and powers are set out by the government rather than being linked to the CRC and the African Children's Charter, therefore the MWCA does not have the necessary legal powers to supervise the implementation of children's rights. Thus, for an independent's children's rights institution to be effective, it must be established by law such as the Norwegian Ombudsman for children.

ii. Independence

Independence is one of the features of a specific child rights institution that strengthens its legitimacy and credibility. It therefore follows that the legislation establishing the children's rights institution must specifically provide for its appointment mechanism, functions, accountability, and funding.¹⁹⁵ It is contended that independent children's rights institution must operate independently from the government while maintaining a close relationship with government in order to exert influence on the government with regards to children's rights.¹⁹⁶ It is clear that financial and political independence enables an independent children's rights institution to carry out its functions effectively without consideration of bureaucratic rules, hierarchies, interests and other pressures.¹⁹⁷

The MWCA cannot boast of being financially and politically independent from the government, the dependency of the MWCA on the government confirms the MWCA's inadequacy in the supervision of the implementation of children's rights. This is also the case with the Children's desk of CHRGG and the vulnerable group unit of UHRC who's funding are

¹⁹³ Barnetombudet http://www.barneombudet.no/english/about_the/law_and_in/ (accessed 10 October 2010).

¹⁹⁴ M G Flekkoy 'The Children's Ombudsman as an Implementor of Children's Rights' (1996)6 *Transnational Law and Contemporary Problems* 366.

¹⁹⁵ International Council on Human Rights Policy (n 192 above) 12.

¹⁹⁶ UNICEF(n 135 above)7.

¹⁹⁷ Flekkoy(n 194 above)363.

not provided for by law. Independent children's rights institutions such as Denmark, Norway, Iceland, Sweden and Belgium have their aims linked to the CRC, this in turn gives them the weight of international law underlining their independence.¹⁹⁸

Finally, with regards to the independence of a child's rights specific institution, the children ombudsman or children's commissioner must be a strong figure able to command the attention of the authorities by the force of his personality.¹⁹⁹

iii. Accessibility

The independent children's rights institution must be accessible to everybody especially children. This is not the case with the SAHRC, the CHRGG and the UHRC whose complaints procedures are fashioned out in a way to address the needs of adults and therefore not easily accessible by children. Children should be able to make written complaints as well as verbal complaints to a child specific institution on the violation of their rights.

The essence of a children's rights institution's accessibility is to enhance its effectiveness, children must be aware of the existence of the institution, its mandate and how to contact it.²⁰⁰ In addition, children must have assurance in the institution's ability to represent their interest, therefore the institution must have a simple procedure on how children can reach it.

iv. Proximity to decision making institutions and collaboration with other child related organisations

The independent children's rights institution must be close to decision making bodies in order to influence child related policies. It must be able to work closely with government officials and politicians. An independent children's rights institution should also be able to co-ordinate NGOs working on children's rights, work with NGOs and national authorities carrying out work on children's rights. This will enable the independent children's rights institution to gain from the expertise of the NGOs as well as circumventing unwanted duplication of work.²⁰¹

v. Conclusion

In conclusion, in order to effectively protect children's rights an independent children's rights institution must be established by law clearly spelling out its mandate, it must be independent

¹⁹⁸ UNICEF(n 135 above) 8.

¹⁹⁹ Flekkoy(n 194 above)364.

²⁰⁰UNICEF(n 135 above) 9.

²⁰¹ As above.

of the government or any other organisation, it must be accessible and well known to children such as the Children's Ombudsman in Norway, it must be close to decision making bodies in order to have an impact on the situation of children, it must be also have the ability to work with government authorities and NGOs. Having discussed the major features of independent children's rights institution it is necessary to discuss the role of an independent children's rights institution below.

4.4 The Role of an Independent Children's Rights Institution

It is certain that an independent children's rights institution has many functions with regards to children. Children are vulnerable and need every aspect of their rights to be protected by the children's rights institution if it is to achieve the purpose for which it is established. The following are the major roles of an independent children's rights institution:

- ❖ In Africa, many parents are edgy with the concept of children's rights, perceiving children's rights as a danger to the strength of the family and their own authority. Independent children's rights institution has a function to change the perception of parents to view children as subjects of rights.²⁰² For instance an independent children's rights institution can offer parents informal education on rights of the child.

- ❖ Independent children's rights institution has a duty to investigate allegations of violations of children's rights or react to complaints on violations of children's rights.²⁰³ This is in view of the fact that the independent children's institution is a means for children to defeat the anonymous, inhuman bureaucracy by having their complaints acknowledged and tracked by an independent children's rights institution.²⁰⁴ It can conveniently be said that the independent children's rights institution is the watch dog against children's rights abuses.

- ❖ Independent children's rights institution has an obligation to ensure that they are appropriate mechanisms in place to address the violations of children's rights.²⁰⁵ They also have an obligation to ensure that such mechanisms are easily accessible to children. The ways by which this obligation can be achieved is by instituting legal

²⁰² UNICEF (n 135 above)6.

²⁰³ As n 111 above, Para 13.

²⁰⁴ Flekkoy(n 194 above) 360.

²⁰⁵ As n 111 above, Para 4.

actions on behalf children whose rights have been violated by their parents, guardians or the private sector.²⁰⁶ This is in view of the fact that children do not have the prerequisite resources to initiate legal action against their parents, guardians or the private sectors. For instance the New Zealand Commissioner has the power to institute an action on behalf of an individual child.

- ❖ Independent children's rights institution also has a duty in cases where it cannot bring an action on behalf of a child due to financial implications of such an action, to supervise the efficiency and accessibility of the existing complaints procedure in responding to the violations of children's rights.²⁰⁷ And in cases where the complaints procedure is viewed to be inefficient with regards to addressing violations of children's rights, the independent children's rights institution has a duty to recommend ways by which the complaints procedure can be improved to cater for the needs of children. This is to enable children challenge violations of their rights in school, public care, family and the juvenile justice system.²⁰⁸ Independent children's rights institution also has the duty to examine recommendations from the complaint procedures in cases where it is not involved to enable it identify shortcomings and advocate for change in those areas.²⁰⁹

- ❖ Independent children's rights institution also has a duty to influence legislation that affects children's rights. The reason that can be advanced for this role is that if independent children's rights institution must advocate for the rights of children, it must be able to identify laws, policies and practice that fall short of protecting children's rights and recommend ways to tackle those short comings.²¹⁰

- ❖ Independent children's rights institution has a function to gather and disseminate information on the situation of children's rights, to research and work towards the direction of establishing a data base.²¹¹

²⁰⁶ As n 111 above, Para 14.

²⁰⁷ UNICEF(n 135 above)7.

²⁰⁸ As above.

²⁰⁹ As above.

²¹⁰ UNICEF(n 135above) 4.

²¹¹ Flekkoy(n 194 above)360.

- ❖ Independent children's rights institution has a duty to constantly monitor government bodies with regards to the implementation of children's rights.²¹² Thus, it has a duty to review government reports on children's rights with regards to assessing its progress in the protection of children's rights. While the independent children's rights institution cannot be responsible for government's reports, it has a duty to review government's reports.²¹³ In addition, the independent children's rights institution has a duty to write its independent report on the situation of children's rights.

4.5 Concluding Notes

It can be concluded that the adequate protection of children rights demands the establishment of an independent institution mandated solely with the affairs of children. The mere establishment of an independent children's rights institution or a children's desk as in the case of Tanzania and Uganda is not enough in itself for the effective protection of children's rights and does not qualify in all justification as an independent children's rights institution. Thus, such institution must possess major features which will enable it to function properly in executing its duty in the supervision of the implementation of children's rights. The Norwegian Ombudsman for children can be used as a model with regards to the major features which an independent children's rights institution must possess. Accordingly, an independent children's rights institution is the much needed glue to seal the gap between the massive violations of children's rights in Africa and the realization of children's rights.

Thus, to successfully protect the rights of children and prevent future occurrence of violations it is necessary to establish an independent children's rights institution which can be called a children's commissioner or ombudsman or whatever name that is deemed appropriate. The important fact remains that such institution must be independent, established by law amongst others in order to effectively execute its role in the overall protection and the supervision of the implementation of children's rights. An independent children's rights institution therefore has the necessary power to carry out the overall supervision of the implementation of children's rights at the national level.

²¹² Flekkoy (n 194 above) 361.

²¹³ As n 114 above, Para 20

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

*There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want...*²¹⁴

Kofi Annan

5.1 Conclusion

This research dug into the problem of the violations of children's rights in Africa and discussed among other things the obligations of state parties under the CRC and the African Children's Charter with regards to the implementation of children's rights. It was discussed in the preceding chapters that state parties to both the CRC and the African Children's Charter have an obligation to take legislative, administrative and other measures in the implementation of the CRC. The research also highlighted the establishment of an independent children's rights institution as one of the obligations of state parties.

During the research it was discovered that majority of the African countries have NHRIs and some of them have undertaken some work in the area of children's rights. It was also discovered from the case studies that CHRGG and UHRC have some form of unit for children's rights, while such unit for children's rights was absent in SAHRC. Thus, the research sought to analyse the present activities of NHRIs and the MWCA with regards to monitoring the implementation of children's rights. It discovered some loopholes in both mechanisms as children were not given the special attention they deserve due to their vulnerability. The research also discovered that the mere establishment of a children's desk within an NHRI as in the case of CHRGG is insufficient if it does not possess some major features. It also discovered that the merger of a children's rights unit with other units renders it ineffective in the supervision of the implementation of all children's rights, as in the case of Uganda.

This research therefore made a case for the supervision of children's rights at the national level by an appropriate institution. It suggested an independent children's rights institution to undertake the supervision of children's rights at the national level. The research drew inspiration from best practices of children's ombudsman or children's commissioner from all

²¹⁴ <http://www.betterworld.net/quotes/children-quotes-3.htm> (accessed 30 September 2010)

over the world, especially Norway in order to create an effective system for monitoring the implementation of children's rights.

Based on the above, the research drew the following conclusions:

That state parties to the CRC and African Children's Charter have an obligation to establish an effective independent children's rights institution for the protection and supervision of children's rights at the national level.

That the existing NHRIs at the national level using South Africa, Uganda and Tanzania as case studies are not effectively supervising the implementation of children's rights at the national level.

That the MWCA cannot effectively supervise the implementation of children's rights. Though, it is conceded that they are carrying out activities with regards to the protection of children's rights. But, their dependency on the government out rightly disqualifies the MWCA from supervising the implementation of children's rights, so at best the MWCA can complement a suitable children's rights institution in the overall supervision of the implementation of children's rights. Thus, the appropriate mechanism that can be put in place for the supervision of children's rights is the creation of an independent children's rights institution.

That such child's rights institution must be established by law, independent, accessible and close to decision making bodies in other to make a difference in the protection and supervision of children's rights. Having reached this conclusion with regards to the research, it is necessary to discuss the recommendations that will enable African countries in realising an appropriate institution for the supervision of children's rights below.

5.2 Recommendations

Drawing inspiration from the Norwegian Ombudsman for Children which is the oldest and one of the most successful Ombudsmen for children in the world, the following are specifically recommended:

a. Recommendations to South Africa

It is recommended that South Africa should adopt the model of an independent children's rights institution as discussed in chapter 4 to establish a children's rights institution in order to effectively supervise the implementation of children's rights.

b. Recommendations to Tanzania

The legislation establishing the CHRGG should be amended to include the establishment of a children's desk mandated to oversee the implementation of the CRC and the African Children's Charter. In addition, the amendment must specifically include the functions and method of funding of the children's desk in order to enhance its independence. Finally, the children's desk must be available in all parts of Tanzania and possess a simple procedure by which children can easily access it.

c. Recommendations to Uganda

It is recommended that Uganda must separate its children's rights units from the vulnerable group desk in order to enhance the visibility and independence of the children's rights desk. It is also recommended that the children's desk must be established by law and must be accessible to all children in Uganda.

d. General Recommendations

It is generally recommended that an independent children's rights institution should be established in African countries. The independent children's rights institution must be separated from the NHRIs in order to operate effectively. And in cases, where it will be too expensive to establish a separate institution for children's rights that such an institution can be integrated into the NHRIs but must be established by law to give it credibility.

That such an independent child's rights institution must be independent of the government in every way, including political and financial independence. It is therefore recommended that such institution should have a separate fund such as the judiciary. For instance it was recommended during the APRM process in Ghana that the Ghana National Commission on Children should be separated from the government to function as an independent body within the government.²¹⁵

That African states with limited funds do not need excessive funds to start off an independent child rights institution as was demonstrated in the case of Norway which started with only a total of four staff and an annual budget of approximately 300,000 US dollars and has now expanded both in staff and budget.²¹⁶

²¹⁵ APRM: Country Review Report of the Republic of Ghana June 2005.

²¹⁶ MG Flekkoy, 'The Ombudsman for Children Conceptions and Developments' in B Franklin (ed) *New Handbook for Children's Rights Comparative Policy and Practice* (2002)408.

That the independent children's rights institution must be accessible to all children, it is therefore recommended in the area of accessibility that 24 hours free telephone lines should be made available in countries where telephone is easily accessible. In addition, there should be an officer carrying out field work in the area of children's rights or the creation of zonal offices in African countries where mobile phones are not easily accessible. The independent children's rights institution should also be easily accessible through the internet such as the Norwegian Ombudsman for Children. There should also be a creation of awareness on the existence of the children's rights institution and how it can be accessed by children in a manner that is easily understood by children and in local languages.²¹⁷ The rationale behind this recommendation is to reach out to children whose rights are being violated by the private sector such as the parents, teachers or legal guardians.

It is also recommended that the children's rights institution must collaborate with NGOs working in the area of children's rights as well as with government institutions in order to effectively monitor the implementation of children's rights by the government and the promotion and protection of children's rights by NGOs, so that the duplication of programmes with regard to the protection of children's rights can be avoided.

Finally, it is strongly recommended that a child's rights institution should be established by African states to monitor the implementation of the CRC and the African Children's Charter at the national level.

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²¹⁷ International Council on Human Rights Policy(n 192 above) 16

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