

Children's Rights in Africa: An appraisal of the African Committee of Experts on the Rights and Welfare of the Child

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DECLARATION

I, **Ruth Esemeje Adegbola** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Professor Tilahun Teshome

Signature

Date.....

DEDICATION

I dedicate this dissertation to God, the Author of Grace and Mercy for making my ambition of getting an LL.M come to pass. I appreciate and love you, my Jehovah.

To the man who made me believe that I could soar like an eagle - **Babatunde Opeyemi Owojaiye**. I say a big thank you. You are my source of inspiration and you indeed, mean the whole world to me.

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PREFACE

...the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

Preamble to the African Charter on the Rights and Welfare of the Child - Paragraph 6

This quotation above shows clearly that children's rights deserve the same level of attention in the human rights discourse like the rights of every other categories of persons protected especially minority groups. Hence, it motivated this work on the African Committee of Experts on the Rights and Welfare of the Child (the Committee) mandated to ensure the promotion and protection of the rights of children in Africa. The current state of affairs within and outside the work of the Committee has begun to pose a threat to the rights enshrined in the African Charter on the Rights and Welfare of the Child in which many individuals, entities and organisations are seeking ways to ensure a viable Committee with all the necessary expertise to fulfil its mandate.

The purpose of this work is to appraise the mandate of the Committee, seek out the loopholes and loose ends and propose positive and proactive ways in ensuring the fulfilment of the mandate of the Committee for an effective child rights promotion and protection in Africa.

The African Charter on the Rights and Welfare of the Child, which complements the UN Convention on the Rights of the Child, would then be working in accordance with the CRC's Preamble:

The child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Preamble to the UN Convention on the Rights of the Child - Paragraph 7

LIST OF ABBREVIATIONS

ACJ	African Court of Justice
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Right
African Court	African Court on Human and Peoples' Rights
AHOSG	Assembly of Heads of State and Government
AHSG	African Heads of State and Government of the OAU
AHRLJ	African Human Rights Law Journal
ANPPCAN	African Network for the Prevention and Protection against Child Abuse and Neglect
AU	African Union
AUC	African Union Commission
CERD	Convention (Committee) on the Elimination of all forms of Racial Discrimination
Coalition	Coalition for an Effective African Court on Human and Peoples' Rights
Committee	Committee of Experts on the Rights and Welfare of the Child
Committee members	Members of the African Committee of Experts on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
CSOs	Civil Society Organisations
Department	Social (and Labour) Affairs Department of the AUC
FGM	Female Genital Mutilation
HOSG	Heads of State and Government
HRLJ	Human Rights Law Journal
ICLQ	International and Comparative Law Quarterly
IDPs	Internally Displaced Persons
IGOs	Inter Governmental Organisations
IHRL	International Human Rights Law
IJCR	International Journal of Children's Rights
IJLF	International Journal of Law and the Family
ILO	International Labour Organisation
IPHR	International Protection of Human Rights

JAL	Journal of African Law
LRA	Lord's Resistance Army
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
OSIWA	Open Society Initiative of West Africa
PAP	Pan-African Parliament
POA	Plan of Action
PSC	Peace and Security Council
Protocol	Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and People's Rights
SA	South Africa
SALJ	South African Law Journal
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
Universal Declaration	Universal Declaration of Human Rights
USA	United States of America

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CHAPTER ONE

INTRODUCTION

1.1. Background to the study

The need to help, care for and protect children from acts and practices detrimental to their interest and other individuals is indubitable. The beginning of the 19th century changed the notion of children being regarded as ‘property items’ and accorded them the status of ‘persons’ under the law.¹

The African Charter on the Rights and Welfare of the Child (ACRWC), the first regional treaty on the human rights of children, was preceded by a Declaration of the Rights and Welfare of the Child in 1979.² The Declaration recognises the unequal status of female children, child marriage, female genital mutilation (FGM), refugee and internally displaced children, urging member states to ratify the International Labour Organisation’s (ILO) Convention on the Minimum Age for Employment.³ The ACRWC was thereafter negotiated and adopted at the 26th ordinary session of the Assembly of Heads of State and Government (AHOSG) of the Organisation of African Unity (OAU) on 11 July 1990. The Charter entered into force on 29 November 1999 (nine years later) after obtaining the requisite number of ratifications.⁴ This is because the Convention on the UN Rights of the Child (CRC) had not addressed the important challenges facing African children. The ACRWC is a self-standing instrument. It has a different monitoring, enforcement and implementation body from the African Charter on Human and Peoples Rights (African Charter): the Committee of Experts on the Rights and Welfare of the Child (the Committee).

The Committee was formally set up in 2001 at the 37th Lusaka Conference of the AHOSG⁵ and has 11 members of ‘high moral standing’⁶ with expertise in the area of children’s rights serving in their personal capacity. The Committee has a broad mandate: to protect and promote the rights in the ACRWC, as well as monitor states’ compliance, interpretation of the ACRWC as well as other tasks as entrusted to the Committee by the AU Assembly, the Secretary General of the OAU or the United Nations (UN) on issues relating to children in Africa.⁷ States Parties to the ACRWC are to submit initial reports to the Committee within two years of ratification or accession and every three years thereafter.

¹ A Glenn Mower, Jr ‘The Convention on the Rights of the Child’ (1997) 11.

² Commentary on the UN Convention of the Rights of the Child: Article 3 – The best interest of the child, University College London, Nijhoff Publishers 2007.

³ No 138. Paragraphs 2, 3, 9 and 12 of the Declaration.

⁴ Article 47(3) provides that the ACRWC will come into force after it has received 15 ratifications from member states. See www.chr.up.ac.za/statorat_14.html (accessed 15 October 2007). The current states ratification stands at 41.

⁵ 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 AHRLJ 13.

⁶ Article 33 ACRWC.

⁷ Article 42 ACRWC, Lloyd (n 5 above) 12.

The social affairs department of the African Union (AU) services the Committee. Some of the activities undertaken by the Committee include; the commemoration of the day of the African child, fact-finding missions, promotional missions and cooperation with non-governmental organisations (NGOs) involved with children's rights. Since its establishment, the Committee has been unable to achieve fully its mandate due a number of factors. For instance, under its protective mandate, there is presently only one communication before the Committee.⁸ However, the communication is yet to be considered since the Guidelines for the Consideration of Communications were only just adopted at the 8th session of the Committee along with the Guidelines for the Conducting of Investigations and the Criteria for Granting Observer Status with the Committee.⁹ Additionally, the function of the Committee is burdened by a lack of an operational secretariat as well as funding.

1.2. Objectives of study and research questions

Commentators on the African human rights system have argued that African human rights institutions do not have the capacity to operate efficiently and promote the speedy recourse to justice on human rights violations.¹⁰ Using the Committee as a case study, this dissertation intends to show the underlying factors for such comments and attitudes. This is in view of the fact that though the assertions may be correct, however, it is this author's view that the human rights systems can work if given the necessary support by States Parties and the AU.

The objectives of this dissertation are to:

- i. Evaluate the mandate of the Committee;
- ii. Assess the working of the Committee as presently constituted; and
- iii. Explore available options to strengthen the effectiveness of the Committee.

The questions this dissertation intends to answer are:

- (a) To what extent is the Committee fulfilling its promotional and protective mandates?
- (b) What are the problems facing the effective implementation of the Committee's mandate?
- (c) What are the most appropriate ways and available best practices to ensure the effective implementation of the mandate of the Committee?

⁸ Prof. Michelo Hansungule of the Centre for Human Rights Pretoria on 11 May 2007 (the author of the communication currently before the Committee) mentioned that there are now three communications before the Committee however; the other two have not been officially acknowledged.

⁹ 8th meeting of the Committee. Copy of the documents on file with the author.

¹⁰ R Murray, *Human Rights in Africa: from the OAU to the African Union* (2004) 267; P Alston, *Best Interests of the Child: Reconciling Culture and Human Rights* (1994); M Mutua, *The African Human Rights System, A Critical Evaluation* http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF (accessed 29 October 2007).

1.3. Significance of the research

The main reason for the adoption of the ACRWC was the perceived inherent weaknesses of the CRC, which did not sufficiently address the peculiar problems facing children living in Africa,¹¹ all of which pose threats to the survival of children.¹²

The Committee, having been given the mandate to protect the rights of African children, has had considerable difficulty in discharging its mandate. It is therefore pertinent to ensure that in order to protect the rights of the African child; the existing mechanism is appraised to ensure its utmost effectiveness within the African context.

The output of this research will support the work of the Committee, as well as ensure that the Committee's work is given the necessary attention it deserves. It will serve as a reference point for the Committee, the AU, the international community and NGOs working on children's rights in plotting a way forward on issues on the rights and welfare of children in Africa.

1.4. Literature survey

There are no available books particularly written on the subject of the Committee as it has not created any jurisprudence in this regard. However, journal articles exist around the subject. Olowu,¹³ Viljoen,¹⁴ Chirwa,¹⁵ Lloyd,¹⁶ Murray¹⁷ and Mezmur¹⁸ are the major works on the theme as they have written articles in journals, following the progress made by the Committee, its achievements, challenges and the contributions of the AU and NGOs to the Committee's work.

Olowu undertook a critique of the ACRWC, highlighting its weaknesses in line with the African context of the rights of children. He raises the cardinal principles on which children's rights under the ACRWC are founded – non-discrimination, best interests of the child, right to life, survival and development and the views of the child. He states further that the landmark achievement of the ACRWC is in its implementation mechanism – the Committee of Independent Experts committed to the implementation of the provisions of the Charter. Olowu and

¹¹ Some of these problems are listed in 1.1 above.

¹² P Ankut 'The African Charter on the Rights and Welfare of the Child: Linking Principles with Practice' (to be published in 2007 by the Open Society Initiative of West Africa (OSIWA), on file with the author).

¹³ D Olowu - *Protecting children's rights in Africa; a critique of the African Charter on the Rights and Welfare of the Child* (2002) 10 IJCR 127.

¹⁴ F Viljoen - *Why South Africa should ratify the treaty* (1999) SALJ 660; *The African Charter on the Rights and Welfare of the Child - Introduction to child law in South Africa* – (2000) JUTA CJ Davel (ed) (cap 12) p 214.

¹⁵ D Chirwa – *The merits and demerits of the African Charter on the Rights and Welfare of the Child* – (2002) 10 IJCR 157.

¹⁶ A Lloyd – *The first to third meetings of the Committee of Experts on the Rights and Welfare of the Child* – (2002) 2 AHRLJ 320, (2003) 3 AHRLJ 329, (2004) 4 AHRLJ 139.

¹⁷ R Murray – 'Children's rights in the OAU' in R Murray (ed) *Human Rights in Africa* (2004) 168.

¹⁸ B Mezmur – *the Committee on the Rights and Welfare of the Child: an Update* – (2006) 6 AHRLJ 549; *Still an Infant or a toddler? The work of the Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary Session* (2007) 7 AHRLJ.

Viljoen however raise concern on the function of the Committee as it may experience financial constraints and amount to a duplication of efforts of the work of the African Commission.

Chirwa also undertakes a comparative analysis of the ACRWC with the CRC, highlighting its achievements and weaknesses. He finds that the Committee has wider powers than the CRC Committee as it can receive individual complaints and interstate communications. However, he criticised three aspects of the functions of the Committee: confidentiality of communications, exhaustion of local remedies and the wisdom of having a separate monitoring body for children.

Mezmur and Lloyd have been monitoring the work of the Committee since inception and have compiled the conduct and discussions at the sessions (nine in all) shared among them.¹⁹ The sessions' reports reveal how the activities of the Committee have been unfolding over the years: registration of disappointment on non-submission of reports, promotional visits to states, funding, a non-functional secretariat and the adoption of Guidelines on observer status, consideration of state reports and investigations²⁰

Lloyd in addition describes the theoretical framework of the ACRWC in comparison with the CRC, the justification for the new Charter and considers the gaps filled by the African version.

Though the reports and the publications of these authors are instructive, the core of this dissertation aims to look into the internal and external factors on gaps identified, to see how the work of the Committee can be used to ensure the full promotion and protection of the rights of children in Africa. The gaps identified, which this dissertation intends to fill are:

- a) Communications before another international human rights body, in this instance, the Ugandan children's communication (*The Centre for Human Rights v Uganda*). This dissertation will explore the options around admissibility requirement of cases brought before the Committee and pendency of these cases at an international tribunal as this has and will continue to be an obstacle to the enjoyment of children's rights in Africa.
- b) African reality on several children's cases and the unwillingness of states to prosecute cases brought against them especially for reasons of funds. The Committee's activities and the communication before the Committee has mainly been the pro-activism of local, regional and international NGOs and organisations.
- c) The role of the AU in dealing effectively with children's rights on the continent.

¹⁹ Lloyd covered the 1st to 3rd sessions and Mezmur covered the 4th to 9th sessions.

²⁰ Adopted at the 8th session in Nov/Dec 2006.

- d) Parallel working of the Committee on human rights issues with the African Commission on Human and Peoples' Rights (African Commission), and the complementarity of the work of the Committee with the African Commission and the African Court on Human and Peoples' Rights (African Court).
- e) The fact that the work of the Committee has not been effective especially since there has not been any consideration of state reports or communications brought before it as well as ensuring compliance with its promotional mandate under the ACRWC.²¹

There has been a lot of brainstorming on the subject by human rights experts and academics on how there can ultimately be efficiency in human rights institutions and monitoring bodies in Africa.²² The overall structure of the AU in ensuring the proper function of its human rights bodies and other monitoring organs will be considered and possible recommendations made in this regard.

This dissertation will therefore contribute in giving more focus to the question of the effective promotion and protection of children's rights in Africa through the work of the Committee.

1.5. Methodology

The dissertation shall mainly be by way of literature survey. It will also employ some empirical analysis using interviews and questionnaires to assess relevant information on the work of the Committee and how its challenges are being perceived and addressed.

The dissertation will draw from the benefit of formal and informal discussions made with persons familiar with the work of the Committee to suggest ways as well as viable options in which the Committee can effectively discharge its promotional and protective mandate.²³

1.6. Limitations of the study

The Committee has not been dynamic in achieving its promotion and protective mandate hence this study is hampered by insufficient jurisprudence and by lack of case studies.²⁴

²¹ The Committee has held nine sessions since inception. The 10th session held from 25 to 27 October 2007.

²² These include the Retreat of members of the African Commission facilitated by The Office of the High Commissioner for Human Rights (OHCHR) 2003 and the Expert Consultation on the African Commission facilitated by the OHCHR 2006 – documents on file with the author.

²³ In this discourse, inspiration will be drawn from the work of the CRC Committee.

²⁴ Chapter four will include some analysis on the Ugandan case.

1.7. Overview of chapters

Chapter one introduces the study.

Chapter two undertakes an overview of the mandate of the Committee as well as the ACRWC especially the background to its adoption. It also highlights the advantages of the ACRWC over other instruments.

Chapter three looks into the recently adopted Guidelines for compliance with the principles in the ACRWC, the achievements, challenges as well as the debates around the mandate of the Committee and the role the AU has played in actualising the mandate of the Committee.

Chapter four examines the role of the Committee *vis a vis* the mandates of the African Commission and the African Court. It also explores a repositioning process of the Committee based on information in chapter three and the African human rights monitoring bodies.

Chapter five presents conclusions and recommendations to the problems and lapses identified in the study, exploring viable options and good practices in the protection and promotion of children's rights in Africa.

CHAPTER TWO

AN OVERVIEW OF THE ACRWC AND THE MANDATE OF THE COMMITTEE

2.1. Introduction

The sad reality for many African children is that violation of their rights is not seen as a serious problem.²⁵ These violations in most cases have severe consequences on children even beyond their childhood, thus posing direct threats to peace, stability and development in Africa.²⁶ A typical example is the participation of children as child soldiers which is ‘...one of the most alarming trends in armed conflicts.’²⁷ Of note however, is that despite the fact that children are victims of human rights violations, they also have responsibilities to the family, society and the continent as contained in the ACRWC.

The purpose of this dissertation is to look at the work of the Committee from the perspective of the human rights of children living in Africa. The concept of human rights is a settled one, which must fulfil a standard set of criteria. As was expounded by the UN Commission on Human Rights, a human right must meet the following criteria:

- (a) Be consistent with the existing body of international human rights laws;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) Provide, where appropriate, realistic and effective implementation machinery...;
- (e) Attract broad international support.’²⁸

Flowing from the above, clearly children’s rights meet international standards. The Universal Declaration of Human Rights (Universal Declaration) is also clear on what the content of human rights should be. It provides that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood...Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...*or other status*²⁹

²⁵ P Kopoka, ‘*The problem of street children in Africa: an ignored tragedy*’ International conference on street children and street children's health in east Africa [http://www.fiuc.org/iaup/ssi/PDF-doc/IDS doc/Streetchildren.pdf](http://www.fiuc.org/iaup/ssi/PDF-doc/IDS_doc/Streetchildren.pdf); Children of WOA, Population Awareness <http://www.overpopulation.org/children.html> (both accessed 29 October 2007).

²⁶ Amnesty international - OAU, The African Charter on the Rights and Welfare of the Child, <http://web.amnesty.org/library/index/engIOR630061998?open&of=eng-312> (accessed 20 September 2007).

²⁷ The impact of armed conflict on children: report of the expert of the UN Secretary-General, 26 August 1996 (on file with the author)

²⁸ Resolution no. 41/120 of 1986 in Sepulveda M et al, *Human Rights Reference Handbook*, 2004 (CD).

²⁹ Articles 1 and 2 Universal Declaration.

Based on this understanding of the definition of human rights as well as children and their rights to benefit from the pool of human rights available, this dissertation shall assess the instruments, created for the protection of children at international and regional levels and look at reasons why the ACRWC was deemed necessary.

2.2. The child defined

Considering the child as an ‘autonomous being’ is widely contested³⁰ as children’s rights are usually associated to that of their family or adults and are not classified as self-standing rights until they attain the age of majority.³¹ Traditionally, children are relegated to the world of the muted – along with groups such as women, the disabled and indigenous and minority peoples. However, the change came with the negotiation and adoption of the CRC.³² An analysis of the percentage of children under 18 in some specific countries in Africa is illuminating: Angola (52%); Ethiopia (53%); Ghana (51%); Liberia (50%); Moçambique (51%); Sierra Leone (50%); and Uganda (56%).³³ A situation in which nearly half of a population has little, if any, say in decisions directly affecting their lives every day could lead to a serious disenfranchisement of a significant percentage of society.

However, the African view on human rights manifests itself in recognition that children are the future of the society and hence must be protected and nurtured.³⁴ International instruments now protect children’s rights³⁵ but their protection is limited to some specific aspects of children’s rights, which are grossly inadequate as they concern other areas of human rights.³⁶

Although the term may be employed in different forms, the CRC defines a child as every human being below the age of 18 years ‘unless under *the law* applicable to the child, majority is attained earlier.’³⁷ The law referred to in the CRC includes international treaties and domestic legislations specific to children.³⁸

The ACRWC defines a child more concisely as ‘every human being below the age of 18 years.’³⁹ There are no exceptions or caveats included in the definition. This definition is the generally accepted one in some African

³⁰ C Lowy – *Autonomy and the appropriate projects of children: A comment on Freeman* (1992) 6 IJLF 72.

³¹ Lowy (n 30 above).

³² A Twum-Danso: Africa: A hostile environment for child participation? http://www.ecpat.net/eng/A4A02-03_online/ENG_A4A/Thematic_Africa.pdf (accessed 19 October 2007).

³³ Twum-Danso (n 32 above).

³⁴ T Kaime *The Convention on the Rights of the Child in the cultural legitimacy of children’s rights in Africa: some reflections* (2005) 5 AHRLJ 224-5.

³⁵ Examples are in articles 25/26 Universal Declaration, articles 14,18,22,23 and 24 ICCPR and articles 10, 12 and 13 CESC.

³⁶ Lloyd (n 5 above).

³⁷ Article 1 CRC.

³⁸ The laws include international treaties: ‘ILO Convention No 138’ concerning the minimum age for the admission of children to employment, ILO Convention No 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour. Domestic laws of State Parties include ‘The Nigerian Child Rights Act 2003 which deals with issues of legal representation of children in Court as well as and the Emancipation of the Child girl in marriage’ of Ethiopia which covers the rights of the girl child to education and not be forcefully married below the age of 18 years.

³⁹ Article 2 ACRWC.

Constitutions and domestic laws on children as the consensus age for children.⁴⁰ Furthermore, Gose argues that the ACRWC, though very clear on age limitations does not seem to fit with African culture and tradition, where childhood is determined not based on years but on other factors.⁴¹ This is seen in the case of Malawi that defines a child as one less than 16 years⁴² while the Constitution of Gambia indicates that children under the age of 16 should be protected from economic exploitation and not engage in hazardous work likely to be disrupt their education.⁴³ The author believes that though the limit set in the ACRWC is pertinent, the ideal situation remains ensuring that the human rights of children are adequately catered for irrespective of the age limits since the age of majority differs under different circumstances.

To have a clear understanding of the mandate of the Committee, a brief chronological discourse on the processes, which led to the adoption of the ACRWC, will give insight on the relevance of the Committee to deal with the issues relating to children in Africa. The need to capture all children's rights in one universally binding instrument led to the adoption of the CRC discussed below.

2.3. The UN Convention on the Rights of the Child (CRC)

The CRC, adopted in 1989 came at a time when the need for improvement in the situation of children all over the globe was clearly apparent.⁴⁴ The preparation of the CRC started in 1979, declared by the UN as the *International Year of the Child*. The CRC became the result of a long negotiating process of ten years, achieving the status of becoming the first international document to state unequivocally the right of children to 'have a say' on issues affecting their lives.⁴⁵

The clamour for adoption of an international Convention to deal with specific issues of children raised five principal arguments. They are freedom of thought, conscience and religion and Islamic states' position; Inter-country adoption and the Latin American countries reservations; the rights of an unborn child and the religious and continental divisions on the issue; harmful traditional practices and duties of children championed by the African group (Senegal in the lead). The fifth and the most controversial issue was 'Children in armed conflicts.'⁴⁶ Compromises and the adoption of minimum standards were the consensus reached by the negotiating states on these issues raised above.⁴⁷

⁴⁰ Section 28(3) South African Constitution, Section 28(5) Ghana Constitution, the Nigerian Child Rights Act 2003, the Kenyan Children's Act 2001.

⁴¹ M Gose 'The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child' (2002) 27 quoted in Murray (n 17 above).

⁴² Article 28(5) Malawian constitution. See also article 34(5) Ugandan Constitution.

⁴³ Article 29(2) Gambian Constitution.

⁴⁴ Glenn Mower (n 1 above) 17.

⁴⁵ M Freeman 'The Moral Status of Children: Essays on the Rights of the Child' (1997) 55.

⁴⁶ C Jesseman 'The protection and participation rights of the child soldier: An African and global perspective' (2001) AHRLJ 141. See also L LeBlanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (1995) 148.

⁴⁷ African Human Rights System, http://www.chr.up.ac.za/centre_publications/ahrs/ahrs_index.html (accessed 12 August 2007).

NGOs contributed to the drafting process especially on issues relating to the use of gender-free wordings in the CRC, lobbying for the inclusion of provisions on protection from sexual and other forms of exploitation⁴⁸ and the ‘breast-feeding’ provision.⁴⁹

Despite the shortcomings in the process of drafting the CRC, this Convention is consistent with principles in the Universal Declaration and international human rights law (IHRL). It is by far the most detailed and comprehensive (in terms of rights recognised, as opposed to the category of persons covered) of all existing international human rights instruments. More still is the swiftness and number of State Party ratification/accession to the instrument. Somalia and the United States of America (USA) are the only non- State Parties to the CRC.⁵⁰

The CRC provides four fundamental principles for the protection of children’s rights:⁵¹ non-discrimination; best interests of the child; right to life, survival and development and the views of the child.⁵² The CRC recognises the child as the bearer of rights entrenched in a binding international instrument comprising of various categories of rights including protection and participation rights.⁵³ These principles are reinforced in the Vienna Programmes of Action, adopted by the 1993 World Conference on Human Rights.⁵⁴

Outside the CRC, children also benefit from rights contained in general human rights treaties. There are also other instruments, documents, resolution and decisions adopted which refer to the promotion and protection of children’s rights at international and regional levels.⁵⁵

⁴⁸ Articles 34-39 CRC.

⁴⁹ Article 24 CRC; see Glenn Mower (n 1 above) 17.

⁵⁰ Somalia has not ratified the CRC for lack of a functional government. USA claims they have a better protection regime for children than the CRC. See P Alston (n 10 above).

⁵¹ The Right of the Child, Fact Sheet 10 (Rev. 1) (2003) 4 – 5.

⁵² Ankut (n 12 above) 2.

⁵³ G Van Bueren - The international law on the rights of the child (1995) 332.

⁵⁴ The POA highlights problems of children in the globe on the rights of the girl child, children in armed conflict, non –discrimination and street children, requesting the UN to ensure that all states become parties to the CRC and acknowledging the efforts of UNICEF in ensuring speedy ratifications, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (accessed 15 October 2007).

⁵⁵ Some of these documents include The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; The Hague Convention on the Civil Aspects of International Child Abduction; The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; African Charter on Human and Peoples’ Rights, The African Youth Charter; Declaration on the Rights and Welfare of the African Child; Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally; Resolution on the Programme of Essential Medicines for Children and their Mothers; Resolution on the Strategies for the Decade for the African Child; Resolution on the World Summit on Children; Tunis Declaration on Aids and the Child in Africa; Resolution of the Plight of African Children in Situations of Armed conflict; Decision on the ILO Convention on the Banning of the Worst Forms of Child Labour and Immediate Action for the Elimination of the Worst Forms of Child Labour; Decision on the Report on the African Conference on the Use of Children As Soldiers; Resolution on the Ratification of the African Charter on the Rights and Welfare of the Child; Decision on the Progress Report of the Secretary-General on the Activities Related to the Ratification of the African Charter on the Rights and Welfare of the Child; Decision on the Global Partnership for Children: ‘Africa’s Children, Africa’s Future’; Decision on the Report of the Secretary-General on the Pan-African Forum on the Future of Children.

The inadequacies in the human rights promotion and protection regime for children in Africa in the CRC as highlighted above, led to the drafting and adoption of the ACRWC, discussed hereinafter.

2.4. The African Charter on the Rights and Welfare of the Child (ACRWC)

The build up to the adoption of the ACRWC instrument is seen in the adoption of the Resolution on UN Declaration on the International Year of the Child;⁵⁶ Resolution on the International Conference on Assistance to African Children;⁵⁷ Declaration on the Rights and Welfare of the Child;⁵⁸ Resolution on the International Year of the Child;⁵⁹ and the Decision of the Report of the Secretary General on the Twenty-Fifth Ordinary Session of the OAU Labour and Social Affairs Commission/Ministerial Conference on Employment and Poverty Reduction in Africa.⁶⁰

The major turning point emanated from controversies at the CRC negotiation on the role of children in armed conflicts. There was also the conference on children in situations of armed conflict in the continent, organised by African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) with the support of UNICEF and Ford Foundation, which discussed the CRC.⁶¹

Experts on children's rights in Africa were convinced that children's problems and difficulties in African states had not been adequately addressed in the drafting process and final version of the CRC.⁶² Only few African countries were involved in the drafting process and they were unable to articulate African children's position especially in the areas of African values, harmful traditional practices among others.⁶³ From the preparatory work, it was clear that the drafting of the CRC lacked an African flavour. Viljoen agrees that the 'numerous

⁵⁶ UNGA resolution A/31/169. This statement adds a section to the 1959 Declaration on the Rights of the Child on the implementation of the Declaration.

⁵⁷ CM/Res 1408 (LVI) Preamble. This document emphasised the need for parents, men and women as individuals, voluntary organisations, local authorities and governments to recognise the rights set forth in the Declaration and take legislative and other measures to promote them. It formed the basis for the drafting and adoption of the CRC.

⁵⁸ AHSG/ST. 4 (XVI) Rev 1. Leveraging on the UN declaration on the International Year of the Child as well as the 1959 declaration, it insist that children's rights in African be taken more seriously in creating an organ to deal with the specific issues of children in Africa.

⁵⁹ CM/Res 737 (XXXIII) Rev 1. The resolution calls upon member states to strengthen their efforts to eliminate child labour. Governments, employers' and workers' organizations should assess the situation of child work and assist the competent national bodies and the ILO to strengthen their action programme for children.

⁶⁰ Doc CM/2262 (LXXVI), CM Dec 584 paragraphs 4 and 5. The document appeals to Member States to sign and or ratify the ACRWC as well as the ILO Convention 182 on the Elimination of the Worst Forms of Child Labour. It also calls on Member States to include compulsory education, the elimination of child labour as well as children in conflict situations and child trafficking in their priority programmes on children. Note that the OAU/AU also supported the Pan-African Forum on the Future of Children in the development of the framework for the African Common position on Children held in Cairo 2001. See the resultant Resolution CM/Dec 584 (LXXIV).

⁶¹ The African Charter on the Rights and Welfare of the Child - reproduced for circulation by ANPPCAN, (1999) 2. See further Ankut (n 12 above).

⁶² Viljoen (n 14 above).

⁶³ Although nine African States were participating in the activities of the Working Group by 1989, for at least five of the nine years that the Working Group took to draft the final proposal, only three African States participated.

political compromises' made at the drafting of the CRC, overlooked issues which were important to African children.⁶⁴

A regional meeting held in Kenya,⁶⁵ examined the draft CRC from an African perspective. The meeting had two objectives: to discuss and take an unambiguous stance on the applicability of the CRC to children in Africa on various socio-economic, cultural and developmental diversities and consequently, whether it was necessary to supplement the CRC with an African counterpart.⁶⁶ A committee was constituted to draft a version that was Africa-compliant on issues of children and apartheid; living conditions; FGM and the unequal treatment of the girl child; lack of participation of children in the local communities; refugee children; responsibilities of the child; children of imprisoned mothers, adoption and fostering by relatives; discrimination and the definition of the child.⁶⁷ The resultant document was *The African Charter on the Rights and Welfare of the Child*.⁶⁸ Of note, however is that the final draft Charter submitted to the Council of Ministers and AHOSG was adopted unanimously without any 'real debate.'⁶⁹

The ACRWC hence seeks to either improve on or expand the scope of this categorisation as embedded in the instrument as follows:

- (a) The minimum age of child involvement in hostilities pegged at 18.⁷⁰ The CRC sets it at 15 years.⁷¹
- (b) Express prohibition on the use of child soldiers⁷²
- (c) The prohibition of child marriage⁷³
- (d) Condemnation of the crime of apartheid⁷⁴
- (e) A communication procedure where individuals can bring communications to the Committee.⁷⁵ This means that children themselves can petition the Committee on their rights as individuals.
- (f) Introduction of duties of children to their families and the society and the role of the family on issues of children's rights⁷⁶
- (g) The best interests of the child, which encompasses the welfare of the child, was made 'the' primary consideration⁷⁷ as compared to the CRC⁷⁸ and some African states' Constitutions.⁷⁹

⁶⁴ Viljoen (n 14 above).

⁶⁵ The meeting took place from 9-11 May 1988.

⁶⁶ Ankut (n 12 above).

⁶⁷ Murray (n 17 above) 166. See also Glenn Mower (n 1 above).

⁶⁸ OAU Doc/CAB/LEG/24.9/49.

⁶⁹ Murray (n 17 above) 66 – Twenty-Sixth Session AHOSG, OAU, Doc CAB/LEG/24.9/49 (1990). The implication of this action and the arguments put forth is discussed in chapter three below.

⁷⁰ Article 22 ACRWC.

⁷¹ Note however that an Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflicts adopted in 2000 raises the age limit to 18 years.

⁷² Article 22(2) ACRWC.

⁷³ Article 21(1) ACRWC.

⁷⁴ Article 26(1) ACRWC.

⁷⁵ Article 44 states that the Committee may receive communication, from any person, group or NGOs recognised by the OAU, by a Member State, or the UN on matters contained in the Charter.

⁷⁶ E Kodjo 'The African Charter on Human and People's Rights' (2003) HRLJ Vol. 11 parts 3-4, 279.

- (h) Special reference to care of the child by extended families⁸⁰
- (i) The non – discrimination clause includes ‘fortune’ as compared to the CRC’s reference to ‘property’.⁸¹
- (j) The preservation and strengthening of positive African morals, traditional values and cultures⁸²
- (k) The promotion of socio-economic rights for children like education and sanitary conditions⁸³
- (l) Protection of handicapped children⁸⁴ and children of imprisoned mothers⁸⁵

An assessment of the ACRWC’s core provisions compared to the CRC shows that in many respects, the ACRWC sets a higher level of protection despite their numerous similarities in the two instruments.⁸⁶ As emphasised by Ankut, the ACRWC complements the CRC.⁸⁷ Murray advocates that the ACRWC attempts ‘to add an African perspective to be defined or accepted.’⁸⁸ The ACRWC has been described as ‘Africa sensitive’,⁸⁹ ‘the most progressive of the treaties on the rights of the child’⁹⁰ and ‘the most forward thinking of all the regional systems’ on children.⁹¹ On this note, beyond addressing children’s rights from an African perspective, the author states that it also helps in the understanding of children’s rights globally. This is in view of the fact that Africa has a responsibility to children in IHRL, which it has done in the case of the ACRWC.

2.5. To promote and protect - The Committee and its mandate

The Committee, the supervising body of the ACRWC, which should consist of 11 Committee members, draws its mandate from chapters two and three of the ACRWC. Article 32 specifically instructs the Committee to ‘promote and protect’ the rights and welfare of the child.

The Committee’s functions as provided in article 42 are in particular, to collect and document information, commission inter-disciplinary assessment of problems in Africa regarding the rights and welfare of the child, organise meetings, formulate and lay down principles and rules aimed at protecting the rights and welfare of

⁷⁷ Article 4(1) ACRWC.

⁷⁸ Article 3(1) CRC provides that the best interests of the child shall be ‘a’ primary consideration.

⁷⁹ Section 28(2) South African Constitution makes the best interests of the child of ‘paramount importance’ in every matter concerning the child. Similarly, section 28(c) Ghana Constitution provides that laws enacted must ensure the interest of children is ‘paramount’.

⁸⁰ Articles 19-20 ACRWC.

⁸¹ Article 3 ACRWC and article 2(1)CRC.

⁸² Article 11(c) ACRWC.

⁸³ Article 14(h) ACRWC.

⁸⁴ Article 13 ACRWC.

⁸⁵ Article 30 ACRWC.

⁸⁶ Ankut (n 12 above) 13.

⁸⁷ C Heyns & M Killander ‘The African Regional Human Rights System’ p 521, in (2006) IPHR, in F Isa & K Feyele, Achievements and Challenges, University of Deusto Bilbao.

⁸⁸ Murray (n 17 above) 167.

⁸⁹ A Lloyd - *Evolution of the African Charter on the Rights and Welfare of the Child and the Committee of Experts: Raising the Gauntlet* (2002) 10 IJCR 179.

⁹⁰ Van Bueren (n 53 above).

⁹¹ Lloyd (n 89 above).

children in Africa. Furthermore, it should cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child.⁹²

The Committee is required to submit to the ordinary session of the AHOSG, reports on its activities including communications received by the Committee every two years.⁹³ While the CRC Committee has the mandate to consider reports from State Parties, the Committee has an additional mandate to entertain individual complaints as a special investigative procedure.⁹⁴ The enhancement of the Committee's 'promote and protect' mandate are supported by mechanisms and Guidelines discussed in chapter three in detail.

2.6. Conclusion

In sum, the chapter concludes that the Committee has a mandate wider than the one conferred on the CRC Committee. Thus, the Committee is expected to carry out its mandate on a higher pedigree than the CRC Committee. The chapter concludes by also illustrating that children have recognised rights in both the CRC and the ACRWC, the latter having a value added effect on the CRC by addressing issues suffered by children in Africa and advancing international human rights law on children's rights.

Chapter three will drawing from the mandate of the Committee in the ACRWC, assess the Committee's work highlighting its achievements, challenges and the debates on its viability.

⁹² The African regional human rights system, <http://www.ishr.ch/hrm/Infokit/InfoPack/AfricanHRsystem.pdf> (accessed 23 August 2007).

⁹³ Article 44 ACRWC.

⁹⁴ F Viljoen - *Africa's contribution to international human rights* (2001) 1 AHRLJ 22.

CHAPTER THREE

ACHIEVEMENTS AND CHALLENGES OF THE COMMITTEE AND THE DEBATES AROUND ITS MANDATE

3.1. Introduction

The Committee, as mentioned earlier, is not fully equipped to carrying out its Charter mandate for several reasons. The Committee only just adopted Guidelines for the Consideration of Communications, Conducting of Investigations and the Criteria for Granting Observer Status at its 8th session in 2006. The Committee's capacity and ability to execute its mandate has elicited varied debates, which are the focus of this chapter.

3.2. The work of the Committee to date: achievements and challenges

The inaugural meeting of the Committee took place six months after the election of Committee members in January 2002, which was delayed because of the activities of transforming the OAU to the AU.⁹⁵ There were also other impediments such as translation and preparation of the documentation for the first meeting.⁹⁶ Nine sessions of the Committee have been held, shared between Nairobi and Addis Ababa. This does not, in the author's view give a true regional representation of the work of the Committee as compared to the sessions of the African Commission, which were held in different regions.⁹⁷ This will ensure States Parties commitment in promoting the work of the Committee.⁹⁸

So far, the Committee has drafted and adopted its own Rules of Procedure and Guidelines for the Initial Report of States Parties at the second meeting of the Committee. It also deliberated on and adopted a Work Plan based on the mandate of the Committee. The Work Plan identified priority areas for its work: popularisation of the ACRWC, commemoration and selection of themes for the Day of the African Child,⁹⁹ capacity building, resource mobilisation, monitoring and evaluation of its work.¹⁰⁰

Looking at the Guidelines for Initial States Reporting, each State Party to the ACRWC shall report to the Committee on measures adopted and progress made in implementing the ACRWC.¹⁰¹ This cures a defect in the African Charter, which was not clear on which body would consider states' reports.¹⁰²

⁹⁵ See generally Lloyd, (n 5 above).

⁹⁶ F Viljoen – International Human Rights Law in Africa (2007) Oxford University Press.

⁹⁷ For example, the Commission's 41st session was held in Ghana while the 42nd Session will be hold in Congo Brazzaville.

⁹⁸ The just concluded 10th session of the Committee was held in Cairo, Egypt.

⁹⁹ The 16th of June every year is commemorated as the *Day of the African Child* since 2004.

¹⁰⁰ See the Work Plan of the Committee of Experts 2002-2004 which forms part of the report of the second session of the Committee.

¹⁰¹ Article 43 ACRWC.

¹⁰² Viljoen (n 94 above).

States Parties must submit initial reports within two years of ratification or the entry into force of the ACRWC and every three years thereafter.¹⁰³ This is more frequent as compared to the CRC, which is within two years of the entry into force of the Convention for the State Party concerned and thereafter every five years.¹⁰⁴ The five-year periodic reporting system is a better option because it gives the state ample time to prepare its reports on issues around the rights of children in their states. Any cooperation between the Committee and the CRC Committee can be better coordinated from this point of view as clearly, African states have been more compliant in submitting their periodic reports to the CRC Committee than to the Committee.

This reporting obligation is made easier by the ACRWC as States Parties are to submit reports made to the CRC Committee and additional information on specific aspects of the ACRWC not provided in the CRC (attached as an addendum) to the CRC reports. This makes the reporting obligation for State Parties less cumbersome. The addendum must specify actions taken by State Parties in response to any recommendation made to them by the CRC Committee. Where a state has not submitted a report to the CRC Committee, it will be required to prepare a complete report on all the rights provided in the ACRWC.¹⁰⁵

Ankut suggests rightly that to further enhance the cooperation between the CRC and the Committee, a system could be developed where reports submitted to the CRC Committee from African States Parties to the ACRWC could be referred to the Committee for consideration. States will only submit additional information required by the ACWRC.¹⁰⁶

In contrast to the CRC Committee, the ACRWC authorises the Committee to receive complaints against States Parties concerning any issue covered by the instrument from any individual, group or NGOs recognised by the OAU/AU, a Member State or the UN.¹⁰⁷ In practice, the reporting mechanism ensures that there is constant dialogue between the state and the Committee based on the reports submitted. Observations and recommendations are drawn from this dialogue as well as contributions from third parties like NGOs. If states allow this periodic review to be continuous, then we are assured that children's rights are permanently taken care of. The publicity of these reporting will also ensure the 'naming and shaming' of non-compliant states in the international arena.¹⁰⁸

¹⁰³ Article 43 ACRWC.

¹⁰⁴ Article 44 CRC.

¹⁰⁵ See Rule 70 of the Rules of Procedure of the Committee. Cmttee/ ACRWC/II. Rev p16.

¹⁰⁶ Ankut (n 12 above) 13.

¹⁰⁷ Article 44 ACRWC. African human rights system -<http://www.ishr.ch/hrm/Infokit/InfoPack/AfricanHRsystem.pdf>, Updates from the Regional Human rights Systems -<http://www.wcl.american.edu/hrbrief/13/2regional.pdf?rd=1> (both accessed 15 September 2007).

¹⁰⁸ See generally R Rosas & M Scheinin 'Implementation Mechanisms and Remedies' (2000) 357, See also J Rehman International Human Rights Law: A Practical Approach, (2003) 124.

As at the 9th session, only four states have submitted initial reports to the Committee.¹⁰⁹ Although a poor response to the 41 ratifications the ACRWC has received, the Committee is yet to consider these reports. At the 8th session of the Committee, the reports of Egypt, Mauritius, Nigeria and Rwanda were divided among some Committee members for preliminary review and strategies for convening a pre-session to consider the reports and collection of additional information from State Parties and the input of NGOs were discussed.¹¹⁰ Feedback on these reports is expected at the 10th session of the Committee.

3.2.1. Achievements

The Committee has since its establishment held nine meetings¹¹¹ during which it has among others;

- (i) adopted its Rules of Procedure;
- (ii) developed Guidelines for preparation of initial reports by member states on the implementation of the ACRWC;
- (iii) developed a Work-Plan for the period 2002-2004;
- (iv) planned and undertook advocacy missions to selected states to lobby for the ratification and implementation of the ACRWC in Sudan, Burundi, Madagascar and Namibia;¹¹²
- (v) initiated partnerships with civil society organisations (CSOs) as well as other relevant institutions working in the area of children's rights;
- (vi) strong collaboration with NGOs;¹¹³
- (vii) held thematic discussions on key issues and problems adversely affecting the rights and welfare of children namely; children and armed conflict, the impact of HIV/AIDS, poliomyelitis and Malaria on children;
- (viii) selected and disseminated annual themes for the celebration of the Day of the African Child;
- (ix) undertook investigative fact-finding mission in August 2005 to Uganda;
- (x) developed, together with the AUC, a reporting schedule indicating the dates by which States Parties should have submitted their initial reports;
- (xi) prepared Guidelines for considering communications, conducting investigations and granting observer status;
- (xii) Coordinated the reports by State Parties for the midterm review of the UN declaration on 'Africa Fit for children.'¹¹⁴ The mid term review meeting coincides with the 10th session of the Committee;¹¹⁵ and
- (xiii) managed to put the ACRWC in the public fora;

¹⁰⁹ These states are Egypt, Mauritius, Nigeria and Rwanda.

¹¹⁰ B Mezmur *Still an infant or now a toddler? The work of the Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session (2007)*7 AHRLJ.

¹¹¹ The 10th session was just concluded in October 2007.

¹¹² See <http://www.africa-union.org/child/home.htm> (accessed 22 October 2007).

¹¹³ A Lloyd - Response to Questionnaire 2 October 2007.

¹¹⁴ African Union, Second Pan-African Forum on Children: Mid Term Review http://www.africa-union.org/root/au/Conferences/2007/November/sa/Children/doc/en/Concept%20Note_r.doc (accessed 30 October 2007).

¹¹⁵ Justice Koome – Response to Questionnaire 12 October 2007.

These achievements, as described by Nielsen and Mezmur, are commendable and are ‘work in progress.’¹¹⁶

3.2.2. New trends: the new Guidelines

A significant achievement of the Committee is in its adoption of Guidelines for the Consideration of Communications, the Conducting of Investigations and the Criteria for Granting Observer Status with the Committee. This important move, albeit late, is a welcome development which will further enhance the work of the Committee as well as make the Committee’s work more visible in the human rights agenda of African states. The Guidelines are discussed below:

(I) Communications

The ACRWC states briefly in article 44 that the Committee may receive communications from listed persons, which must contain the name and address of the author and should be treated in confidence. This procedure is not comprehensive, compared to the African Charter on admissibility requirements and exhaustion of local remedies.¹¹⁷ The Rules of Procedure of the Committee mention further that consideration of communications and conduct of investigations would be clarified in future ‘Guidelines’.¹¹⁸ Hence, the Committee at its 7th session undertook to draft Guidelines for consideration of communications.

The new Guidelines were reviewed and adopted at the 8th session of the Committee. It provides on admissibility, similar criteria provided in article 56 of the African Charter:

- (a) Compatibility with the Constitutive Act or with the ACRWC.¹¹⁹
- (b) Communication not exclusively based on information in the media¹²⁰
- (c) Issues must not have been decided by another ‘investigation, procedure or international regulation’¹²¹
- (d) Exhaustion of domestic remedies or when the author of the communication is not satisfied with the solution provided at domestic level¹²²
- (e) Presentation of the communication within a ‘reasonable period’ after exhaustion¹²³
- (f) The wording of the communication shall not be offensive.¹²⁴

The Committee can also review its decision in a communication where the complainant can provide additional information to support his/her case.¹²⁵ Furthermore, the Committee can receive a communication from a non-

¹¹⁶ Joint response to questionnaire by Nielsen and Mezmur on (6 October 2007).

¹¹⁷ Article 56 African Charter.

¹¹⁸ Committee’s Rules of Procedure, R 74 (Cmtee/ACRWC/II. Rev 2), adopted at the Committee’s 2nd ordinary session, February 2003. See further Viljoen (n 93 above).

¹¹⁹ Ch 2, art 1(III)(a) Guidelines for Communications.

¹²⁰ Ch 2, art 1(III)(b) Guidelines for Communications.

¹²¹ Ch 2, art 1(III)(c) Guidelines for Communications.

¹²² Ch 2, art 1(3)(d) Guidelines for Communications. Mezmur argues that this criteria is unclear, a fall out from the lack of ‘the necessary technical legal drafting skills required.’

¹²³ Ch 2, art 1(3)(e) Guidelines for Communications.

¹²⁴ Ch 2, art 1(3)(f) Guidelines for Communications.

State Party in the ‘best interest of the child’.¹²⁶ This is in consonance with the provision of article 4 of the ACRWC where the best interest of the child is *the* primary consideration.¹²⁷

The inclusion of the power of the Committee to grant provisional measures also puts the work of the Committee in the league of a human rights protector.¹²⁸ The only problem envisaged with this provision is the consequences for a State Party who flaunts this provision. This is seen in the instance of the cases where Nigeria¹²⁹ and Botswana¹³⁰ disregarded the African Commission’s provisional orders on summary executions of the subjects of the Communications. No sanctions were pronounced on the recalcitrant states.¹³¹

The emphasis on confidentiality of communications¹³² and non-disclosure of information in communications to the public may not sufficiently protect the right of children in Africa as persons or organisations with information on the violations may not be allowed to participate in the proceedings of the Committee or at least have access to information on the subject matter.¹³³ The experience of the African Commission on non-disclosure measures for communications has continually posed problems especially in cases of states notorious for human rights violations as seen in the case of Zimbabwe where the annual reports of the African Commission was not published based on the confidentiality requirement in article 59 of the African Charter.¹³⁴

Children who are the authors of or victims in communications now have an opportunity to express their opinions to the Committee.¹³⁵ This provision guarantees the cardinal principle of child participation in issues concerning him or her.

The appointment of a Commissioner as Special Rapporteur to monitor the implementation of decisions of the Committee is a milestone in view of challenges faced by the African Commission in enforcing its decisions.¹³⁶ Murray had earlier advocated that a Special Rapporteur be appointed to assist the African Commission assert

¹²⁵ Ch 2, art 2(II)(3) Guidelines for Communications.

¹²⁶ Ch 2, art 1(II)(2) Guidelines for Communications.

¹²⁷ See also article 36(2) Ethiopian Constitution.

¹²⁸ Ch 2, art 2 (IV) Guidelines for Communications.

¹²⁹ Communications 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation versus Nigeria.

¹³⁰ Communication 240/2001, Interights et al (on behalf of Mariette Sonjaleen Bosch) versus Botswana.

¹³¹ However, the African Commission through a resolution in 2006 complained about non-compliance with its provisional measures.

¹³² Ch 3, art 1 Guidelines for Communications.

¹³³ See rules 32, 33 and 34 of the CRC Committee’s Rules of Procedure.

¹³⁴ The 19th – 21st reports were not adopted. See further Mezmur (n 110 above).

¹³⁵ Ch 3, art 3(3) Guidelines for Communications.

¹³⁶ Ch 3, art 4(1) Guidelines for Communications.

compliance rate of its decisions by states to ensure that victims' remedies are not jeopardised.¹³⁷ This provision fills the gap for future decisions of the Committee.¹³⁸

(II) Investigations

This is also one of the new Guidelines adopted at the 8th session of the Committee in compliance with article 45 of the ACRWC and article 74 of the Committee's Rules of Procedure. Investigation missions can be initiated by a state by referring a matter to the Committee or the Committee can *suo moto* undertake investigations.¹³⁹ A preliminary report is to be prepared before each investigation on available information to ensure the mission team has background knowledge of the situation of children in the country, based on some listed criteria in the Guidelines.¹⁴⁰

The Guidelines has two appendixes: form for the collection of field information and a list indicating the principles and guarantees that mission members should have.

An important aspect of the Guidelines is in the possibility for public invitation of persons and bodies to contribute in making missions of the Committee successful. The mission is expected to meet with authorities in both the public and private spheres as well as ensure a wide coverage of the state in question.¹⁴¹ A preliminary result of the mission is to be communicated to the government and the media of the state and thereafter a final report is prepared incorporating the mission's recommendations.¹⁴² This mission's report is to be attached to the progress report of the Committee to the AHOSG, thereafter published after consideration and approval by the AHOSG.¹⁴³

The Committee also adopts the follow up approach by ensuring that a State Party visited can be requested to present, within six months after the mission or the adoption of a decision by the Committee, a written reply on any measures taken in light of the recommendations made in the mission report.¹⁴⁴ It should also include in subsequent reports presented under Article 43 of the ACRWC, information on any measures in reaction to the recommendations made by the Committee after the mission. CSOs and 'specialised institutions' like children's NGOs could also be requested to provide information on the situation of children in that state.¹⁴⁵

¹³⁷ R Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 AHRJ 10.

¹³⁸ Mezmur also recommends that the Committee in drafting its decisions should mention clearly what actions should be taken by states concerned to facilitate the work of the Rapporteur.

¹³⁹ Articles 4(1) & (2) Guidelines on the Conduct of Investigations.

¹⁴⁰ Article 8(1)(2), 10 Guidelines on the Conduct of Investigations.

¹⁴¹ Articles 17, 20 and 23 Guidelines on the Conduct of Investigations.

¹⁴² Articles 23 Guidelines on the Conduct of Investigations.

¹⁴³ Article 25(2) Guidelines on the Conduct of Investigations.

¹⁴⁴ Article 26(1) Guidelines on the Conduct of Investigations.

¹⁴⁵ Article 27(2) Guidelines on the Conduct of Investigations.

(III) Observer status

The adoption of this Guidelines is inspired by article 42 of the ACRWC and articles 34, 37, 81 and 82 of the Rules of Procedure on representation and cooperation with CSOs and NGOs actively involved in the protection of children's rights in Africa.

The criteria for granting observer status is divided into six sections: principles to be applied in granting observer status in the AU Committee of Experts on the Rights and Welfare of the Child; application procedure for NGOs; procedure for consideration of applications by the Committee; participation of observers in deliberations of the Committee; relations between the Committee and observers; and final provisions.

The Guidelines encourages the formation of coalitions by CSOs and NGOs with similar objectives.¹⁴⁶ These NGOs and CSOs must be registered in a member state¹⁴⁷ with the mandate to carry out regional and international activities.¹⁴⁸ Proof of at least three years of post-registration as an NGO/CSO and work done in the defence of children's rights with proof of operations, must be submitted along with the application to the Committee.¹⁴⁹

The NGOs should have a recognised headquarters,¹⁵⁰ democratically adopted statutes¹⁵¹ and a representative structure.¹⁵² The NGOs must submit a list of documentation to aid their application at least three months before a session of the Committee,¹⁵³ which must include a memorandum of activities.¹⁵⁴

NGOs with observer status may request the Committee to put on its agenda, issues of their interest and make oral statements at the sessions. They are entitled to receive information on the time, location and agenda of the sessions of the Committee. They can access documents, which are not confidential.¹⁵⁵ The Committee, through its Chairperson, can invite an NGO to participate in the deliberations of the meetings of the Committee without a voting right.¹⁵⁶

The NGOs are also under an obligation to establish close relations with the Committee and to hold regular consultations on all issues of 'common interest.'¹⁵⁷ NGOs are required 'to submit analytic reports on their

¹⁴⁶ Sec I art 3 Criteria for Granting Observer Status.

¹⁴⁷ See caution advised by Mezmur on the tension between governments and NGOs/CSOs in respect of registration and the non participation of NGOs at the point of considering their application at the session of the Committee where it is been considered.

¹⁴⁸ Sec I art 4(a) Criteria for Granting Observer Status.

¹⁴⁹ Sec I art 4(b) Criteria for Granting Observer Status.

¹⁵⁰ Sec I art 5(a) Criteria for Granting Observer Status.

¹⁵¹ Sec I art 5(b) Criteria for Granting Observer Status.

¹⁵² Sec I art 5(c) Criteria for Granting Observer Status.

¹⁵³ Sec II art 1 Criteria for Granting Observer Status.

¹⁵⁴ Sec II art 2 Criteria for Granting Observer Status.

¹⁵⁵ Sec IV art 3(a) Criteria for Granting Observer Status.

¹⁵⁶ Sec IV art 6 Criteria for Granting Observer Status.

¹⁵⁷ Sec V art 1 Criteria for Granting Observer Status.

activities every two years.¹⁵⁸ Where NGOs are in default regarding their obligations the Committee may suspend or withdraw the observer status,¹⁵⁹ which is final, and not subject to a judgment of a Court or a Tribunal.¹⁶⁰

3.2.3. Challenges

Despite the commendable efforts of the Committee, it still faces numerous challenges in fulfilling its mandate. Study in this regard show that there is indeed a lot that still needs to be done in respect of the work of the Committee. These challenges, if not systematically addressed, may in the future defeat the aims and objectives of setting up the Committee captured in chapter two above. Some of these set backs are surveyed below.

(i) Functional secretariat

The Committee is yet to establish a fully functional secretariat.¹⁶¹ The need for a functional secretariat is because the Committee is expected to carry out its promotional activities as well as cater for its protective mandate by dealing with communications as well as states' reports. This can only be achieved when the secretariat provides the necessary support to carry out this mandate.

As commented by Heyns and Killander, 'The Committee suffers from serious lack of resources and the question could be asked whether the Committee should not be merged with the African Commission.'¹⁶² This problem has recurred on the agenda of the sessions of the Committee. The problem of resources and a functional secretariat has hampered the speedy work of the Committee especially in consideration of state reports and the logistics of the Committee's work. It also affects efforts aimed at follow-up of the Committee's resolutions.¹⁶³

It is herein suggested that the Committee be staffed with at least 10 persons ranging from secretaries attached to two of the Committee members (for the time being), two lawyers to deal with all issues on the protective mandate as well as other administrative staff.

(ii) Attitude of states

The unenthusiastic manner and unwillingness of States Parties to nominate persons to serve as Committee members is a recurring challenge of the Committee. The constant resignation of Committee members is worrisome as it is always difficult to get sufficient nominations for the membership of the Committee and filling vacant seats when they occur. Chad and Senegal refused for a long time to nominate persons to replace vacant

¹⁵⁸ Sec V art 2 Criteria for Granting Observer Status.

¹⁵⁹ Sec V art 4 Criteria for Granting Observer Status.

¹⁶⁰ Sec V art 5 Criteria for Granting Observer Status.

¹⁶¹ A secretary to the Committee was recently appointed (Mrs. Miriam Cisse from Niger) but she is yet to be allocated adequate staff and resources.

¹⁶² Heyns & Killander (n 87 above).

¹⁶³ Koome (n 115 above).

seats due to resignation of Committee members from their countries. The Committee has had to work below the statutory requirement of 11 members as provided for in article 39 of the Charter and rule 14 of the Committee's Rules of Procedure.¹⁶⁴ The 36th and 37th ordinary sessions of the AHOSG held in 2000 and 2001 respectively, ended without the Committee being constituted contravening article 34 of the ACRWC, which provides for the election of Committee members by the AHOSG, *as soon as the Charter enters into force*, from a list of persons nominated by the States Parties to the Charter.

Furthermore, just as we were celebrating the full representation of the continent on the Committee on the swearing in of Mrs Dalwat Hassan of Egypt at the 8th session of the Committee, she soon thereafter announced at the 9th meeting her appointment as Advisor to the Minister of Agriculture and International Relations in her country which may raise independence issues.¹⁶⁵

This attitude of States Parties can be traced back to the adoption of the ACRWC. There was no 'real debate' over the content of the Charter. The ACRWC was adopted as a result of some weaknesses in the CRC hence the AHOSG should have at least had a checklist to ensure that the new Charter addressed all the issues on children's rights that states were willing to adopt at domestic levels. This contributed to the delay in ratifying the ACRWC compared to the CRC, which received an almost immediate ratification, by all but one African state. The only noticeable influence of the AU in this regard is seen in the Resolution adopted by the AHOSG asking states to comply with the content of the ACRWC.¹⁶⁶

This clearly indicates that states have refused to put in the frontline of their agenda, issues relating to the Committee they had set up in 2001. This attitude ultimately frustrates the efforts of the Committee.

(iii) Non-competitiveness of electing Committee members and tenure of office

The nomination of Committee members by State Parties as contained in article 34 has threatened the past, present and future work and progress of the Committee. This does not give room for selection of best candidates to take up or fill vacancies in the Commission. The fact also that only the AHOSG has the power to select persons from a list drawn from State Parties also does not give a sufficient representation of children's interest. The involvement of individuals and organisations in the nomination process is preferable, as the AHOSG will then have to ensure (based on relevant lobbying and pressure from these organisations) that persons who truly have the interest of children and the will power to make a difference are chosen. It also makes Committee members more committed to their work based on the rigorous process of selection.

¹⁶⁴ Nielsen and Mezmur (n 116 above).

¹⁶⁵ B Mezmur *Looking back to look ahead: The 9th ordinary session of the Committee of Experts on the Rights and Welfare of the Child* (October 2007) Unpublished paper, 2. further implications of this is discussed in chapter five.

¹⁶⁶ See n 56 and n 58 above.

Article 37(1) of the ACRWC provides that Committee members are elected for a term of five years and, unlike the African Commission, they may not be re-elected. This provision in practice has not been beneficial to the work of the Committee as compared to the African Commission, which has a provision for re-election of persons for one more term after expiration.¹⁶⁷ This requirement hampers continuity as resources are invested in people who leave after completion of their term of office or leave the Committee before the end of their five-year tenure because of independence issues.

(iv) Financial constraints

Financial incapacitation has besieged the work of the Committee. This has halted a number of lobbying visits for ratification of the ACRWC as sponsorship from the AU and other institutional partners were not forthcoming. Of note is that lobbying missions have been carried out mainly due to the pragmatic financial support received by the Committee from NGOs.¹⁶⁸

(v) Capacity building

Viljoen argues that the failures of the Committee can be attributed to a lack of ‘coordination and experience-sharing.’¹⁶⁹ The members of the Committee are not fully equipped to deal with the mandate of the ACRWC as its mandate goes beyond a show of empathy for children’s issues.¹⁷⁰

An item of the 2002-2004 Work Plan was ensuring capacity building for Committee members for an effective and informed child-rights protection mechanism within the Committee. It is clear that several years after the adoption of the Work Plan, capacity building remains elusive for Committee members especially in relation to consideration of states’ reports as well as communications. The Committee has received training on capacity building on procedures before the Committee from the Institute for Human Rights and Development in Africa (IHRDA) funded by Save the Children, Sweden, in Dakar 2004 and 2005, which had in attendance, the former acting secretary¹⁷¹ and the current Chairperson of the Committee.¹⁷²

(vi) Dissemination of information

Information is priceless to the work of any organisation. The website of the Committee is hardly indicative of its current outputs. The ANPPCAN, which had acted as the temporary secretariat of the Committee for six months in 2004, had taken up the responsibility to update the website. The website has since lacked lustre and is hardly

¹⁶⁷ Same also for the CRC Committee, article 43(6) CRC.

¹⁶⁸ Support was provided by Save the Children Sweden and UNICEF

¹⁶⁹ Viljoen (n 96 above)

¹⁷⁰ Viljoen (n 96 above)

¹⁷¹ Mrs Sadequa Rahim

¹⁷² Ankut - Response to Questionnaire (28 September 2007). She was part of the fund raising team and a facilitator at the training conferences

updated with current information on the work of the Committee, nor does it disseminate the publications and sessions report on the website, despite donor support.

(vii) Ratification and domestication

The ACRWC presently has 41 ratifications.¹⁷³ A cursory review of the 53 African states shows that some of the non-signatories or States Parties are the gross violators of human rights in Africa. Examples include the DRC,¹⁷⁴ Sahrawi Arab Democratic Republic,¹⁷⁵ Somalia¹⁷⁶ and the Sudan.¹⁷⁷ These violations range from recruitment of child soldiers, early child marriages, and child trafficking to enslavement, drug abuse, sexual exploitation, child labour and harmful cultural practices like FGM and male child preference. Of the States Parties that have ratified the ACRWC, only some have domesticated the instrument.¹⁷⁸

(viii) Non-state reporting

A look at states' reporting history to the Committee also shows non-commitment by State Parties to fulfil their treaty obligations in respect of the ACRWC. Although 41 Member States of the AU have ratified the ACRWC, only four State Parties have submitted their reports as required by Article 43 of the ACRWC.¹⁷⁹ The reasons for this can be associated with the fact that responsibility for preparing and submitting states' reports differ from country to country, which makes it difficult for the Committee to follow up with defaulting states. The four reports, though already assigned to different Rapporteurs to look into, still has the continuous problem of a non-functional secretariat to coordinate effectively the reporting cycle and lack of resources to make reports available in working languages of the AU. This constrains Committee members from full participation in consideration of reports.

(ix) Others

Other important setbacks identified are the constant lack of the presence of Legal Counsel to sessions of the Committee to give legal guidance on decisions being taken by the Committee; lack of coordinated cooperation and communication between the African Commission and the Committee and the non-prioritising by the AU of the work of the Committee resulting in delays and cancellation of sessions.¹⁸⁰

¹⁷³ See 'Annexure D'

¹⁷⁴ CRIN http://www.crin.org/email/crinmail_detail.asp?crinmailID=1780;
UNICEF: http://www.unicef.org/french/media/media_19030.html (both accessed 29 October 2007)

¹⁷⁵ Human Rights in Western Sahara http://en.wikipedia.org/wiki/Human_rights_in_Western_Sahara (accessed 29 October 2007)

¹⁷⁶ UNICEF Calls for Halt to Violations of Children's Rights in Somalia <http://radio.un.org/story.asp?NewsID=6054>

¹⁷⁷ US Department of State: Sudan <http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm>; Rights of the Child in Sudan <http://www.omct.org/pdf/cc/SudanEng.CC.pdf> (accessed 29 October 2007)

¹⁷⁸ Example include the Kenyan Children's Act 2001, Nigerian Children's Rights Act 2003

¹⁷⁹ Mezmur (n 110 above)

¹⁸⁰ Lloyd (n 113 above), Viljoen (n 96 above)

These challenges and setbacks have contributed to little accomplishments of the Committee's mandate, making it enjoy very limited visibility from State Parties and the international community.¹⁸¹ These led to debates around the continued existence of the Committee in a bid to ensure effectiveness of its work and activities.

3.3. Debates: the AU and the Committee

The Committee was inaugurated in 2001 and held its first meeting in 2002. Since then, there have been many issues arising from non-fulfilment of its mandate as discussed above. The AU has through the AUC, been providing support to the Committee to discharge its mandate under the ACRWC.

Notable contributions of the AUC were mentioned at the 8th session of the Committee. The Acting Director of the department of social affairs highlighted a number of 'important initiatives' by the AUC in the promotion of the welfare of children. These initiatives include the First AU Award for Children's Champion in Africa awarded to ANPPCAN at the Banjul Summit in July 2006 and cooperation with AU partners in addressing the quandary of children in Africa, which include children affected by HIV/AIDS, malaria and polio, children in conflict, and ensuring the protection and survival of children.

The AUC through the social affairs department has provided funding especially for sessions of the Committee and some of its activities in partnership with international NGOs working on children's rights. However, Lloyd notes that the influence of the department in the work of the Committee is more driven by its own agenda (Roll Back Malaria, Elimination of Polio among others), than supporting the Committee's mandate.¹⁸² Even though the Committee is to protect and promote the right to health of children in Africa, the Committee does not drive these developments and initiatives. Substantive issues considered by the Committee are generally those of importance to the social affairs department as the Committee is weak in setting its own agenda.¹⁸³ The effect is reflected in the sessions of the Committee, where the work of the department is discussed instead of the Plan of Action (POA) of the Committee or the interpretation of the ACRWC.¹⁸⁴

Sufficient funding for the activities of the Committee by the AU has continually posed problems, hampering the work of the Committee and resulting in cancellation of some lobbying visits.¹⁸⁵ As maintained by Hansungule, '...the Committee is not a priority of the AU.'¹⁸⁶ This is seemingly the reason why funding is not pumped into the institution as much as other human rights institutions – the African Commission and the African Court. Ankut who mentions that the AU has too many agencies (outside of the human rights discourse) which it can

¹⁸¹ Viljoen (n 96 above)

¹⁸² Lloyd (n 113 above)

¹⁸³ Lloyd (n 113 above)

¹⁸⁴ Lloyd (n 113 above)

¹⁸⁵ Lloyd (n 113 above). At its 8th session, the Committee agreed to undertake visits to encourage countries which have not already done so to ratify the Charter, and to encourage others to submit their country report. Visits were proposed to Tunisia, Sao Tome and Principe, Democratic Republic of Congo, Liberia and Zambia. Dates for the missions have yet to be set

¹⁸⁶ M Hansungule – Response to Questionnaire (18 September 2007)

neither afford nor sustain buttresses this assertion. A strong case is made therefore for rationalisation of the AU organs to better focus and maximise the use of its limited resources.¹⁸⁷

Mindzie notes that with regard to the limited resources of the AU organs and bodies, one can question the relevance of a specific mechanism protecting children on the continent and may therefore buttress the argument that the creation of a specific monitoring body to cater for the rights of children is a waste of the meagre resources of the AU.¹⁸⁸ This argument is pertinent in light of the UN's current initiative to merge all treaty bodies as submitted by the UN High Commissioner for Human Rights.¹⁸⁹ This has resulted also in adoption of the 'Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents.'¹⁹⁰

Furthermore, the non-listing of the Committee as one of the main organs of the AU, but as 'an appendage under an omnibus clause of all other agencies created by the AU,'¹⁹¹ does not set the work of the Committee in the league of a monitoring body but as one of the executive creations of the AU. This placement, Viljoen argues, further contributes to the inefficiencies of the Committee, causing a separation between it and the main human rights body of the AU - the African Commission.¹⁹²

It is argued further that the African Charter and its implementing mechanism has its own problems of ineffectiveness, resources and internal limitations inherent in the Charter itself which the African Commission is still grappling with.¹⁹³ Now, the Committee which is not as effective as the African Commission, has a complaint and reporting mechanism while it is not yet clear how the funding and management of the Committee's work will be done. This is the basis for argument that the work of the Committee will be a 'proliferation of mechanisms, each one depleting scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.'¹⁹⁴

¹⁸⁷ Viljoen (n 96 above)

¹⁸⁸ M Mindzie – response to questionnaire (3 October 2007)

¹⁸⁹ See Plan of Action A/59/2005/Add.3 paragraph 99

¹⁹⁰ The Fourth inter-committee meeting Geneva 20-22 June 2005 and the seventeenth meeting of Chairpersons of the human rights treaty bodies Geneva 23-25 June 2005, Item 7 on the provisional Agenda.

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b098619a74d669ecc125700d004a5c37?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b098619a74d669ecc125700d004a5c37?Opendocument) (accessed 15 October 2007)

¹⁹¹ Ankut (n 172 above)

¹⁹² Viljoen (n 96 above). See also A Lloyd & R Murray, *Institutions with Responsibility for Human Rights Protection under the African Union* (2004) 48 JAL 165, 175

¹⁹³ These limitations are seen in the fact that the African Charter does not expressly provide for state reporting and individual complaints procedure as is seen in the ACRWC. Internationally recognised rights are only perfunctorily referred to in the African Charter

¹⁹⁴ Heyns & Killander (n 87 above) 538

Lloyd differs from the notion of the Committee being a waste of resources of the AU in principle. However, she concedes that the AU rarely provides in good time, the requisite resources that has severely affected the work and effectiveness of the Committee to date as the Committee's works is not on the AU's priority list.¹⁹⁵

Rahim argues that this assertion does not capture the true position of the work of the Committee, as the AU will most probably give funds for activities of the Committee and make room for supplementary budgets for projects of the Committee where the need arises. This, in most cases, is supplemented by extra funding from the long-standing partners of the AU, which include Plan International and UNICEF.¹⁹⁶ Furthermore, she argues that despite the competing interests of other organs of the AU, the Committee's work is given the necessary attention it requires.

Nielsen and Mezmur believe that the establishment of the Committee is indeed a commendable move as it fills a gap that existed within international law. Additionally, the establishment of the Committee promotes specialisation, helping to share the burden the African Commission would have in the future as communications involving children can be channelled to the Committee. Koome insists that the percentage of children in terms of Africa's populations and the magnitude of the problems facing them require a specialised institution within the AU to monitor the implementation of the ACRWC hence the effort of the AU in this regard is not a waste of resources.¹⁹⁷

3.4. Conclusion

It can be deduced from the arguments in this chapter that indeed, Africa and its regional human rights monitoring bodies are in need of an overhauling to ensure the promotion and protection of human rights in compliance with international human rights standards. However it is vital to draw attention to the comments made by Heyns and Killander as they mention the fact that Africa has a human rights regional system which provides an entry point for international human rights to play a role which otherwise would not have existed.¹⁹⁸

Chapter four will undertake a repositioning process to ensure that an effective child protection mechanism in Africa as provided for under the ACRWC and the implications of the different propositions on the way forward for the Committee.

¹⁹⁵ Lloyd (n 113 above).

¹⁹⁶ Interview with Mrs Rahim on 7 September 2007.

¹⁹⁷ Koome (n 115 above).

¹⁹⁸ Heyns and Killander (n 87 above).

CHAPTER FOUR

THE REPOSITIONING PROCESS

4.1. Introduction

As has been mentioned earlier in this work, Africa has two major human rights monitoring mechanisms: the African Commission and the African Court on Human and Peoples' Rights (African Court). The African Court of Justice as provided in the Constitutive Act of the AU¹⁹⁹ is yet to be established as the AU intends to merge the African Court with the African Court of Justice in order to avoid duplicity of processes.

This chapter analyses the mandate of the two institutions with the mandate of the Committee. It aims at filling the gaps identified in chapter one of this paper. It then explores a repositioning process looking at the implication of each of the options proposed: A stand-alone or a merger. Inspiration for the repositioning process will be drawn from the CRC Committee.

4.2. The African Commission and the Committee

The African Commission established in 1987 draws its mandate from the African Charter:

- (i) to promote human and peoples' rights;
- (ii) to protect human and peoples' rights;
- (iii) to interpret provisions of the African Charter; and
- (iv) any other tasks that may be entrusted to it by the AHOSG.²⁰⁰

The mandate of the Committee mirrors that of the African Commission, in that the Committee can receive individual and inter-states communications, examine states reports and undertake fact-finding missions. Like the decisions of the Committee, the decisions of the Commission are recommendations that do not have the effect of binding Court judgments.²⁰¹

Clearly, the African Commission can also deal with issues relating to children as specified under the ACRWC. So far, the Commission has not dealt with any specific issue relating to children nor does it have any internal mechanism, working group or Rapporteur portfolio specific to children.²⁰² It however has dealt with a communication involving students (though their ages were not mentioned in the Communication).

¹⁹⁹ Article 18, Constitutive Act.

²⁰⁰ Article 45 African Charter.

²⁰¹ See n 129 and 130 above.

²⁰² The current special mechanisms are: Special Rapporteurs: Prisons and Conditions of Detention in Africa, the Rights of Women in Africa, Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, Human Rights Defenders in Africa, Extra-Judicial, Summary and Arbitrary Executions in Africa and Freedom of Expression in Africa. Working groups: Specific Issues, Indigenous Populations, Economic, Social and Cultural Rights, Robben Island Guidelines on the Death Penalty.

In *Curtis Francis Doebbler versus Sudan*,²⁰³ a group of female students who were having a picnic by the banks of a river in Khartoum with friends were arrested and beaten up by the police for violation of ‘public order’, contrary to Article 152 of the Criminal Law of 1991. They were purportedly not ‘properly dressed’ and acted in ways considered ‘immoral’ (girls dancing and talking to boys). The complainants alleged a violation of Article 5 of the African Charter, which prohibits inhuman or degrading treatment. The Commission in finding the Sudan in violation of the African Charter also requested the government to:

- a. immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments
- b. abolish the penalty of lashes; and
- c. take appropriate measures to ensure compensation of victims.²⁰⁴

The African Commission too like the Committee suffers institutional weaknesses and lack of human and financial resources.²⁰⁵ Hence, arguments have arisen that since the mandate of the Committee is similar to that of the African Commission, it would be in the best interests of the AU to merge the workings of the two bodies to enable the AU cater adequately for their similar mandates in the African system.²⁰⁶ The implication of a merger of these two institutions will be discussed in this chapter.

4.3. The African Court and the Committee

The Protocol establishing the African Court on Human and Peoples’ Rights (the Protocol), created to fill gaps in the existing African human rights system, was adopted in 1998. The Protocol entered into force in 2004, after deposit of the fifteenth instrument of ratification by Comoros, as provided in article 34 (3) of the Protocol.²⁰⁷

A reading of the preamble of the Protocol shows that there would be a lot of cooperation between the African Court and the African Commission especially on the protective mandate of the African Commission, which the Court is to complement.²⁰⁸ Nothing is mentioned about any kind of cooperation between the African Court and the Committee. This may be because the ACRWC came into force after the adoption of the Protocol. Hence, the drafters of the African Court’s Protocol did not envisage that *locus standi* be granted to a Committee whose treaty was not yet in force at the time of its adoption, hence the express omission. However, the jurisdiction of the African Court covers ‘other relevant human rights instruments ratified by concerned states’²⁰⁹ which could

²⁰³ Communication 236/2000 - See also G Musila ‘CRIN - What is the African Commission on Human and People’s Rights?’ <http://www.crin.org/RM/achpr.asp> (accessed 19 September 2007).

²⁰⁴ Decision of the African Commission at the 33rd Ordinary session in Niamey, Niger 15-29 May 2003.

²⁰⁵ See generally Viljoen (N 96) and Heyns & Killander (N 87) and R Murray (N 17).

²⁰⁶ See Olowu (n 13 above).

²⁰⁷ Information note on the first meeting of African Court on Human and Peoples’ Rights - http://www.africa-union.org/root/AU/Conferences/Past/2006/July/summit/doc/CADHP/BACKGROUND_DOCUMENT_ON_THE_AFRICAN_COU RT.doc (accessed 16 September 2007).

²⁰⁸ See preamble to the Protocol.

²⁰⁹ Article 32 Protocol.

accommodate the Committee's cases. The merger process of the two African Courts and the jurisprudence it will create will provide the appropriate opportunity to mitigate this omission.²¹⁰

4.3.1. Integration of the two African Courts: where does the Committee fit in?

Two principal reasons have motivated this merger. First is the financial and human resource implication of maintaining two different Courts²¹¹ and second, to avoid unnecessary duplication of mandates between an African Court of Justice and a separate Human Rights Court.²¹² This resource-based justification for a single Court has merit since the issue of resources constitutes a major challenge for institutions at the regional level.²¹³ The underlying decision for this integration was the concern at the growing number of AU institutions, which the AU could not support.²¹⁴

The Coalition for an Effective African Court on Human and Peoples Rights (the Coalition) is an organisation with over 120 experts dedicated to the cause of ensuring functionality of the African Court.²¹⁵ The Coalition, as part of its contribution to assist in implementing the decision of the AHOSG to merge the two Courts, prepared a draft Model Protocol on the merger. The major provisions of the draft Model Protocol proposes in respect of the Committee as follows:

...the progressive abolition of the protective competences of the African Commission on Human and Peoples' Rights and the Committee of Experts on the Rights and Welfare of the Child as these relate to processing complaints;

transitional provisions detailing how the progressive diminution of them protective competences of both the African Commission and the Committee of Experts will be achieved over time...²¹⁶

These provisions however are not clear on how the African Court will achieve over time collaboration on the Committee's cases. There is also no indication that this proposal would be approved by the AHOSG. Hence pending when this is approved and implemented, the Committee's relationship with the Court will still be in question.

²¹⁰ Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State & Government of the African Union to Integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. www.justiceinitiative.org/db/resource2/fs/?file_id=14964 (accessed 29 October 2007).

²¹¹ The aim of saving cost may be defeated as the protective mandate of the Committee may have been overlooked.

²¹² About the African Court - Coalition for an Effective African Court on Human and Peoples Rights http://www.africancourtcoalition.org/editorial.asp?page_id=16 (accessed 19 October 2007).

²¹³ G Musila: United States of Africa Positioning the Pan-African Parliament and Court in the political union debate, ISS Paper 142 • June 2007.

http://www.iss.co.za/dynamic/administration/file_manager/file_links/PAPER142H.PDF?link_id=100&slink_id=4671&link_type=12&slink_type=23&tmpl_id=3 (accessed 19 October 2007).

²¹⁴ N 213 above.

²¹⁵ Coalition prepares model Protocol on the merger ACC newsletter 2005: African Commission resolves to support the African Court Project, http://africancourtcoalition.org/content_files/files/ACCNewsletterEdition3.pdf (accessed 19 October 2007).

²¹⁶ The Model Protocol was prepared by a Technical Working Group chaired by Dr. Chaloka Beyani, Senior Lecturer, Department of Law, London School of Economics and representation from the Coalition, NGOs, Institutions and academics within and outside of Africa.

4.3.2. Relationship between the Committee, the African Commission and the African Court

While there may be concerns that the protective mandate of the African Commission and Committee are being removed in its entirety, the African Commission will retain some aspect of this mandate. The Commission will be able to undertake investigations in cases of gross human rights violations under Article 58, present its findings to the AHOSG, and handle complaints affecting states that do not ratify the merger Protocol.²¹⁷ Nothing is mentioned about the after-effect of the merger and the status of the Committee's powers, as indicated expressly for the African Commission. However, the ACRWC is clear on the mandate it gives to the Committee. It is hoped that all anomalies around the Committee are looked into in the discourse around the merger and clear statements made as to the relationship between the African Court and the African Committee. This is in view of the fact that these institutions must have a working relationship with the overall objective of promoting and protecting human rights in Africa. These can be coordinated by the creation of the office of the Commissioner for human rights in the AU.²¹⁸

The AU provides for a Commissioner on Political Affairs whose portfolio includes human rights, democracy, good governance as well as refugees and internally displaced persons (IDPs).²¹⁹ The author believes that a specific Office for the Commissioner for human rights is more likely to ensure the integration of human rights issues into the activities of the various organs of the AU and the AUC. The duties of this Office should include advising the Chairperson of the AUC on all human rights issues, coordinating the relationship and interactions between the African Commission, the Children's Committee and the African Court. The Commissioner should also ensure that decisions and recommendations of these bodies receive due consideration from the AU and states and also coordinate and provide technical assistance to states on promotion and protection of human rights.²²⁰ The work of the Committee will then be able to benefit from the work of this Office especially from a human rights perspective.

4.4. Duplication of effort? African human rights monitoring bodies and States Parties

From the foregoing, it is clear that matters on the protective mandate of the Committee can be dealt with by the African Commission by virtue of article 18(3) of the African Charter, which provides that 'The State shall ensure ...the protection of the ...child as stipulated in international declarations and conventions...'²²¹

Using the communication before the Committee as an example to illustrate the point – *The Centre for Human Rights versus Uganda* - this communication instituted with the Committee since 2005 is on the violation of

²¹⁷ N 213 above.

²¹⁸ This office will function like the OHCHR in the UN system.

²¹⁹ Amnesty International: Time to Commit to Human Rights Promotion and Protection in Africa <http://web.amnesty.org/library/Index/ENGIOR630012003?open&of=ENG-398> (accessed 26 October 2007).

²²⁰ Amnesty International (n 219 above).

²²¹ A glance at this provision clearly indicates that the African Commission can deal only with issues relating to the protection of children and not necessarily the promotion of their rights.

children's rights in the rebel-controlled region of Northern Uganda.²²² This is a situation where children are forcefully abducted to participate in hostilities between rebels and government troops, incidents of the denial of the right to education, IDPs, sexual slavery and many more violations proscribed by the ACRWC and the African Charter.

Children are not the only victims of human rights violations being committed in Northern Uganda. There are issues of refugees and internally displaced persons, collective punishment, violation of the right to peace and security among others.²²³ This means that communications can either be instituted against Uganda at the African Commission for non-compliance with the rights contained in the African Charter coupled with the state's duty to respect, promote and protect the rights of the citizens of Uganda. Furthermore, with the commencement of the work of the African Court, individuals and organisations can also bring communications before the African Court being committed in the state. This implies that communications can be instituted against a State Party on almost the same issues at different human rights monitoring bodies in Africa. This is especially true since most African states are parties to international human rights treaties in which complainants and victims seeking remedies, reparations and or compensation for human rights violations can also approach based on set down rules of procedure.

Incidents of human rights violations in a state can usually have a multiplier effect as human rights violations cannot be isolated in the context of ensuring that justice prevails in a given situation. The implications of the above scenario, which may occur in the near future, are as follows:

4.4.1. The rule of pendency

The African Commission has been accused of not addressing efficiently communications brought before it as communications take a minimum of two and half years to be decided.²²⁴ The rule of pendency of cases before an international tribunal will not allow cases to be moved to other international human rights bodies while it is still pending before another,²²⁵ or be tried concurrently in two or more human rights bodies with jurisdiction over the subject matters. In most cases, human rights bodies require parties to disclose or bring to the notice of the body where cases are pending before another body. This fate has befallen the Ugandan Children's case before the Committee as the communication may have been decided if the African Commission had considered it or the CRC Committee given a concluding observations and comments, which will be the basis of CSO and NGO activism. Moreso Uganda is also Party to the two treaties.

²²² The Lord's Resistance Army (LRA).

²²³ Heading home? Protection and return in Northern Uganda <http://www.odihpn.org/report.asp?id=2863> (accessed 19/10/07); Joint written statement: Consideration of the Human Rights situation in Northern Uganda <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EK0I-6NE4N8?OpenDocument> (accessed 22 October 2007).

²²⁴ J Oder, INTERIGHTS, *Litigating Torture Cases in Light of Recent Developments within the African Human Rights System*, Paper presented at the OMCT Complaints Workshop, Geneva, 10 – 12 July 2007 http://www.omct.org/pdf/UNTB/2007/litigation_workshop_july2007/african_system_J_Oder.pdf (accessed 19 October 2007).

²²⁵ Except where the case is withdrawn and taken before another body.

Furthermore, complainants and victims must ensure that cases filed are brought before the most appropriate human rights monitoring body or else time, effort and resources would have been wasted if not carefully prosecuted. This may discourage applicants from remedying a human rights violation.²²⁶ In a complex case like the case of Uganda, the most appropriate African human rights body to commence a communication will be difficult to determine. This is because the Committee is not fully functional and lacks capacity to deal with communications, but has the mandate to deal with children's cases. The African Commission deals with other human rights violations for adults and indirectly children's cases but is not seized of the communication. The African Court has the power to pronounce binding decisions on all aspects of human rights violations in Uganda which is the best option given that the recommendations of both the Committee and the Commission are not binding on States Parties, however, the institution is yet to be functional.

These gaps continue to perpetrate serious human rights violations and do not present a straightforward answer to issues around ensuring effective protection of the rights of victims of human rights violations especially within children's rights discourse. Hence, pendency of cases before the Committee may lead to delays within this context coupled with other external factors as discussed earlier.

4.4.2. State Parties: reporting and communications

African states have a history of non-compliance with decisions of human rights monitoring bodies especially the decisions of the African Commission. A typical example is the Zimbabwean cases before the African Commission, which caused the non-adoption and publication of the African Commission's Annual Activity report²²⁷ and also the cases of flagrant disregard²²⁸ of the provisional measures of the African Commission.

The obligation to report to treaty bodies has also been lax as African states deem it a waste of time and resources. Furthermore, failure to report to regional and even international treaty bodies is hinged on the fact that states do not understand the reasons why they have to report in the first place. The obligation to send in states reports as well as respond adequately to communications against states is principally not to correct human rights violations complained about, but to shield the public relations of states in the international community coupled with the 'naming and shaming' effect of non submission of reports motivate swift responses to human rights violations in the state.

²²⁶ See the cases brought before the African Commission at inception, were dismissed for non-compliance with the admissibility rule set out in article 56 of the African Charter. Frederick Korvah versus Liberia Communication 001/88, Centre for the Independence of Judges and lawyers versus Yugoslavia Communication 003/88

²²⁷ N 134 above.

²²⁸ N 129 and 130 above.

The current framework of having several human rights monitoring bodies discourages states from responding to invitations to defend themselves or comply with decisions of treaty bodies. This is due to financial incapacity to pursue a defence, nonchalant attitude or lack of political will to ensure compliance.

4.5. Revamping the Committee – viable options and their implications

Children’s rights as contained in the ACRWC are adequate to protect the rights of children; but considering the current challenges of the Committee and further looking at the history of the African Commission, it may seem possible that the rights of children will continually be put on hold due to bureaucratic bottlenecks within the Committee and the AU. Viable options have been proposed to ensure that children’s rights are adequately catered for within the African human rights mechanism: A stand alone or a merger with the African Commission and adequacy for collaboration of the Committee with the African Court.

4.5.1. A stand alone

This is the current position of the Committee under the ACRWC implying that the Committee remains a full-fledged human rights monitoring body within the African human rights system.

On a positive note, Nielsen and Mezmur indicate that this is the only framework in which the Committee will be effective and efficient in its mandate. Koome and Rahim strengthen this point as they both agree that the work of the Committee goes beyond legal technicalities.²²⁹ Koome mentions that the percentage of children in terms of state populations and the magnitude of the problems facing them require a specialised institution within the AU to monitor implementation of the ACRWC.²³⁰ Rahim on this point reiterates that the overall mandate of the Committee is to ensure full implementation of the ACRWC as the Charter has both a legal and social focus. She states further that what the Committee needs is more commitment from the Committee members in order to achieve this mandate.²³¹ Fall has similarly indicated that a stand alone may help regenerate the Committee.²³²

Lloyd in this regard mentions that a stand-alone will always be the best option as this was what was originally envisaged and adopted by the AU. However, there must be a shift from the theoretical aspects as the practice in the AU seems to indicate that children’s rights are not a top priority. She also indicates that a stand-alone might not be the most appropriate mechanism since women’s rights were provided for through an additional Protocol to the African Charter ensuring that the lessons learnt by the African Commission in its 20 years of existence will be used to strengthen provisions relating to the promotion and protection of children’s rights.²³³

²²⁹ Rahim (n 196 above) and Koome (n 115 above).

²³⁰ Koome (n 115 above).

²³¹ Rahim (n 196 above).

²³² A Fall – Response to Questionnaire (17 October 2007).

²³³ Lloyd (n 113 above).

The negative implications will continue to be a multiplicity of cases before African human rights monitoring bodies and the financial implications for the AU the Committee and States Parties. Furthermore is the recognition and visibility of the contributions of the Committee by States Parties and other AU organs especially those dealing with aspects of human rights, which include the Pan-African Parliament (PAP) and the Peace and Security Council (PSC).

4.5.2. A merger or collaboration with already existing African human rights bodies

Mindzie advocates a merger with the African Commission. She states that it would address concerns on resources and visibility of the Committee's work. Ankut suggests that the office of a *Special Rapporteur on children* within the African Commission would be the most appropriate forum to deal with children's rights.²³⁴ At present, the Committee has appointed one of its Committee members as its Special Rapporteur on Children in Africa. This will go a long way towards ensuring that the rights set out in the ACRWC in the Committee's which can be converted into a Rapporteur portfolio as one of the African Commission's mechanisms in due course.

Nielsen and Mezmur argue that a merger with the African Commission could be possible legally, but children's rights issues would fall between the cracks and fade into the background.²³⁵ Lloyd concurs on this point as a merger would water down the promotion and protection of children's rights significantly; however if a merger is the preferred option, then the work of the Committee (in whatever form the Committee's work will be transformed into), should remain a unique and identifiable entity.²³⁶

Viljoen who strongly supports the proposal on a merger states that the African Commission be mandated to take over the substantive provisions of the ACRWC²³⁷ either through a Protocol to the ACRWC, adopted by the AHOSG or a resolution of the Committee mandating the African Commission to fulfil the functions designated to the Committee.²³⁸ Viljoen's view is that the African 'Committee's quasi-judicial nature makes some expertise not only in law, but particularly in international human rights law, more than just recommended²³⁹ as the close link with the African Commission will further enhance capacities of Committee members in the learning process needed to carry out their duties.²⁴⁰

²³⁴ Ankut (n 172 above).

²³⁵ Nielsen and Mezmur (n 116 above).

²³⁶ Lloyd (n 113 above).

²³⁷ This argument had been earlier made, though not as strongly, by Olowu (n 13 above) at the time of the Committee was first constituted in 2001.

²³⁸ See article 48 of the ACRWC on amendments to the Charter. See the expository notes by F Viljoen (n 96 above) on the four reasons advanced for a merger/take over of the functions of the Committee by the African Commission.

²³⁹ Viljoen (n 96 above) 73.

²⁴⁰ Viljoen (n 94 above).

4.5.3. The Committee and the CRC Committee: Lessons and learning process

Comparatively speaking, the ACRWC contains similar rights provided in the CRC except the right to social security.²⁴¹ The CRC Committee comprising of 18 independent experts²⁴² are elected for a term of four years by States Parties and may be re-elected if nominated.²⁴³

Positive aspects of the work of the CRC Committee are seen in the fact that membership is comprised of experts from different continents with particular expertise and track records of working on children's rights. Election of members of the Committee is not competitive a situation that needs to be rectified by possibly adopting the CRC procedure.²⁴⁴

The sessions of the CRC Committee are held three times a year totalling 9 weeks²⁴⁵ while the ACRWC makes provision for the Committee to have 'at least two sessions per year'.²⁴⁶ These sessions as earlier mentioned are infrequent and at its 9th session, the AU Commission, through the Director of the department of Social Affairs, proposed to reduce the number of sessions to one per year given the financial implications of organising such meetings. The department complained of being under a lot of 'difficult circumstances' and the two sessions per year would be reconsidered when the Committee has a fully functional secretariat.²⁴⁷

This motion met with stiff resistance and the subject matter dropped, as the Committee members cited article 2(1) of the Rules of Procedure, which states that 'the Committee shall normally hold two ordinary sessions annually not exceeding two weeks.' The sessions over the years hold for only a few days. The 9th session of the Committee lasted only three days with the last day focused only on the reading and adoption of the report of the meeting despite the fact that the Committee members complained in previous sessions that a lot of work is still pending.²⁴⁸

The CRC Committee is empowered not only to monitor implementation of the Convention, but also to render technical and development assistance to States Parties.²⁴⁹ This commitment on technical assistance constitutes:

a change in the very concept of a treaty monitoring body. The role of the Committee is not only to evaluate the efforts made by States to fulfil their obligations under the Convention but also to help them, when appropriate, to obtain assistance needed to overcome to full implementation²⁵⁰

²⁴¹ Articles 18 and 26 CRC.

²⁴² An amendment to article 43(2) of the CRC replaced the word 'ten' to 'eighteen' as approved by the UNGA resolution 50/155 of 1995.

²⁴³ OHCHR – Committee on the Rights of the Child – Members <http://www.ohchr.org/english/bodies/crc/members.htm> (accessed 17 October 2007).

²⁴⁴ See 3.2.3. (ii)(iii) above for the arguments in this regard.

²⁴⁵ OHCHR – Committee on the Rights of the Child – Sessions <http://www.ohchr.org/english/bodies/crc/sessions.htm> (accessed 17 October 2007). This excludes pre-sessions which are held for one week each before the sessions.

²⁴⁶ Rule 2(1) Rules of Procedure.

²⁴⁷ Two personnel had earlier been recruited however have left the services of the Committee for different reasons.

²⁴⁸ Mezmur (n 165 above).

²⁴⁹ Articles 28(3) and 45(b) CRC.

²⁵⁰ N 1 above, 92.

This additional obligation as seen in the CRC Committee will at present, not be achieved under the mandate of the Committee as the absence of technical and development expertise within the Committee has to be addressed first. Ankut on this point insists that the Committee and the CRC committee could build a working relationship to assist first in capacity building of the Committee and other procedural matters significant to the Committee's work.

4.6. Working partners of the Committee

An attempt to reposition the Committee will be incomplete without reference to the significant roles NGOs and international institutions have played in the work of the Committee. These bodies have served as the backbone of the Committee's work since inception. International NGOs have been particularly involved in the work of the Committee, providing different kinds of expertise and financial support to most of the work of the Committee in partnership with the AU.

ANCPPAN for example assisted the Committee in creating the website of the Committee.²⁵¹ This was acknowledged at the 4th session of the Committee. It further provided a temporary secretarial support to the Committee for six months in 2004.

Save the Children Sweden sponsored the 1st lobbying mission of the Committee to Sudan, Burundi, Madagascar and Namibia and has continually assisted the Committee on its fund raising drive for specific activities.²⁵² They also plan another lobbying mission for South Africa in November 2007.²⁵³

IHRDA in partnership with *Save the Children Sweden* also assisted in organising capacity building and training workshops for Committee members in the recent past.²⁵⁴ The *IHRDA* also assisted in drafting some of the Committee's working documents including the three Guidelines adopted by the Committee in May 2007.

UNICEF also supports different activities of the Committee and funds the employment package of the new Secretary of the Committee, through the AU-UNICEF collaboration in ensuring that the Secretariat is functional.²⁵⁵ The UNICEF took over the staffing of the Secretariat, an issue that had been dragging for too long.²⁵⁶

²⁵¹ Assisted also in this regard with finances from Save the Children, Sweden.

²⁵² Rahim (n 196 above).

²⁵³ Interview with Dr. Vahard (OHCHR) 14 September 2007.

²⁵⁴ Viljoen (n 96 above). See also Ankut (n 172 above).

²⁵⁵ Mezmur (n 165 above).

²⁵⁶ The secretary began work in September 2007.

Plan International assists in lobbying international donors to sponsor the POA of the Committee, specifically the Canadian Group. Other bodies include the Community Law Centre South Africa, the ICRC and the ACPF.²⁵⁷

It has been decried that NGOs contributions to the Committee's work may seemingly influence the independence of the Committee as the NGO's agenda may be impliedly promoted to the detriment of the actual purpose the Committee. The AUC had insisted that it is not possible for the NGOs to influence the work of the Committee in their favour. Writers have stated that reliance on the support received from international NGOs is what the Committee needs to boost its work giving the circumstances at hand.²⁵⁸

Although NGO involvement at inception was minimal,²⁵⁹ it is seen that over the years NGOs have taken a pivotal role in ensuring that the Committee fulfils its mandate, providing the necessary support needed to facilitate its work. The adoptions of the Guidelines for granting observer status will also ensure that more NGOs contribute to the success story of the Committee.

4.7. Conclusion

This chapter concludes that the mandate of the Committee though similar to the African Commission's, has its special peculiarities. It further concludes on the repositioning process that the AHOSG, the AUC and its working partners must ensure that the mandate of the Committee, in whichever form, is achieved in the best interests of children in Africa. The debates on the future existence of the Committee reveals that more has to be done to ensure the overall promotion and protection of children's rights in Africa. It is the author's view that more can still be done in ensuring that this human rights monitoring body achieves the aim it was created for or alternatively, the rights created in the ACRWC are implemented in any other form the AU will be able administer properly.

It is in this light that chapter five will conclude this discourse and proffer recommendations to ensure that the rights covered and the beneficiaries of these rights are catered for. This will strengthen the Committee's effectiveness in the promotion and protection of children's rights in Africa (or in the new form the AU may decide in the near future) and the AU's commitment in ensuring human right compliance in Africa.

²⁵⁷ Rahim (n 196 above); Mindzie (n 188 above).

²⁵⁸ Response to Questionnaires – Ankut, Nielsen and Mezmur.

²⁵⁹ Lloyd (n 5 above) 322 narrates the lack of NGO participation at the earlier days of the Committee.

CONCLUSIONS AND RECOMMENDATIONS

A wise man is one who does not sit and cry over his problems and misery but wipes his tears, takes up his working kit and helps himself²⁶⁰

5.1. Conclusions

Member States of the AU have committed themselves to strengthening human rights protection mechanisms in Africa.²⁶¹ The ACRWC in some important respects builds on international standards,²⁶² setting the pace for other regional organisations and institutions.

This discourse has revealed that the Committee has not achieved optimally its mandate as provided in the ACRWC. Central to this work is the firm contention that the negotiation, adoption and work of the Committee is premised primarily on ensuring that children have equal rights with other human beings as exemplified in general and specific human rights documents. However, several factors (internal and external) have militated against the achievement of the mandate of the Committee as either a contributory factor or a catalyst.

This work has shown that, though the Committee has taken bold steps in ensuring the promotion and protection of the rights of children in Africa, more needs to be done to revamp the work of the Committee. This will ensure that children's rights are not neglected. Failure to ensure that the mandate of the Committee is fulfilled, in whatever form is most appropriate for the African continent, will continue to constitute a breach of children's rights under the ACRWC and consequently other treaties on the promotion and protection of children's rights.

The arguments of the AUC of lack of resources due to competing interests may not be sustainable as AU projects generate resources from its international partners. Furthermore, Africa cannot afford to relegate issues on human rights to the background as all other matters on the globe are attached to compliance with human rights norms and is the core for the development of any continent. This is the case in the UN system where the OHCHR is mandated to ensure that all the arms and departments of the system are *human rights compliant* in all their activities.²⁶³

²⁶⁰ Nigerian Proverb.

²⁶¹ Articles 2 & 4 of the Constitutive Act of the African Union.

²⁶² Amnesty International: *The African Charter on the Rights and Welfare of the Child*, AI Index: IOR 63/006/1998 <http://web.amnesty.org/library/index/engIOR630061998?open&of=eng-312> (accessed 12 August 2007).

²⁶³ The OHCHR, a department of the UN Secretariat, is mandated to promote and protect the enjoyment and full realisation, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties. The Office leads efforts to integrate a human rights approach within all work carried out by United Nations agencies. <http://www.ohchr.org/english/bodies/crc/mandate.htm> (accessed 17 October 2007).

The shift of the objectives of the OAU from self-determination to an AU with strong human rights objectives in conformity with international standards is a good move, which ensures that all categories of rights and persons are covered. Notwithstanding the criticisms of the work of the Committee and the operational problems identified in this discourse, it is undeniable that the ACRWC is a potentially powerful tool for enhancing the lives of millions of African children.²⁶⁴ Nevertheless, if the African Committee is to stand out in the realisation of its lofty aspirations, how does it overcome the inherent deficiencies observed?

In this regard, recommendations are made on a general note and based also on the viable options proposed in chapter four. These recommendations give an indication as to how best to address some of the problems and setbacks mentioned in this discourse to mitigate the Committee's *Achilles heel*. This ensures that the promotion and protection of children's rights are treated with the kind of attention it deserves.

5.2. Recommendations

5.2.1. General

There is an urgent need for the creation of position of the Commissioner for Human Rights within the AU.²⁶⁵ This will put the human rights discourse especially on children in the public fora.

Capacity building is very important to and for the work of all human rights institutions in Africa especially for the Committee members. The AU and the AHOSG must ensure at all times that, Committee members chosen are not unnecessarily politicised. This will ensure that persons come into the human rights system with capacity from previous commitments, which will benefit the work of the Committee. Hence, fewer resources will be spent on capacity building. The capacity building must reflect all the interdisciplinary and multidisciplinary approaches on international child protection standards.

The effective implementation of the ACRWC and other international and regional instruments on children's rights must take on an interdisciplinary approach in dealing with children's rights, involving stakeholders in the supply and demand side of the AU justice system.

The Committee must make itself visible through its work and the dedication to the mandate of the Committee is paramount hence Members of the Committee must show more commitment in their work.

NHRIs in addition to NGOs and CSOs are collectively aware of human rights violations specific to children in different African States. The non-inclusion of NHRIs as organisations that can obtain observer status²⁶⁶ with the Committee is an omission, which should be remedied accordingly.

²⁶⁴ D Olowu, (n 13) 133.

²⁶⁵ Discussed in chapter four.

The AU as well as States Parties must ensure *effective State reporting* on human rights issues especially on the mandate of the Committee. This can be done through trainings on efficient reporting, increased collaboration with NGOs, ‘naming and shaming’ and increased reliance on shadow reports. A good example is the case of Ethiopia, which in partnership with the OHCHR organised a National Conference and training workshops on treaty body reporting.²⁶⁷ This kind of collaboration with the OHCHR and other regional organisations can be organised by states to boost their reporting capacity.

An effective method to ensure compliance to reporting obligations is the example is on the Committee on the Elimination of all Forms of Discrimination (CERD). States Parties, who fail to provide their reports over a period, receive a *note verbal* from the CERD stating that it would consider the state’s compliance with the provisions of the treaty from other reliable sources in the state’s absence and draw its concluding observations. This method effectively names and shames non-compliant states.²⁶⁸

Governments should assist the work of the Committee by domesticating rights contained in the ACRWC²⁶⁹ and conducting civic education on the ACRWC’s content through awareness campaigns.

5.2.2. Viable options

It is difficult to indicate to the AU what the standing of the Committee should be, given that different options are workable. The options mentioned in chapter four are a stand alone of the Committee or a merger with existing African mechanisms. The recommendations for either of the options to make them effective are as follows:

(A) Stand alone

The Committee in this respect would continue to function as a separate institution from the African Commission and Court. Additions to the general recommendations above are:

(i) The new Guidelines

The Committee must ensure that the Guidelines for the Consideration of Communications are reviewed to clear all ambiguities in the document. This will ensure that delays in respect of considering communications, which is and would come before the Committee are not subjected to legal technicalities. The Centre for Human Rights, University of Pretoria, has presented to the Committee a proposal on areas of the Guidelines that should be amended.²⁷⁰

²⁶⁶ Resolution on granting Observer Status to National Human Rights Institutions in Africa, <http://www.nhri.net/pdf/ResAfrNhri.pdf> (accessed 26 October 2007).

²⁶⁷ Held at the ECA Conference Centre, Addis Ababa from 1 – 10 October 2007.

²⁶⁸ This happened in the case of Ethiopia which motivated the National Conference and training workshops in October 2007

²⁶⁹ See the Nigerian Child Rights Act 2003 and the Kenyan Children’s Act 2001 on specific aspects of the ACRWC.

²⁷⁰ See ‘Annexure F’.

(ii) Office of the Legal Counsel

This Office must take the work of the Committee more seriously and ensure that all legal matters are dealt with timeously. The contribution of this Office to the work of the Committee has been minimal,²⁷¹ which consequently affected some decisions on legal framework taken by the Committee.²⁷² Preferably, a legal officer should be attached to the Committee at all relevant times.

(iii) Sessions of the Committee and funding

The timing and length of the sessions of the Committee must be regular and sufficient to cover all issues raised by the Committee and as envisaged by the ACRWC. The sessions must not be held at periods when the African Commission holds its sessions, as members of the Committee should be encouraged to attend the sessions as part of the experience sharing between the Commission and the Committee.

The AU must make funds for the sessions available and its agenda well planned. It is primarily the AU's responsibility to support the Committee financially and to ensure its effective functioning on its promotional and protective mandates. Implicitly acknowledging its failure to provide adequate resources, the Executive Council in 2005 urged the AUC to 'to strengthen the Committee and to urgently ensure the full and effective functioning of its Secretariat'.²⁷³ This commitment must be backed up with the financial capacity crucial to sustain the Committee.

(iv) Removal from the AUC and staffing of the Secretariat

The most appropriate way the Committee can function is to be separate body from the social affairs department. The Committee should be a distinct entity like the African Commission and Court as this is what is provided in the ACRWC. Moreso, the ACRWC recognises the Committee as a separate human rights monitoring body, different from the AUC and the social affairs department.

This will consequently facilitate the staffing to enable the Committee stand on its own. Staffing of the Secretariat is paramount and should be completed before the 11th session of the Committee in 2008.²⁷⁴

(v) Voluntary contributions fund

It is noted that the African Commission in looking at its financial constraints, resolved to establish a voluntary fund to assist the work of human rights institutions in Africa.²⁷⁵ The preamble of the resolution²⁷⁶ mentions the

²⁷¹ Lloyd (n 113 above).

²⁷² Lloyd (n 113 above). See also (n 5 above).

²⁷³ Doc EX.CL/Dec.233 (VII), Decision on the African Committee of Experts on the Rights and Welfare of the Child.

²⁷⁴ At its 9th session, it was proposed that an emergency meeting be held with the Director of Administration and Human Resources Development to ensure the speedy staffing of the secretariat.

²⁷⁵ The 40th Session of the African Commission held in The Gambia, from 15 - 29 November 2006.

Committee as one of the African institutions²⁷⁷ and makes a member of the Committee a committee member to manage the funds.²⁷⁸ The resolution states that the fund is:

...to strengthen the human, material, technical and financial resources of the African Commission for the implementation of its mandate of promotion and protection of Human Rights in Africa;

to strengthen the activities of the special mechanisms set up by the African Commission on Human and Peoples' Rights...²⁷⁹

The Committee should therefore pass a resolution similar to that of the African Commission specific to the Committee and ensure that its partners contribute to this fund for their different projects. This will not be new as in the African system as the PAP has a similar trust fund to assist its work.²⁸⁰

(vi) Collaboration with the African Commission

Since their mandates are similar, coordination of activities of the African Commission and the Committee is pertinent. This can be achieved through ensuring presence at each other's meetings and sessions of both institutions must not coincide to enable NGOs, and members of both institutions attend both sessions.²⁸¹

Meetings of the Chairpersons/Presidents of the human rights institutions in Africa should be held either on a six-monthly or yearly basis to draw a Work Plan and way forward on the human rights issues in Africa.²⁸²

Secondment of staff, and the sharing of information and experience is indispensable.²⁸³

(vii) Independence of the Committee

The Committee, compared with the African Commission has not had issues of independence and conflict of interest affecting its work. However, persons who take up political appointments in their countries should be declared as incompetent to serve on the Committee as it amounts to *conflict of interest*. The interpretation given by the Office of the Legal Counsel at the 9th session of the Committee on the appointment of Mrs Dawlat as Advisor to the Minister of Agriculture and International Relations in Egypt is unsatisfactory.²⁸⁴ The interpretation given to Rules 11.2 and 3 of the Rules of Procedure of an appointment of a Commissioner to a State Executive office as compatible with the functions of the Committee is erroneous. This is in view of the fact that this may affect the individual's independence due to allegiance to their governments. The portfolio also has nothing to contribute to the work of the Committee. Furthermore, appointments to other regional human rights bodies or organisations would be disallowed on this ground.

²⁷⁶ ACHPR/Res.96(XXXX)06: Resolution on the Establishment of a Voluntary Contribution Fund for the African Human Rights System http://www.achpr.org/english/resolutions/resolution101_en.html (accessed 25 October 2007).

²⁷⁷ Paragraph 4 (n 263 above).

²⁷⁸ Recommendation 2.

²⁷⁹ Recommendation 1.

²⁸⁰ Pan-African Parliament, second ordinary session – Resolutions and Recommendations http://www.iss.co.za/af/RegOrg/unity_to_union/pdfs/pap/2ndresrec.pdf (accessed 31 October 2007).

²⁸¹ Viljoen (n 96 above).

²⁸² This is done in the UN system.

²⁸³ Viljoen (n 96 above).

²⁸⁴ See Mezmur (n 165 above) for the arguments put forward.

(viii) Publicity of the work of the Committee and judicial network

This must be coordinated on the same pedigree as the African Commission and Court. Without publicity, the work of the African Committee will remain in the shadows. The website must contain current information on all aspects of the Committee's work. Since one of the core objects of the ACRWC is ensuring the best interest of the child,²⁸⁵ the Committee should establish a judicial network in Africa focusing on the international protection of children, like the Coalition for the African Court.

(B) Merger or collaboration

In this scenario, a special independent body takes over the mandate of the Committee as set in the ACRWC. In this case, as the Commission grows bigger and more sophisticated in its decision-making processes, its workload is distributed among the specialised units, which will include the Committee.

The Committee should have its own Rapporteur portfolio as well as a working group on different aspects of children's rights within this merger.

(C) Support from the UN system

(i) CRC

The Committee and the CRC Committee should develop a more systematic working relationship to facilitate sharing of information, joint action and programming. This will ease the burden of reporting and facilitate the work of the monitoring mechanisms, especially in relation to follow-up to recommendations.

(ii) OHCHR

The Commission should carry out regular training of state officials at sub-regional levels. To facilitate this, the Commission should seek collaboration with the OHCHR. The training should utilise appropriate methods such as practical sessions. This is in view of the fact that the African Commission has participated in capacity building workshops with the OHCHR²⁸⁶ in which the African Commission and Court were discussed.²⁸⁷

(iii) UNICEF

The UNICEF should collaborate more with the Committee (or its mandate) on aspects relating to the welfare of children at the grassroot level in Africa. The support it provides to the Committee is minimal as compared to the CRC. It should take a step further than employing the Secretary of the Committee to engaging in what it is best

²⁸⁵ Article 4 ACRWC.

²⁸⁶ Report on the OHCHR workshop on experiences with regional Human Rights Mechanisms in Africa, Europe and Latin America 26 - 27 February 2007 <http://www.ohchr.org/seasia/hrworkshop2007.htm> (accessed 25 October 2007).

²⁸⁷ Viljoen who gave a presentation on the African Human Rights System made no allusions to the work of the Committee. Summary of the presentations on the three regional systems - <http://www.ohchr.org/seasia/docs/hrworkshop2007.doc> (accessed 25 October 2007).

known for globally: community oriented, working best at the domestic level. The Committee deals with the advocacy, framework of action, sensitisation campaigns. Hence, it creates the policies, which are endorsed at the national levels. While the Committee takes the leadership role and defines the terms of all activities relating to children in Africa, partners/donors like UNICEF should implement these terms at country level with their resources using its global network.

5.4. Conclusion

Going through all the issues dealt with from chapter two to five, the study has achieved its aims and objectives and successfully answers all the research questions posed in this study. Thus, we can safely conclude that the Committee can achieve its Charter mandate but must be strategically placed to ensure the ‘promotion and protection’ of children’s rights in Africa: the aim of the whole exercise.

WORD COUNT: 17,989 (including footnotes)

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INTERVIEWS

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ANNEXURE A

**QUESTIONNAIRE PREPARED BY RUTH ADEGBOLA – 10 SEPTEMBER 2007
AT THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), ADDIS
ABABA**

**IN FURTHERANCE TO AN LLM DISSERTATION PAPER TO BE SUBMITTED TO THE
UNIVERSITY OF PRETORIA AND ADDIS ABABA UNIVERSITY RESPECTIVELY**

**TOPIC: Children’s Rights in Africa: An appraisal of the African Committee of Experts on the Rights and
Welfare of the Child (African Committee)**

OBJECTIVE: To assess the work of the African Committee in line with its mandate as stipulated in the African Charter on the Rights and Welfare of the Child adopted in 1990. The questionnaire aims at looking into the workings, the achievements and setbacks of the African Committee as well as efforts undertaken by the relevant authorities to eradicate or at least minimize the problems.

Kindly answer the following questions based on personal and or practical experiences which should be backed up with data where available.

LIMITATION: This is purely an academic research, thus unsubstantiated statements will add little or no value to the purpose of the research.

QUESTIONS

1. What are the major achievements of and setbacks to the work of the African Committee of Experts?
2. What is your impression of the support by the AU Commission for the African Committee?
3. What are the causes of the delay in dealing with the only communication before the Committee of Experts (*The Centre for Human Rights v Uganda*)?
4. What is your opinion on the argument that the setting up of the African Committee of Experts is a waste of the resources of the African Union?

5. What is your view on the future of the African Committee on the following options which have been proposed?

5.1. A stand alone;

5.2. A merger with other African human rights bodies e.g. the Africa Commission on Human and Peoples' Rights, or a unit under the African Court of Human and Peoples' Rights.

Please give reasons for your opinion and what the consequences will be on the options in 5.1 and 5.2

6. What are the greatest challenges of the Committee of experts?

7. Have International bodies, organizations and NGOs contributed positively to the work of the African Committee? Please give examples.

8. Do you foresee a situation where there will emerge in the work of the African Commission the following issues: lack of independence, infrequent sessions and monitoring roles, follow up measures for communications and investigations and over-reliance on NGOs support?

9. What kind of measures or action plans have been set in motion by the African Committee to ensure compliance with state party obligations in the submission of initial and periodic reports to the African Committee? What are the steps, which should be taken? What is your opinion in respect of those efforts i.e. do you think these efforts have been successful.

10. What should be OR is likely to be the relationship of the Committee of Experts with:

10.1 the African Commission?

10.2 the African Court on Human and Peoples' Rights?

NAME:

ADDRESS:

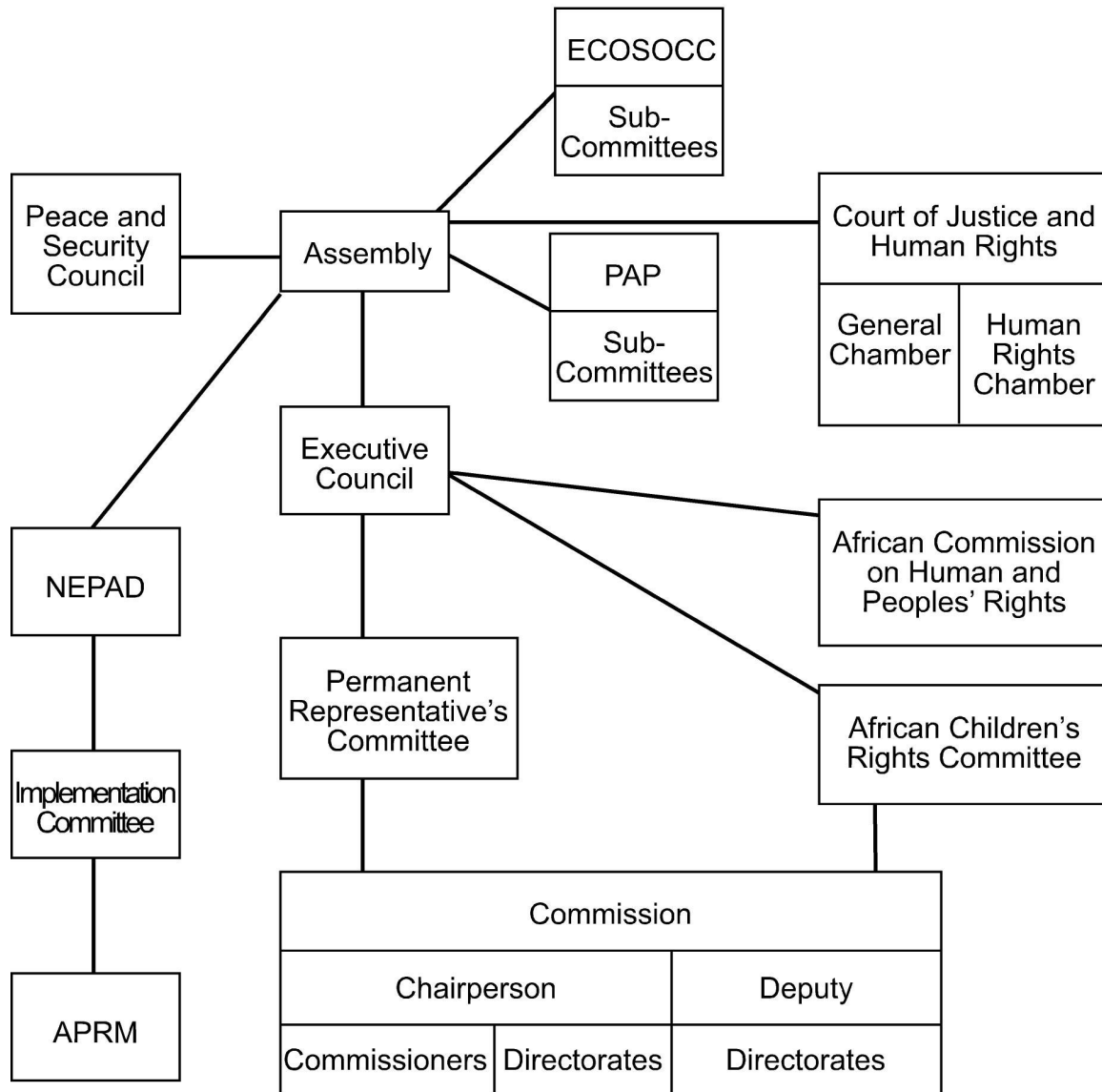
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POSITION HELD:

DATE:

THE ORGANOGRAM OF THE AFRICAN UNION

Figure 1: African regional architecture



ANNEXURE C

NAMES OF PAST AND PRESENT COMMITTEE MEMBERS

AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AS WELFARE OF THE CHILD

SN	Name	Country	Appointment	Date of Exit	Term	Remarks
1	Hon. Lady Justice. Joyce Aluoch	Kenya	July 2001	July 2005	4 years	Completed term Pioneer Chairperson
2	Mr. Rodolphe Soh	Cameroon	July 2001	July 2005	4 years	Completed term Pioneer 1 st Vice Chairperson
3	Ms. Suzanne Aho	Togo	July 2001	July 2003	2 years	Pioneer 2 nd Vice Chairperson Resigned to take up a ministerial position in Togo
4	Mr. Karabo Karabo Mohau	Lesotho	July 2001	July 2003	2 years	Completed term Pioneer 3 rd Vice Chairperson
5	Dr. Rebecca M. Nyonyintono	Uganda	July 2001	July 2003	2 years	Completed term Pioneer Rapporteur
6	Mr. Straton Nsanzabaganwa	Rwanda	July 2001	July 2005	4 years	Completed term Pioneer Deputy Rapporteur
7	Mr. Dirus Diale Dore	Guinea	July 2001	July 2003	2 years	Completed term
8	Prof. Lullu Tshiwula	South Africa	July 2001	July 2005	4 years	Completed term
9	Mr. Louis Pierre Robert Ahnee	Mauritius	July 2001	July 2005	4 years	Completed term

10	Ms. Nanitom Motaya	Chad	July 2001	July 2005	4 years	Resigned to join the UNICEF
11	Ms. Dior Fall Sow	Senegal	July 2001	July 2006	5 years	Resigned to join the ICTR
12	Mr. Jean-Baptise Zoungrana	Burkina Faso	Jul 2003	Jul 2008	5 years	Chairperson
13	Ms. Mamosebi T Phole	Lesotho	July 2005	July 2010	5 years	1 st Vice Chairperson
14	Ms. Koffi Appoh Marie Chantal	Cote d'Ivoire	July 2005	July 2010	5 years	2 nd Vice Chairperson
15	Hon. Justice Martha Koome	Kenya	July 2005	July 2010	5 years	3 rd Vice Chairperson
16	Mr. Moussa Sissko	Mali	July 2005	July 2010	5 years	Rapporteur
17	Ms. Biopelo Lucia Seithamo	Botswana	July 2005	July 2010	5 years	Deputy Rapporteur
18	Mme. Nakpa Polo	Togo	July 2003	July 2008	5 years	Member
19	Dr. Peter Ebigbo	Nigeria	July 2003	July 2008	5 years	Member
20	Dr. Assefa Bequele	Ethiopia	July 2003	July 2008	5 years	Member
21	Ms. Seynabou Ndiaye Diakhate	Senegal	July 2003	July 2008	5 years	Resigned to join the West African Monetary and Economic Union
22	Ms. Dalwat Ibrahim Hassan	Egypt	January 2006	January 2011	5years	Member Her resignation on being appointed as Advisor to the Minister of Agriculture in Egypt was decided as not being incompatible with her function as a Commissioner

ANNEXURE D

**LIST OF COUNTRIES, WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN
CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD
AS AT 27 OCTOBER 2007²⁸⁸**

S/N	Country	Date of Signature	Date of Ratification/Accession	Date Deposited
1	Algeria	21/05/1999	08/07/2003	24/09/2003
2	Angola	-	11/04/1992	07/10/1999
3	Benin	27/02/1992	17/04/1997	30/05/1997
4	Botswana	10/07/2001	10/07/2001	10/07/2001
5	Burkina Faso	27/02/1992	08/06/1992	10/07/1992
6	Burundi	-	28/06/2004	24/08/2004
7	Cameroon	16/09/1992	05/09/1997	23/06/1999
8	Central African Republic	04/02/2003	-	-
9	Cape Verde	27/02/1992	20/07/1993	01/09/1993
10	Chad	06/12/2004	30/03/2000	04/04/2000
11	Côte d'Ivoire	27/02/2004	-	18/06/2007
12	Comoros	26/02/2004	18/03/2004	16/04/2004
13	Congo Brazzaville	28/02/1992	-	10/10/2006
14	Djibouti	28/02/1992	-	-
15	Democratic Republic of Congo	-	-	-
16	Egypt	30/06/1999	09/05/2001	22/05/2001
17	Equatorial Guinea	-	20/12/2002	19/02/2003
18	Eritrea	-	22/12/1999	25/01/2000
19	Ethiopia	-	02/10/2002	27/12/2002
20	Gabon	27/02/1992	-	12/06/2007
21	Gambia	-	14/12/2000	30/03/2001
22	Ghana	18/08/1997	10/06/2005	15/07/2005
23	Guinea-Bissau	08/03/2005	-	-
24	Guinea	22/05/1998	27/05/1999	21/01/2000
25	Kenya	-	25/07/2000	10/08/2000

²⁸⁸<http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (last accessed 31 October 2007)

26	Libya	09/06/1998	23/09/2000	03/11/2000
27	Lesotho	-	27/09/1999	29/10/1999
28	Liberia	14/05/1992	-	-
29	Madagascar	27/02/1992	30/03/2005	24/06/2005
30	Mali	28/02/1996	03/06/1998	14/08/1998
31	Malawi	13/07/1999	16/09/1999	17/11/1999
32	Mozambique	-	15/07/1998	22/12/1998
33	Mauritania	-	-	14/12/2005
34	Mauritius	07/11/1991	14/02/1992	27/02/1992
35	Namibia	13/07/1999	23/07/2004	26/08/2004
36	Nigeria	13/07/1999	23/07/2001	02/05/2003
37	Niger	13/07/1999	11/12/1999	05/03/2000
38	Rwanda	02/10/1991	11/05/2001	17/05/2001
39	South Africa	10/10/1997	07/01/2000	21/01/2000
40	Sahrawi Arab Democratic Republic	23/10/1992	-	-
41	Senegal	18/05/1992	29/09/1998	30/10/1998
42	Seychelles	27/02/1992	13/02/1992	27/02/1992
43	Sierra Leone	14/04/1992	13/05/2002	18/06/2002
44	Somalia	01/06/1991	-	-
45	Sao Tome & Principe	-	-	-
46	Sudan	-	-	-
47	Swaziland	29/06/1992	-	-
48	Tanzania	23/10/1998	16/03/2003	09/05/2003
49	Togo	27/02/1992	05/05/1998	18/05/1998
50	Tunisia	16/06/1995	-	-
51	Uganda	26/02/1992	17/08/1994	21/10/1994
52	Zambia	28/02/1992	-	-
53	Zimbabwe	-	19/01/1995	22/02/1995

Number of countries: 53

Number of Ratifications: 41

Number of Signatures only: 9

Number of non-signatures:²⁸⁹ 3

²⁸⁹ DRC, Sao Tome and Principe and Sudan

ANNEXURE E

**DATES FOR THE SUBMISSION OF INITIAL REPORTS ON THE IMPLEMENTATION OF THE
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD
AS AT 27 OCTOBER 2007²⁹⁰**

S/N	Country	Date of Signature	Date of Ratification/Accession	Due date of initial reports	Due date for 1 st periodic reports
1	Algeria	21/05/1999	08/07/2003	08/07/2005	08/07/2008
2	Angola	-	11/04/1992	29/11/2001	29/11/2004
3	Benin	27/02/1992	17/04/1997	29/11/2001	29/11/2004
4	Botswana	10/07/2001	10/07/2001	10/07/2003	10/07/2006
5	Burkina Faso	27/02/1992	08/06/1992	29/11/2001	29/11/2004
6	Burundi	-	28/06/2004	28/06/2006	28/06/2009
7	Cameroon	16/09/1992	05/09/1997	29/11/2001	29/11/2004
8	CAR	04/02/2003	-	-	-
9	Cape Verde	27/02/1992	20/07/1993	29/11/2001	29/11/2004
10	Chad	06/12/2004	30/03/2000	30/03/2002	30/03/2005
11	Côte d'Ivoire	27/02/2004	-	18/06/2007	18/06/2010
12	Comoros	26/02/2004	18/03/2004	18/03/2006	18/03/2009
13	Congo Brazzaville	28/02/1992	-	10/10/2006	10/10/2009
14	Djibouti	28/02/1992	-	-	-
15	DRC	-	-	-	-
16	Egypt	30/06/1999	09/05/2001	09/05/2001	09/05/2004
17	Equatorial Guinea	-	20/12/2002	20/12/2004	20/12/2007
18	Eritrea	-	22/12/1999	12/12/2001	12/12/2004
19	Ethiopia	-	02/10/2002	02/10/2004	02/10/2007
20	Gabon	27/02/1992	-	-	-
21	Gambia	-	14/12/2000	14/12/2002	14/12/2005
22	Ghana	18/08/1997	10/06/2005	10/06/2007	10/06/2010
23	Guinea-Bissau	08/03/2005	-	-	-
24	Guinea	22/05/1998	27/05/1999	29/11/2001	29/11/2004
25	Kenya	-	25/07/2000	25/07/2002	25/07/2005

²⁹⁰ <http://www.africa-union.org/child/Due%20date%20of%20Submission%20of%20Reports.pdf> (last accessed 31 October 2007)

26	Libya	09/06/1998	23/09/2000	23/09/2002	23/09/2005
27	Lesotho	-	27/09/1999	29/11/2001	29/11/2004
28	Liberia	14/05/1992	-	-	-
29	Madagascar	27/02/1992	30/03/2005	30/03/2007	30/03/2010
30	Mali	28/02/1996	03/06/1998	29/11/2001	29/11/2004
31	Malawi	13/07/1999	16/09/1999	29/11/2001	29/11/2004
32	Mozambique	-	15/07/1998	29/11/2001	29/11/2004
33	Mauritania	-	-	-	-
34	Mauritius	07/11/1991	14/02/1992	29/11/2001	29/11/2004
35	Namibia	13/07/1999	23/07/2004	23/07/2006	23/07/2009
36	Nigeria	13/07/1999	23/07/2001	23/07/2003	23/07/2006
37	Niger	13/07/1999	11/12/1999	11/12/2001	11/12/2004
38	Rwanda	02/10/1991	11/05/2001	11/05/2003	11/05/2006
39	South Africa	10/10/1997	07/01/2000	07/01/2002	07/01/2005
40	SADR	23/10/1992	-	-	-
41	Senegal	18/05/1992	29/09/1998	29/11/2001	29/11/2004
42	Seychelles	27/02/1992	13/02/1992	29/11/2001	29/11/2004
43	Sierra Leone	14/04/1992	13/05/2002	13/05/2004	13/05/2007
44	Somalia	01/06/1991	-	-	-
45	Sao Tome & Principe	-	-	-	-
46	Sudan	-	-	-	-
47	Swaziland	29/06/1992	-	-	-
48	Tanzania	23/10/1998	16/03/2003	16/03/2005	16/03/2008
49	Togo	27/02/1992	05/05/1998	29/11/2001	29/11/2004
50	Tunisia	16/06/1995	-	-	-
51	Uganda	26/02/1992	17/08/1994	29/11/2001	29/11/2004
52	Zambia	28/02/1992	-	-	-
53	Zimbabwe	-	19/01/1995	29/11/2001	29/11/2004

Number of countries: 53
Number of Ratifications: 41
Number of submissions: 4
Due dates for submission: 32

ANNEXURE F

Comments on the Draft Guidelines for the Consideration of Communications provided for in Article 44 of the African Charter on the Rights and Welfare of the Child

1. Introduction

Our mandate was to review the Guidelines for consideration of communications submitted to the Committee under the African Charter on the Rights and Welfare of the Child. A draft was given to us, which we comment on below. The numbering style used in the draft presented difficulties in, hence our recommendation that a proper numbering system be adopted.

2. Comments on the provisions

Paragraph 2 of the introduction is in keeping with general practice. The author of a communication has to be reflected (See Article 44 African Charter on the Rights and Welfare of the Child); the purpose of such a requirement is to ensure that the Committee is not flooded with vexatious and unfounded communications. It seeks to prevent abuse of the process by unscrupulous individuals.

General Provisions

Article 2: the two sub provisions can be merged to form one concise provision, to read:

‘The Committee’s Secretariat shall record and maintain a register of all communications’.

Authors of Communication

Chapter 2 Article 1 (1) is even broader than the Inter-American system, where the Commission only admits petitions from NGOs recognized by member states of the OAS or the OAS itself.

This provision deals with standing before the Commission, and in light of the prevailing human rights violations throughout Africa; it is imperative that standing should be broadened. That is, the submission of communications must not be limited to victims only. This provision also caters for victims who for lack of financial resources would be unable to access justice by allowing NGOs and individuals and groups of individuals to institute proceedings on their behalf.

Conditions of Form

The Committee cannot consider communications that are not written. The problem placed by such a provision would be ameliorated by giving the Committee powers to act *motu proprio*. That is where an unwritten

communication reaches the Committee it may have powers, *motu proprio* to initiate the processing of a petition which in its view meets the necessary requirements. This would ensure that a genuine communication does not fail solely because the victim could not submit it in written form. (See Article 24 Rules of Procedure of the Inter-American Commission). Allowing the Committee to act *motu proprio* is in keeping with the practice of public interest litigation where a letter can initiate a full-fledged civil application.

Conditions of content

The Committee shall not consider a matter that **has been** considered according to another investigation, procedure or international regulation. The preferred wording here would be ‘ the committee shall not consider a matter that **is being** considered according to another procedure of international investigation’. (See Rule 96(e) of the Rules of Procedure of the UN Human Rights Committee; and Article 33 of the Rules of the Inter-American Commission. Both instruments underline **is being**, as compared to **has been**. What is being avoided here is duplication of functions, where two forums would end up dealing with the same issue simultaneously, hence the preference for the use of the word **is being** instead of **has been**. The effect of using **has been** in the provision would be to bar a matter that was previously dealt with by another body of international investigation or adjudication from being taken to the Committee.

Further, where the determination of a matter currently being heard by another system of international investigation is unduly delayed, the Committee must find the matter admissible.

Sub-Article (e): Communication to be presented within a **reasonable** period after exhaustion of local remedies. For purposes of clarity and the avoidance of ambiguity, a specific time frame should be stipulated, e.g.

The communication is presented within 6 months from the time local remedies are exhausted, unless the particular circumstances of the case prevents applicant from submitting within six months.

Further, the provision on the exhaustion of local remedies must be qualified by a proviso couched in the following terms: (similar to Article 31(2) of the Rules of Procedure of the Inter-American Commission, which provides thus)

The provisions [relating to exhaustion of local remedies] in (e) above shall not apply when –

- (a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The requirement for local remedies to be exhausted before a matter can be taken to the international plane is to give the violating state notice of the perceived violation. It also ensures that where such a violation indeed exists, the state party is given the chance to remedy the violation, before the Committee can be approached for intervention. The benefit of such an arrangement is that the Committee or any other international adjudicating body can benefit from the jurisprudence of local courts as they expound on these human rights issues domestically. Further, it ensures that the Committee is not used as a court of first instance unless the circumstances dictate otherwise, and this helps prevent backlog of cases.

The exceptions to the rule on exhaustion of local remedies has been pronounced upon by the African Commission in *Jawara v The Gambia*,²⁹¹ where it was held that the remedy must be available, effective and sufficient. A remedy is deemed available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint. A remedy that has no prospect of success does not constitute an effective remedy. Hence the court will allow such an exception.

Procedure for consideration of communications

There must be a time limit within which the Committee shall consider or decide on whether a communication is admissible or inadmissible. The wording of Rule 93 of the Rules of Procedure of the United Nations Human Rights Committee provides: '*The Committee shall decide as soon as possible and in accordance with the following rules whether the communication is admissible or is inadmissible*'.

Provision II (2): The Committee shall notify the author of its decision as soon as possible if it finds the communication admissible. The Committee ought to Communicate its decision timeously whether the matter is admissible or not, and not only when it is admissible as is anticipated by this provision currently. This is necessary if the Committee is to uphold and dispense justice swiftly and promptly. The provision should therefore read thus:

The Committee shall communicate as soon as possible through the Secretariat, its justified decision on the admissibility or otherwise of the communication.

Transmission of communications

The provision is silent on who transmits the communications. Rule 102 of the Rules of Procedure of the African Commission would be helpful in this regard. In order to seize the Committee of a particular communication, the Secretariat shall transmit to the Committee all communications submitted to it for consideration.

²⁹¹ (2000) AHRLR 107 (ACHPR 2000), 31 and 32.

Further, the Secretariat must be charged with preparing lists of communications submitted to the Committee pursuant to the above 'rule', to which the Secretariat shall attach a brief summary to their contents and regularly cause the lists to be distributed to members of the Committee. The Secretariat shall also keep a permanent register of all these communications, which shall be made public. It is also suggested that the views of the Committee on implementation should be kept in a register of implementation.

A further requirement on transmission is that the full text of each communication referred to the Committee shall be communicated to each member of the Committee on request. This ensures that by the time the Committee sits to deliberate over a matter, the members have already apprised themselves of the facts of the matter, thereby speeding up the proceedings.

Order in which communications are considered

Provision III (3): this sentence could be added to (2) above to read, '*Two or several communications may be dealt with together if the Committee or working group so decides and the authors of these communications shall also be informed of such a decision.*' This would ensure that the Committee does not spend time dealing with matters which are substantially similar, but will instead maximise its time by combining them under one process.

Additional information, clarifications and observations

The Committee's powers to request further information from either the state party or the author of a communication aims to prevent genuine communications from being rejected for lack of particular information. This provision is therefore best fitted under admissibility. In seeking further information, to avoid the matter from dragging on too long, the Committee must fix a time limit within which such further information, clarifications or observations are to be submitted. (See Rule 117 of the Rules of Procedure of the African Commission)

Further, where a state party is given enough opportunity to furnish the Committee with further information, clarifications or observations but fails to do so, the Committee should have the power to declare the matter admissible; or at least proceed on the basis of the information already tendered.

Further on admissibility, the Committee shall decide on the issue of admissibility if the state party fails to send a written response within three months from the date of notification of the text of the communication. (See Rule 117(4) of the Rules of Procedure of the African Commission.

Recusal of members of the Committee

This provision is appropriate as it is and is aimed at ensuring impartiality. However, the provision should be accompanied by another that reads, '*Any question which may arise under paragraph 1 above shall be decided by*

the Committee.' (See Rule 90 of the Human Rights Committee Rules of Procedure). This is in line with the Committee's powers to regulate itself.

Article 4: Monitoring Decisions

Combine first and second provisions to read:

The Committee shall designate one of its members to be responsible for monitoring its decisions, and he or she shall regularly report to the Committee.

Provision (3) seems incomplete, it reads, 'The Committee Chairperson shall inform the Chairperson of the AU Commission.' It does not state the subject of his information; it does not state what s/he should be informing the AU Commission Chairperson.

Further, there should be included a provision to read:

In rendering its decisions, the Committee shall issue an order compelling the respondent state to include in its next state report measures taken to implement the recommendations made by the Committee.

The Committee should also be empowered to adopt interim measures when desirable to avoid irreparable damage to the victim of the alleged violation. (See Rule 86 of the Rules of Procedure of the Human Rights Committee of the UN.) Hence the following two provisions are suggested:

1. Before making its final views known to the Assembly on the communication, the Committee may inform the State Party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.
2. The Committee may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.
3. Upon receiving an order for specific provisional measures, the state shall report to the Committee on the implementation of protective measures within a period of 6 months.
4. The victims shall be entitled to complain to the Committee if the measures so ordered are not implemented by the state concerned.

Friendly settlement

A provision couched in similar fashion to article 52 of the African Charter on Human and Peoples' Rights on friendly settlements is required here. It can be couched thus:

After having obtained all the information it deems necessary, and after having tried all appropriate means to reach an amicable settlement based on the respect of Human Rights and Peoples' Rights, the Committee shall prepare a report stating the facts and its findings.

Also Rule 98 Rules of Procedure to draft a provision reading thus

The Committee shall place its good offices at the disposal of the interested States Parties to the Charter so as to reach an amicable solution on the issue based on the respect of human rights and fundamental liberties, as recognized by the Charter; the Committee may however adopt or accept the settlement as fair and conclusive of the matter.

Amicus Briefs

In domestic jurisdictions, amicus curiae briefs play a big role in enlightening the courts on particular issues, making available esoteric knowledge, which the courts would otherwise be unable to have access to. It is submitted that the Committee be given the power to invite and accept amicus curiae briefs from organisations or persons who in the opinion of the Committee are knowledgeable about a particular issue under investigation by the Committee. See art 36 of the European Convention of Human Rights.

Prepared by the Centre for Human rights, Pretoria, South Africa

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