

**THE WELFARE AND PROTECTION OF CHILDREN IN UGANDA. A CRITIC OF
THE CHILDREN ACT**

BY

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**A RESEARCH DISSERTATION SUBMITTED TO THE SCHOOL
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DECLARATION

I, **Sentalo George** 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 Degree in Law at Kampala International University.

Signed..........

Date.....5th 10/6/15.....

APPROVAL

This report on the "THE WELFARE AND PROTECTION OF CHILDREN IN UGANDA. A CRITIC OF THE CHILDREN ACT" has been done under my supervision and submitted to the faculty of Law with my approval.

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DEDICATION

I dedicate this dissertation to God.

ACKNOWLEDGEMENTS

To all my classmates.....

To my family.....

To all the others who in one way or the other have been a blessing to my life, your reward lies in the hands of the one who knows how appropriately to bless you.

Thank you all.

ABSTRACT

...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
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
UDHR	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).

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/stutorat_14.html (accessed 15 October 2007). The current states ratification stands at 41.

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.

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.

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, Ibid 5

⁸ Prof. Michelo Hansungule (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.

1.2. Objectives of study.

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:

1. Evaluate the mandate of the Committee;
2. Assess the working of the Committee as presently constituted; and
3. Explore available options to strengthen the effectiveness of the Committee.

1.3 Research questions

The questions this dissertation intends to answer are:

1. To what extent is the Committee fulfilling its promotional and protective mandates?
2. What are the problems facing the effective implementation of the Committee's mandate?
3. What are the most appropriate ways and available best practices to ensure the effective implementation of the mandate of the Committee?

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://hdl.handle.net/docs/publications/background_papers/MUTUA.PDF (Last accessed 29 March 2015).

1.4. 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, all of which pose threats to the survival of children.¹¹

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.

1.5. Literature review.

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,¹² Viljoen,¹³ Chirwa,¹⁴ Lloyd,¹⁵ Murray¹⁶ and Mezmur¹⁷ are the major works on the theme as they have written articles in

¹¹ 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)).

¹² 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.

¹³ 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.

¹⁴ D Chirwa – *The merits and demerits of the African Charter on the Rights and Welfare of the Child* – (2002) 10 IJCR 157.

¹⁵ 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.

¹⁶ R Murray – 'Children's rights in the OAU' in R Murray (ed) *Human Rights in Africa* (2004) 168.

¹⁷ 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.

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 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.¹⁸ 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 investigations.¹⁹

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.

¹⁸ Lloyd covered the 1st to 3rd sessions and Mezmur covered the 4th to 9th sessions.

¹⁹ Adopted at the 8th session in Nov/Dec 2006.

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:

1. 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.
2. 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.
3. The role of the AU in dealing effectively with children's rights on the continent.
4. 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).
5. 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.²⁰

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.²¹ The overall structure of the AU in ensuring the

²⁰ The Committee has held nine sessions since inception. The 10th session held from 25 to 27 October 2007.

²¹ 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

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.

1.6. Methodology

The dissertation shall mainly be by way of literature survey. It will also employ some empirical analysis using interviews and questionnaires used by the various actors 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.²²

1.7. 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.²³

1.8 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

²² In this discourse, inspiration will be drawn from the work of the CRC Committee. o

²³ Chapter four will include some analysis on the Ugandan case.

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.²⁴ 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.²⁵ A typical example is the participation of children as child soldiers which is ‘...one of the most alarming trends in armed conflicts.’²⁶ 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:

1. Be consistent with the existing body of international human rights laws;
2. Be of fundamental character and derive from the inherent dignity and worth of the human person;
3. Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
4. Provide, where appropriate, realistic and effective implementation machinery...; Attract broad international support.²⁷

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

²⁴ 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.iuic.org/iaup/ssi/PTI_doc/HO%20doc/Streetchildren.pdf Last accessed 5th April 2015.

²⁵ Amnesty international- OAU, The African Charter on the Rights and Welfare of the Child, http://web.amnesty.org/library/index/engIOR630061998?open&of=enq_312 Last accessed 5th April 2015.

²⁶ The impact of armed conflict on children: report of the expert of the UN Secretary-General.

²⁷ Resolution no. 41/120 of 1986 in Sepulveda M et al, *Human Rights Reference Handbook*, 2004 (CD).

*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.*²⁸

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 contested²⁹ 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.³⁰

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.³¹ 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%).³² 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.³³ International instruments now protect children's rights³⁴ 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.³⁵

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

²⁸ Articles 1 and 2 Universal Declaration of Human Rights

²⁹ C Lowy – *Autonomy and the appropriate projects of children: A comment on Freeman* (1992) 6 IJLF 72.

³⁰ Ibid 29

³¹ A Twum-Danso: Africa: A hostile environment for child participation. http://www.eccpat.net/cng/AAAQ/03_online/ENG_AAA/Thematic_Africa.pdf Last accessed 5th April 2015.

³² Ibid 31

³³ 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

³⁴ Examples are in articles 25/26 Universal Declaration, articles 14,18,22,23 and 24 ICCPR and articles 10, 12 and 13 CESCR.

³⁵ Ibid 5

the child, majority is attained earlier.³⁶ The law referred to in the CRC includes international treaties and domestic legislations specific to children.³⁷

The ACRWC defines a child more concisely as 'every human being below the age of 18 years.'³⁸ There are no exceptions or caveats included in the definition. This definition is the generally accepted one in some African Constitutions and domestic laws on children as the consensus age for children.³⁹ 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.⁴⁰ This is seen in the case of Malawi that defines a child as one less than 16 years⁴¹ 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.⁴² 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.

³⁶ Article 1 CRC

³⁷ 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.

³⁸ Article 2 ACRWC.

³⁹ Article 257 Constitution of the Republic of Uganda 1995, Section 2 Children Act Cap 59 Laws of Uganda, Section 28(3) South African Constitution, Section 28(5) Ghana Constitution, the Nigerian Child Rights Act 2003, the Kenyan Children's Act 2001.

⁴⁰ 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

⁴¹ Article 34(5) Ugandan Constitution Article 28(5) Malawian constitution.

⁴² Article 34(4) Constitution of the Republic of Uganda 1995, Article 29(2) Gambian Constitution

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.⁴³ 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.⁴⁴

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'.⁴⁵ Compromises and the adoption of minimum standards were the consensus reached by the negotiating states on these issues raised above.⁴⁶

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 exploitation⁴⁷ and the 'breast-feeding' provision.⁴⁸

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

⁴³ Ibid 1 Glenn Mower 17

⁴⁴ M Freeman 'The Moral Status of Children: Essays on the Rights of the Child' (1997) 55.

⁴⁵ C Jesseman 'The protection and participation rights of the child soldier: An African and global perspective' (2001) AHRLJ 141.

⁴⁶ African Human Rights System, http://www.chu-up.ac.za/cntrc/publications/ahrs/ahrs_index.html Last accessed 5th April 2015.

⁴⁷ Articles 34-39 CRC.

⁴⁸ Article 24 CRC

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.⁴⁹

The CRC provides four fundamental principles for the protection of children's rights:⁵⁰ non-discrimination; best interests of the child; right to life, survival and development and the views of the child.⁵¹ 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.⁵² These principles are reinforced in the Vienna Programmes of Action, adopted by the 1993 World Conference on Human Rights.⁵³

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.⁵⁴

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.

⁴⁹ 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.

⁵⁰ The Right of the Child, Fact Sheet 10 (Rev. 1) (2003) 4 – 5.

⁵¹ Ibid 12 Ankut 2

⁵² G Van Bueren - The international law on the rights of the child (1995) 332.

⁵³ 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.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) Last accessed 5th April 2015

⁵⁴ 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.

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;⁵⁵ Resolution on the International Conference on Assistance to African Children;⁵⁶ Declaration on the Rights and Welfare of the Child;⁵⁷ Resolution on the International Year of the Child;⁵⁸ 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.⁵⁹

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.⁶⁰

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.⁶¹ 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

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ AHS/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.

⁵⁸ 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.

⁵⁹ Doc CM/2262 (LXXVI), CM Dec 584 paragraphs 4 and 5.

⁶⁰ The African Charter on the Rights and Welfare of the Child - reproduced for circulation by ANPPCAN, (1999)2.

⁶¹ Ibid 4 Viljoen

others.⁶² From the preparatory work, it was clear that the drafting of the CRC lacked an African flavour. Viljoen agrees that the 'numerous political compromises' made at the drafting of the CRC, overlooked issues which were important to African children.⁶³

A regional meeting held in Kenya,⁶⁴ 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.⁶⁵ 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.⁶⁶ The resultant document was *The African Charter on the Rights and Welfare of the Child*.⁶⁷ Of note, however is that the final draft Charter submitted to the Council of Ministers and AHOSG was adopted unanimously without any 'real debate'.⁶⁸

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

1. The minimum age of child involvement in hostilities pegged at 18.⁶⁹ The CRC sets it at 15 years.⁷⁰
2. Express prohibition on the use of child soldiers⁷¹
3. The prohibition of child marriage⁷²
4. Condemnation of the crime of apartheid⁷³

⁶² 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.

⁶³ Ibid 14 Viljoen

⁶⁴ The meeting took place from 9-11 May 1988.

⁶⁵ Ibid 12 Ankut

⁶⁶ Ibid 17 Murray 166.

⁶⁷ OAU Doc/CAB/LEG/24.9/49.

⁶⁸ Ibid 17 Murray 66 – Twenty-Sixth Session AHOSG, OAU, Doc CAB/LEG/24.9/49 (1990).

⁶⁹ Article 22 ACRWC.

⁷⁰ 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.

⁷¹ Article 22(2) ACRWC.

⁷² Article 21(1) ACRWC.

⁷³ Article 26(1) ACRWC.

5. A communication procedure where individuals can bring communications to the Committee.⁷⁴ This means that children themselves can petition the Committee on their rights as individuals.
6. Introduction of duties of children to their families and the society and the role of the family on issues of children's rights.⁷⁵
7. The best interests of the child, which encompasses the welfare of the child, was made 'the' primary consideration⁷⁶ as compared to the CRC⁷⁷ and some African states' Constitutions.⁷⁸
8. Special reference to care of the child by extended families⁷⁹
9. The non – discrimination clause includes 'fortune' as compared to the CRC's reference to 'property'.⁸⁰
10. The preservation and strengthening of positive African morals, traditional values and cultures⁸¹
11. The promotion of socio-economic rights for children like education and sanitary conditions⁸²
12. Protection of handicapped children⁸³ and children of imprisoned mothers⁸⁴

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.⁸⁵ As emphasised by Ankut, the ACRWC complements the CRC.⁸⁶ Murray advocates that the ACRWC attempts 'to add an African perspective to be defined or accepted'.⁸⁷ The ACRWC has been described as 'Africa sensitive',⁸⁸ 'the most progressive of the treaties on the rights of the child'⁸⁹

⁷⁴ Article 44 states that the Committee may receive communication, from any person, group or NGOs recognised by the AU, by a Member State, or the UN on matters contained in the Charter.

⁷⁵ E Kodjo 'The African Charter on Human and People's Rights' (2003) HRLJ Vol. 11 parts 3-4, 279.

⁷⁶ Article 4(1) ACRWC.

⁷⁷ Article 3(1) CRC provides that the best interests of the child shall be 'a' primary consideration.

⁷⁸ 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'.

⁷⁹ Articles 19-20 ACRWC.

⁸⁰ Article 3 ACRWC and article 2(1)CRC.

⁸¹ Article 11(c) ACRWC.

⁸² Article 14(h) ACRWC.

⁸³ Article 13 ACRWC.

⁸⁴ Article 30 ACRWC.

⁸⁵ Ibid 12 Ankut 13.

⁸⁶ 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.

⁸⁷ Ibid Murray 17 167.

⁸⁸ 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.

and 'the most forward thinking of all the regional systems' on children.⁹⁰ 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 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.⁹¹

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.⁹² 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.⁹³ The enhancement of the Committee's 'promote and protect' mandate are supported by mechanisms and Guidelines discussed in chapter three in detail.

2.6. The Children Act Cap 59

Uganda signed the CRC on August 17, 1990 and ratified it on September 16, 1990.⁹⁴ Uganda signed the African Charter on the Rights and Welfare of the Child

⁸⁹ Ibid 52 Van Bueren

⁹⁰ Ibid 88 Lloyd

⁹¹ The African regional human rights system,
<http://www.ishr.ch/hum/Infokit/InfoPack/AfricanHRSysstem.pdf>

⁹² Article 44 ACRWC.

⁹³ F Viljoen - *Africa's contribution to international human rights* (2001) 1 AHRLJ 22.

on February 16, 1992. Uganda submitted its initial report to the Committee on the Rights of the Child on June 17, 1996. It submitted its second report on August 2, 2003; however, this report does not appear on the UN Treaty Database. The third report was due on September 15, 2002, but it has not yet been submitted.

Uganda adopted The Children Act, Chapter 59 of the Laws of Uganda on August 1, 1997. Under this Act, Local Councils (LCs) are responsible for child protection.⁹⁵ If these local government councils cannot resolve a child protection case, it is brought before the family and children court.⁹⁶ Section 16 provides that “the child shall have a right to legal representation” in all matters before the family and children court. The Act does not provide any additional information about the responsibilities or duties of the legal representative for the child, nor has the family and children court been funded by the government. The Law Development Centre's Legal Aid Clinic represents children in a variety of cases, but its primary focus is on representing children in conflict with the law. Representing children who have been abused or neglected is primarily the responsibility of the state, which would prosecute these cases as criminal proceedings. Thus it seems that most child abuse and neglect cases are handled through the criminal system, whereas most civil family law cases concern maintenance and custody proceedings.

There are two key issues Uganda faces in implementing the provisions in The Children Act, specifically Section 16. First, Uganda does not have the institutions or financial resources to fully implement the provisions in the Act. In its own initial report to the UN Committee on the Rights of the Child it reports: “In the case of child abuse for instance, the Probation Officer in the present circumstances cannot do much. The officer has no ready place to take the child. Existing children's institutions are inadequate, formal fostering is still not developed owing to cultural and economic limitations. The greater problem is that Probation and Welfare Officers have no resources, they are few and therefore cannot adequately solve the problems of the child's family and those of the child.”⁹⁷ Moreover, three of the five concerns mentioned in the NGO report to the UN Committee on the Rights of the Child also concern a lack of funding and other resources.⁹⁸ Second, customary law

⁹⁵ Section 10 The Children Act Cap 59

⁹⁶ Section 13 The Children Act Cap 59

⁹⁷ Committee on the Rights of the Child, *Initial Report of State Parties due in 1992: Uganda*, P. 93 (June 17, 1996) Available at www.law.yale.edu/crw/crw/jurisdictions/af/uganda/frontpage.htm

⁹⁸ Uganda Child Rights NGO Network, *Response to the Government of Uganda Country Report on the Implementation of The UN Convention on the Rights of the Child*, 2 (Feb. 1997).

is a powerful force in Uganda and at times it conflicts with certain provisions of the CRC. The extended family acting as a support network and the emphasis on village resolution through the LC's are two common elements of customary law in Uganda. Both of these factors could prohibit particularly complex or difficult cases being referred to the family and children court, instead of being resolved by the LC's. However, it is important to note that there has been extensive training of the LC's on children's rights to legal protection by both the Ugandan government and various NGOs.

2.6.1 Compliance with the CRC

In its 2005 Concluding Observations, the Committee on the Rights of the Child noted that some progress had been made in bringing domestic laws into conformity with the Convention on the Rights of the Child, including in the area of juvenile justice. Nevertheless, the Committee expressed concern at the lack of a systematic and comprehensive legislative review, and urged the State to specifically direct the Law Reform Commission and provide it sufficient resources to review relevant national laws, and ensure that legislation and regulations in the area of children's rights are effectively implemented.

While the Committee on the Rights of the Child welcomed some areas of reform with regards to domestic law, its 2005 Concluding Observations highlighted a number of areas in which the law fell short of the provisions of the CRC. Particular concerns were raised with regards to violence in a number of settings, perhaps most seriously with regards to child sacrifice in the Mukono and Kayunga districts. The Committee recommended that the State legislate to specifically prohibit such actions and enforce the law to ensure that perpetrators of such killings are prosecuted and appropriately punished. The Committee also raised the issue of corporal punishment, with regards to which it welcomed the prohibition on such punishment in schools and in the penal system, but urged the State to extend the prohibition to all settings, including the home. The Committee also urged the State to explicitly prohibit female genital mutilation and enforce the new laws so as to combat the widespread practise.

With regards to juvenile justice, the Committee recognised that some efforts had been made in the area, but remained concerned at the limited progress made in establishing a functioning juvenile justice system, particularly with respect to the

lack of magistrates, remand houses for children in conflict with the law and the poor conditions in those institutions that exist. Accordingly, the Committee recommended improving the training of professionals working with children in the justice system, providing children with legal assistance at an early stage of legal proceedings, and strengthening the role of local authorities, particularly with respect to minor offences.

The Committee noted the widespread practice of child labour which, as of 2005, affected as many as 2.7 million children⁹⁹. The Committee noted that the State "had not taken comprehensive measures to prevent and combat this large-scale economic exploitation of children" and recommended that the State develop and implement a comprehensive programme to prevent child labour.

2.6.2 Critic of Children Act and the stakeholders

Uganda has ratified a number of international and regional treaties and conventions including the Convention on the Rights of the Child (CRC) which legally obliges the state to protect the rights of all children including those who are in conflict and in contact with the law.

At the national level the Children Act Cap. 59, has put in place full safeguards for the rights of all children in the country. The adoption of the Children's Act was a giant stride forward in harmonising national laws with international treaties which Uganda has signed and ratified.

The Children's Act has immensely improved the lives of many Ugandan children. It guarantees their rights to health and medical care, of which are the responsibility of the parents, the extended family and the government. The provisions of the Children's Act also empower the police to caution and release child offenders without recourse to formal hearings thus taking on a more rehabilitative approach.

The legal framework also supports separate juvenile courts, although in practice such courts are not "separate" from the usual criminal courts that are used by adults.

Nonetheless, there are still a number of problems to surmount. Uganda's severe economic and social difficulties have prevented the full realisation of children's

⁹⁹ Child Rights International Network CRIN. Available at <http://www.crin.org/en/library/publication/uganda-national-laws>

rights, and there is concern over the inadequate enforcement of legislation to ensure the 'physical and mental integrity' of all children.

Street children are of particular concern. Today's toxic combination of economic and social factors is forcing more and more children to continue pouring into the streets throughout the country. According to a report released by Human Rights Watch on 17 July 2014 titled 'Where Do You Want Us to Go?' Abuses against Street Children in Uganda, Uganda is failing to protect particularly homeless children against police abuse and other violence. Street children throughout Uganda's urban centres face violence, and physical and sexual abuse.

A considerable percentage of children appearing before the juvenile courts are street children with some arrested for committing crimes, and some taken in to be 'processed' by the care and protection system.

Although the care and protection system is conceptually separate from the criminal justice system, the two systems appear to merge in practice. Both groups of children are picked up and held in the same police cells, and are treated similarly at courts. Rights and advocacy groups, especially ANPPCAN, are alarmed about the physical and sexual abuse of Ugandan street children and the increasing burden of HIV/AIDS on orphans that prematurely forces them into adult roles; coupled with inadequate access to education, especially for girl children.

While the fact that some street children commit crimes is undisputed, the majority are driven by poverty, which we cannot address or prevent without broad reaching socio-economic reforms.

Ugandan children, child activists and children's organisations are pinning their hopes on the full implementation of the Children's Act to improve the situation of street children and all young people in Uganda. We hoped that the legislation – which outlaws any form of discrimination – would dramatically change the inattention, neglect and abuse towards child rights.

In 2013, the Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI) compiled a joint review of juvenile justice data in Uganda and produced a report titled A review of law and policy to prevent and remedy violence against children in police and pre-trial detention in Uganda. The report revealed some interesting but critical issues that require urgent attention.

For instance, the report noted that children are often detained for petty offences due to undeveloped structured diversionary methods; the difficulty in determining the actual number of children in detention and ineffective monitoring and the lack of evaluation mechanisms which would help eliminate practices that violate the rights of children in conflict with the law, such as arbitrary arrests, lengthy pre-trial detention, violence and substandard conditions in facilities for juvenile deprived of liberty.

This joint review culminated in a roundtable, the overall purpose of which was to bring together professionals involved in implementing, monitoring and supporting the reform of juvenile justice system in Uganda, to discuss priorities and targets and take steps to promote diversion and a restorative justice approach, and to define priorities in supporting and accelerating the national juvenile justice reforms.

As a child rights activist, I am particularly concerned about the length of time that elapses between the first appearance and the conclusion of cases. Over-crowded court rolls ensure that cases drag on. This is worrying, particularly where children are held in the Juvenile Remand Home, or where those that are 15 years and older are held together with adults in adult remand centres awaiting trial. I think more needs to be done on the following:

1. Provision of legal aid to children who cannot afford lawyers need to be well structured with clear provisions on how it will be facilitated.
2. Child protection measures in Uganda need to be implemented effectively and fully. Compliance with such legislation would increase if the magnitude of the problem and better knowledge about the factors that put children at risk was available to both state and non-state actors.
3. National and local government officials should put an end to organised round-ups of street children, hold police and others accountable for abuse, and provide improved access for these children to education and healthcare.

The Children's Act bridged an important gap. But good policies without implementation are of little benefit and there is an urgent need to ensure that the justice system in this country is in full conformity with the right of all children – as

stated in Article 40 of the CRC to be treated in a manner which promotes their sense of dignity and worth¹⁰⁰.

A little more needs to be done on the following: legal representation of children should be strengthened, since there is currently not so effective state-paid legal aid system.

Provision of legal aid to children who cannot afford lawyers need to be well structured with clear provisions on how it will be facilitated; child protection measures in Uganda need to be implemented effectively and fully.

Compliance with such legislation would increase if the magnitude of the problem and better knowledge about the factors that put children at risk was available to both state and non-state actors; national and local government officials should put an end to organised roundups of street children, hold police and others accountable for abuses, and provide improved access for these children to education and health care.

2.7. 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.

¹⁰⁰ Penal Reform International Available at <http://www.penalreform.org/blog/uganda-stronger-child-protection-mechanisms/>

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.¹⁰¹ There were also other impediments such as translation and preparation of the documentation for the first meeting.¹⁰² 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.¹⁰³ This will ensure States Parties commitment in promoting the work of the Committee.¹⁰⁴

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

¹⁰¹ Ibid Lloyd 5

¹⁰² F Viljoen – International Human Rights Law in Africa (2007) Oxford University Press.

¹⁰³ For example, the Commission's 41st session was held in Ghana while the 42nd Session will be hold in Congo Brazzaville.

¹⁰⁴ The just concluded 10th session of the Committee was held in Cairo, Egypt.

Day of the African Child,¹⁰⁵ capacity building, resource mobilisation, monitoring and evaluation of its work.¹⁰⁶

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.¹⁰⁷ This cures a defect in the African Charter, which was not clear on which body would consider states' reports.¹⁰⁸

States Parties must submit initial reports within two years of ratification or the entry into force of the ACRWC and every three years thereafter.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

¹⁰⁵ The 16th of June every year is commemorated as the *Day of the African Child* since 2004.

¹⁰⁶ Work Plan of the Committee of Experts 2002-2004 which forms part of the report of the second session of the Committee.

¹⁰⁷ Article 43 ACRWC

¹⁰⁸ Ibid 97 Viljoen

¹⁰⁹ Article 43 ACRWC.

¹¹⁰ Article 44 CRC.

¹¹¹ Rule 70 of the Rules of Procedure of the Committee. Committee/ ACRWC/II. Rev p16.

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.¹¹²

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.¹¹³ 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.¹¹⁴

As at the 9th session, only four states have submitted initial reports to the Committee.¹¹⁵ 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.¹¹⁶ 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 meetings¹¹⁷ during which it has among others;

1. adopted its Rules of Procedure;

¹¹² Ibid Ankut 13

¹¹³ Article 44 ACRWC. African human rights system. Available at <http://www.ishr.ch/hum/Infokit/InfoPack/AfricanHRsystem.pdf>, Last accessed 6th April 2015

¹¹⁴ R Rosas & M Scheinin 'Implementation Mechanisms and Remedies' (2000) 357, J Rehman International Human Rights Law: A Practical Approach, (2003) 124.

¹¹⁵ These states are Egypt, Mauritius, Nigeria and Rwanda.

¹¹⁶ B Mezmar *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.

¹¹⁷ The 10th session concluded in October 2007.

2. developed Guidelines for preparation of initial reports by member states on the implementation of the ACRWC;
3. developed a Work-Plan for the period 2002-2004;
4. planned and undertook advocacy missions to selected states to lobby for the ratification and implementation of the ACRWC in Sudan, Burundi, Madagascar and Namibia;¹¹⁸
5. initiated partnerships with civil society organisations (CSOs) as well as other
6. strong collaboration with NGOs;
7. 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;
8. selected and disseminated annual themes for the celebration of the Day of the African Child;
9. undertook investigative fact-finding mission in August 2005 to Uganda;
10. developed, together with the AUC, a reporting schedule indicating the dates by which States Parties should have submitted their initial reports;
11. Guidelines for considering communications, conducting investigations and granting observer status;
12. Coordinated the reports by State Parties for the midterm review of the UN declaration on 'Africa Fit for children.'¹¹⁹ The mid-term review meeting coincides with the 10th session of the Committee; and
13. managed to put the ACRWC in the public fora;

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. The AU has through the AUC, been providing support to the Committee to discharge its mandate under the ACRWC.

¹¹⁸ Available at <http://www.africaunion.org/child/home.htm> Last accessed 6th April 2015

¹¹⁹ African Union, Second Pan-African Forum on Children: Mid Term Review. Available at <http://www.africaunion.org/root/au/conference/2007/November/2007Children/doc/en/ConceptualNote.pdf> Last accessed 6th April 2015.

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.¹²⁰ 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.¹²¹ 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.¹²²

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.¹²³ As maintained by Hansungule ...the Committee is not a priority of the AU. 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 neither afford nor sustain buttresses this assertion. A strong case is made therefore for

¹²⁰ Ibid 15 Lloyd

¹²¹ Ibid 15 Lloyd

¹²² Ibid 15 Lloyd

¹²³ Ibid 15 Lloyd - 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.

rationalisation of the AU organs to better focus and maximise the use of its limited resources.¹²⁴

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. 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.¹²⁵ 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.'¹²⁶

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,'¹²⁷ 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.¹²⁸

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.¹²⁹ 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

¹²⁴ Ibid Viljoen

¹²⁵ Plan of Action A/59/2005/Add.3 paragraph 99

¹²⁶ 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> Last accessed 6th April 2015.

¹²⁷ Ibid Ankut.

¹²⁸ A Lloyd & R Murray, *Institutions with Responsibility for Human Rights Protection under the African Union* (2004) 48 JAL 165, 175

¹²⁹ 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

mechanisms, each one depleting scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.¹³⁰

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 work is not on the AU's priority list.¹³¹

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.¹³² 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. 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.

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

¹³⁰ Ibid 86 Heyns & Killander 538

¹³¹ Ibid Lloyd

¹³² Interview carried out by UNICEF on Mrs Rahim

human rights regional system which provides an entry point for international human rights to play a role which otherwise would not have existed.¹³³

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.

¹³³ Ibid 86

CHAPTER FOUR

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 AU¹³⁴ 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:

1. to promote human and peoples' rights;
2. to protect human and peoples' rights;
3. to interpret provisions of the African Charter; and
4. any other tasks that may be entrusted to it by the AHOSG.¹³⁵

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.

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.¹³⁶ It however has dealt with a

¹³⁴ Article 18, Constitutive Act.

¹³⁵ Article 45 African Charter.

¹³⁶ 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.

communication involving students (though their ages were not mentioned in the Communication).

In *Curtis Francis Doebbler versus Sudan*,¹³⁷ 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:

1. immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments
2. abolish the penalty of lashes; and
3. take appropriate measures to ensure compensation of victims.¹³⁸

The African Commission too like the Committee suffers institutional weaknesses and lack of human and financial resources.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

¹³⁷ Communication 236/2000, 16th Annual Activity Report of the African Commission 2002 - 2003

¹³⁸ Decision of the African Commission at the 33rd Ordinary session in Niamey, Niger.

¹³⁹ Ibid Viljoen 96

¹⁴⁰ Ibid Olowu 13

¹⁴¹ 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_COURT.doc

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.¹⁴⁹ 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...*¹⁵⁰

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.

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.¹⁵¹ 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

¹⁴⁹ 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>

¹⁵⁰ 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.

¹⁵¹ Ibid 147

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.¹⁵²

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).¹⁵³ 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.¹⁵⁴ 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. 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...'¹⁵⁵

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 children's rights in the rebel-controlled region of Northern Uganda.¹⁵⁶ 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.

¹⁵² This office will function like the OHCHR in the UN system

¹⁵³ Amnesty International: Time to Commit to Human Rights Promotion and Protection in Africa
<http://www.amnesty.org/library/index/ENGLOR630012003>

¹⁵⁴ Ibid Amnesty International 153

¹⁵⁵ 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.

¹⁵⁶ The Lord's Resistance Army (LRA).

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.¹⁵⁷ 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.¹⁵⁸ 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, 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

¹⁵⁷ Protection and return in Northern Uganda <http://www.odihpn.org/report.asp>

¹⁵⁸ 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 http://www.omct.org/pdf/UNHCR_2007_litigation_workshop_july2007_african_system/J_Oder.pdf

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.

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 violation¹⁵⁹. 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 report and also the cases of flagrant disregard 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

¹⁵⁹ 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

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.

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.¹⁶⁰ 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.¹⁶¹ 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

¹⁶⁰ Ibid Koome and Rahim

¹⁶¹ Ibid Koome

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. Fall has similarly indicated that a stand alone may help regenerate the Committee.

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.¹⁶²

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.¹⁶³

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.

¹⁶² Ibid Lloyd

¹⁶³ Ibid Ankut

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.¹⁶⁴ 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.¹⁶⁵

Viljoen who strongly supports the proposal on a merger states that the African Commission be mandated to take over the substantive provisions of the ACRWC 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.¹⁶⁶ 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 recommended'¹⁶⁷ 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.

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. 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

¹⁶⁴ Ibid Nielsen and Mezmur

¹⁶⁵ Ibid Lloyd

¹⁶⁶ Article 48 of the ACRWC on amendments to the Charter.

¹⁶⁷ Ibid Viljoen

Committee on its fund raising drive for specific activities.¹⁶⁸ They also plan another lobbying mission for South Africa in November 2007.

IHRDA in partnership with *Save the Children Sweden* also assisted in organising capacity building and training workshops for Committee members in the recent past.¹⁶⁹ 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.¹⁷⁰ The *UNICEF* took over the staffing of the Secretariat, an issue that had been dragging for too long.

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.¹⁷¹

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.

Although NGO involvement at inception was minimal,¹⁷² 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

¹⁶⁸ Ibid Rahim

¹⁶⁹ Ibid Viljoen

¹⁷⁰ Ibid Mezmur

¹⁷¹ Ibid Rahim

¹⁷² Ibid Lloyd 322 narrates the lack of NGO participation at the earlier days of the Committee.

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.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

Member States of the AU have committed themselves to strengthening human rights protection mechanisms in Africa.¹⁷³ The ACRWC in some important respects builds on international standards,¹⁷⁴ 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.¹⁷⁵

¹⁷³ Articles 2 & 4 of the Constitutive Act of the African Union

¹⁷⁴ Amnesty International: *The African Charter on the Rights and Welfare of the Child*, AI Index: IOR 63/006/1998

¹⁷⁵ <http://web.amnesty.org/library/index/eng/R630061998?open&of=enq-311>

¹⁷⁵ 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

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.¹⁷⁶ 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.

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.

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/cr/mandate.htm>

¹⁷⁶ Ibid 13 D Olowu, 133.

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.¹⁷⁷ The non-inclusion of NHRIs as organisations that can obtain observer status with the Committee is an omission, which should be remedied accordingly.

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.¹⁷⁸ 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.¹⁷⁹

Governments should assist the work of the Committee by domesticating rights contained in the ACRWC¹⁸⁰ and conducting civic education on the ACRWC's content through awareness campaigns.

¹⁷⁷ Resolution on granting Observer Status to National Human Rights Institutions in Africa, <http://www.nhri.net/pdf/ResAfRhrInst.pdf>

¹⁷⁸ Held at the ECA Conference Centre, Addis Ababa from 1 – 10 October 2007. ○

¹⁷⁹ This happened in the case of Ethiopia which motivated the National Conference and training workshops.

¹⁸⁰ Nigerian Child Rights Act 2003 and the Kenyan Children's Act 2001 on specific aspects of the ACRWC.

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.

(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,¹⁸¹ which consequently affected some decisions on legal framework taken by the Committee.¹⁸² 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.

¹⁸¹ Ibid Lloyd

¹⁸² Ibid Lloyd

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'.¹⁸³ 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 2008.¹⁸⁴

(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.¹⁸⁵ The preamble of the resolution¹⁸⁶ mentions the Committee as one of the African institutions and makes a member of the Committee a committee member to manage the funds. 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...

¹⁸³ Doc EX.CL/Dec.233 (VII), Decision on the African Committee of Experts on the Rights and Welfare of the Child.

¹⁸⁴ 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

¹⁸⁵ The 40th Session of the African Commission held in The Gambia

¹⁸⁶ ACHPR/Res.96(XXX)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

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.¹⁸⁷

(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.¹⁸⁸

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.¹⁸⁹

Secondment of staff, and the sharing of information and experience is indispensable.¹⁹⁰

(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. 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.

¹⁸⁷ Pan-African Parliament, second ordinary session – Resolutions and Recommendations

http://www.isc.co.za/af/RegOrg/unity_to_union/pdf/Pap/2ndOrdRec.pdf

¹⁸⁸ Ibid Viljoen 96

¹⁸⁹ This is done in the UN system

¹⁹⁰ Ibid Viljoen 96

(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,¹⁹¹ 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

¹⁹¹ Article 4 ACRWC.

capacity building workshops with the OHCHR¹⁹² in which the African Commission and Court were discussed.¹⁹³

(iii) UNICEF

The UNICEF should collaborate more with the Committee (or its mandate) on aspects relating to the welfare of children at the grass root 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 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.

¹⁹² 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/sectors/hrworkshop2007.htm>

¹⁹³ 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/sectors/hrworkshop2007.doc>

