

# Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the *Nubian Children* communication

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## Summary

*The article analyses the Nubian Children communication, the very first case to be finalised by the African Committee of Experts on the Rights and Welfare of the Child. It critically reviews the progressive approach of the Committee of Experts with regard to its interpretation of the exhaustion of local remedies. The Committee ruled that the best interests principle should serve as an exception to the exhaustion of local remedies rule. While the approach of the Committee is commended, it is argued that this progressive approach should be lauded with caution. Further, the article argues that the African Committee of Experts' approach to the indivisibility of human rights guaranteed under the African Children's Charter in the Nubian children communication is progressive and capable of advancing human rights, particularly socio-economic rights, of children in the region. While this decision serves as an important precedent for advancing children's rights in the region, it misses an opportunity of adopting a gender-sensitive approach in the interests of the girl child.*

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## 1 Introduction

The need to develop a region-specific treaty on children's rights in Africa culminated in the much-lauded adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>1</sup> in 1990 and its entry into force in 1999. It was considered unique in that it established a communications procedure to strengthen the protection of children's rights, close to that provided in the African Charter on Human and Peoples' Rights (African Charter).<sup>2</sup> This procedure, however, remained untested until the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts) received a communication filed by the Centre for Human Rights of the University of Pretoria against the Republic of Uganda in 2005 on behalf of children caught up in the conflict in Northern Uganda. The African Committee of Experts received a second communication submitted jointly by the Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent in Kenya against the Republic of Kenya (*Nubian Children* communication) in March 2009. The African Committee considered the *Nubian Children* communication fully on its merits and gave its decision on 22 March 2011. The decision serves as a significant development in the advancement of children's rights on the continent as well as the African Committee's role as the principal protector of children's rights under the African human rights system. The decision makes a strong first impression with innovative approaches to the rule on the exhaustion of domestic remedies, finding the child's right to nationality at birth and the affirmation of economic and social rights of the child as enshrined in the African Children's Charter.

The article examines the African Committee of Experts' decision and highlights key aspects of its approach to admissibility and substantive arguments put to it by the authors of the communication. It critically reviews the progressive approach of the Committee of Experts with regard to its interpretation of the exhaustion of local remedies. The Committee had ruled that the best interests principle should serve as an exception to the exhaustion of local remedies rule. While the approach of the Committee is commended, it is argued that it should be lauded with caution. Further, the article argues that the African Committee's approach to the indivisibility of human rights guaranteed under the African Children's Charter in the *Nubian Children* communication is progressive and capable of advancing the human rights, particularly socio-economic rights, of children in the region. While this decision

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1 OAU Doc CAB/LEG/24.9/49 (1990).

2 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity 27 June 1981, entered into force 21 October 1986.

serves as an important precedent for advancing children's rights in the region, it misses an opportunity to adopt a gender-sensitive approach to the interests of the girl child.

## 2 Background, facts and arguments

In present-day Kenya, the Nubians are the descendants of the Sudanese Nubian members of the British colonial forces in East Africa known as the King's African Rifles (KAR).<sup>3</sup> At the end of World War II, these Nubian soldiers requested that they be repatriated to their homeland but the British government refused to do this. Instead, the British government allocated parcels of land to them at Kibera near Nairobi without any formal land title documents.<sup>4</sup> Since independence, successive governments of Kenya refused to recognise the Nubians as Kenyan citizens as well as their claims to the land in Kibera. Thus, having lived in Kenya for more than a century, Nubians are not recognised officially as one of the Kenyan tribes and are not considered by the government to merit citizenship because they do not have any entitlement to land or have any indigenous connection to Kenya. The vast majority of the Nubian population have continued to encounter difficulties having access to land due to their statelessness.

Following unsuccessful attempts by the Nubian community in Kenya to affirm their right to Kenyan nationality through the Kenyan courts, IHRDA and OSJI in 2006 jointly filed a communication on their behalf before the African Commission on Human and Peoples' Rights (African Commission), alleging violations of the right to freedom from discrimination and other rights, the combined effect of which rendered Kenyan Nubians stateless.<sup>5</sup> In the course of developing the communication before the African Commission, IHRDA and OSJI identified certain violations which impacted more heavily on Nubian children, such as their low level of access to education, the denial of access to higher education due to a lack of citizenship identification documents, and a lack of access to proper health and sanitation and discrimination.<sup>6</sup> Inspired by the fact that the African Children's Charter

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3 See Open Society Foundation 'Nubians in Kenya appeal for their "right to existence"' 17 July 2005, [http://www.soros.org/initiatives/osiea/news/nubians\\_20050630](http://www.soros.org/initiatives/osiea/news/nubians_20050630) (accessed 1 June 2012).

4 See MO Makoloo *Kenya minorities, indigenous peoples and ethnic diversity* (2005) 16, <http://www.minorityrights.org/1050/reports/kenya-minorities-indigenous-peoples-and-ethnic-diversity.html> (accessed 1 June 2012).

5 The African Charter does not have a specific provision on the right to nationality. However, the effect of the denial of nationality results in the violation of the freedom from discrimination and other related rights, forming the basis of the communication submitted to the African Commission.

6 'Building a case for Nubian children' (2007) IHRDA case memorandum. Edmund Amarkwei Foley, co-author of this article, obtained a copy in the course of his duties as a legal officer at IHRDA.

provided for the child's right to nationality in article 6, IHRDA and OSJI commenced work to gather more evidence specific to Nubian children in order to develop a communication for submission to the African Committee of Experts. The choice of the African Committee by the authors of the communication was also to strengthen its protection mandate since its communications procedure had been grossly under-utilised.

Kenyan birth certificates carry a *caveat* that '[p]ossession of a birth certificate does not constitute proof of nationality'.<sup>7</sup> At 18 years of age, all Kenyans are required by law to be registered as citizens and be issued with a national identity card as proof of such citizenship. Whereas all other Kenyan children have a legitimate expectation of obtaining an identity card at the age of 18 years, in view of the security of their parents' citizenship, Nubian children cannot boast of the same expectation because their parents' citizenship is suspect. To verify their status, Nubians go through a process of vetting before an identity card is issued to them. The onerous requirements for vetting and the tedious process have resulted principally in discrimination and violations of economic, social and cultural rights of Nubians in Kenya. This, in turn, has limited Kenyan Nubian children's access to educational and health facilities and services.

From the evidence gathered,<sup>8</sup> IHRDA and OSJI alleged violations of the right to freedom from discrimination;<sup>9</sup> the right to nationality;<sup>10</sup> the right to education;<sup>11</sup> the right to health care and services;<sup>12</sup> and the right to adequate housing<sup>13</sup> under the African Children's Charter. IHRDA and OSJI urged the African Committee of Experts to find violations of all these articles and therefore recommend that Nubian children had a right to Kenyan nationality and the fulfilment of the rights related thereto.

On the basis of evidence it was argued that the systematic denial of Kenyan nationality to Nubian children by the Kenyan government, even though Nubians satisfied the constitutional and statutory requirements, was a violation of article 3 of the African Children's Charter, which prohibited discrimination on grounds of ethnic group,

7 IHRDA & OSJI '*Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Kenyan Nubian Minors v Kenya – Submissions on admissibility*' (2009) para 7 (copy of submissions on file with authors).

8 The evidence included sworn affidavits from Nubian children and/or their guardians, reports of United Nations agencies and the Kenyan Commission for National Human Rights as well as independent studies conducted on the lives of Nubians in Kenya in general and Kibera in particular.

9 Art 3 African Children's Charter.

10 Art 6(3) African Children's Charter.

11 Art 11(3) African Children's Charter.

12 Arts 14(2)(b) & (c) African Children's Charter.

13 Art 20(2)(a) African Children's Charter.

national or social origin or other status.<sup>14</sup> In addition, it was alleged that the denial of Kenyan nationality to Nubian children constituted a violation of articles 6(2) on nationality; 11(3) on education; and 20(2) on housing of the African Children's Charter.

Having been formally notified of the communication in April 2009, the African Committee of Experts was seized of the communication and requested IHRDA and OSJI to submit arguments on admissibility. A brief was submitted to the 14th session of the African Committee in November 2009 in which IHRDA and OSJI argued that all the requirements for admissibility as per the Committee's guidelines on the consideration of communications had been met.<sup>15</sup> On the question of exhaustion of local remedies, the brief argued that the Nubians had filed a case on their right to nationality in the Kenyan High Court which had by then been pending for over six years with no substantive consideration, thus making the remedy delayed and ineffective. At its 15th ordinary session in April 2010, the African Committee admitted the communication on the basis that the suit in the High Court had been unduly delayed, as argued by IHRDA and OSJI.<sup>16</sup>

Before a formal request was made for further arguments, IHRDA and OSJI submitted a full brief on the merits in June 2010 to enable the African Committee to expedite its consideration of the communication.<sup>17</sup> The government of Kenya was informed and invited to participate at every stage of the consideration of the communication, but no response was received by the Committee of Experts, the Nubian community or the authors of the communication.<sup>18</sup>

The African Committee invited IHRDA and OSJI to present oral arguments during the 17th ordinary session held in Addis Ababa from 22 to 25 March 2011. A team from both institutions presented the arguments. A representative of the United Nations High Commission for Human Rights (UNHCR) also submitted a paper in support of the communication. At the conclusion of the session, the African

14 'Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) on behalf of the Nubian Children in Kenya v Republic of Kenya – Arguments on the merits of the communication' (2010) 15-28 (copy on file with the authors).

15 African Committee of Experts on the Rights and Welfare of the Child 'Guidelines for the consideration of communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child' ACERWC/8/4.

16 African Committee of Experts on the Rights and Welfare of the Child '15th session of the African Committee of Experts on the Rights and Welfare of the Child, 15-19 March 2010, Addis Ababa, Ethiopia – Report ACERWC/Rpt. (XV)' (2010) para 48, <http://www.acerwc.org/wp-content/uploads/2011/03/ACERWC-Session-15-report-English.pdf> (accessed 1 June 2012).

17 IHRDA and OSJI (n 14 above).

18 15th session of the African Committee of Experts on the Rights and Welfare of the Child, 22-25 March 2011, Addis Ababa, Ethiopia – Report ACERWC/Rpt (XVII) (2010) para 35 [http://www.acerwc.org/wp-content/uploads/2011/03/Report-17th-session-ACERWC\\_Eng.pdf](http://www.acerwc.org/wp-content/uploads/2011/03/Report-17th-session-ACERWC_Eng.pdf) (accessed 1 June 2012).

Committee adopted a decision in its session report, finding Kenya in violation of all the articles alleged and promised to deliver its reasons within a month.<sup>19</sup> The authors received an official copy of the decision in September 2011. At the end of its decision, finding Kenya to have violated all the articles so alleged, the African Committee of Experts concluded as follows in paragraph 69:<sup>20</sup>

For the reasons given above, the African Committee finds multiple violations of articles 6(2), (3) and (4), article 3, articles 14(2)(b), (c) and (g); and article 11(3) of the African Children's Charter by the government of Kenya, and:

- 1 Recommends that the government of Kenya should take all necessary legislative, administrative and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.
- 2 Recommends that the government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.
- 3 Recommends that the government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative and other measures to ensure that children of Nubian descent are registered immediately after birth.
- 4 Recommends that the government of Kenya should adopt a short-term, medium-term and long-term plan, including legislative, administrative and other measures, to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.
- 5 Recommends to the government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

### 3 Best interests versus exhaustion of local remedies

Before discussing the approach of the African Committee of Experts to some of the human rights issues raised in this communication, it is important to first examine the reasoning of the Committee in addressing the exhaustion of local remedies. The provision on

19 African Committee of Experts on the Rights and Welfare of the Child (n 18 above) para 36.

20 African Committee of Experts on the Rights and Welfare of the Child, Decision on the communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Government of Kenya (2011) para 69 <http://www.acerwc.org/wp-content/uploads/2011/09/002-09-IHRDA-OSJI-Nubian-children-v-Kenya-Eng.pdf> (accessed 1 June 2012).

the need to exhaust local remedies is not peculiar to the African Children's Charter, but can be found in virtually all international and regional human rights instruments.<sup>21</sup> As correctly noted by the African Committee, the reason for this provision is to ensure that a state which is alleged to have violated human rights is informed of such violations and given the opportunity to remedy them.<sup>22</sup> This is to avoid a situation where regional and global human rights bodies are made courts of first instance. It should be noted that the African Children's Charter, unlike the African Charter, does not contain a provision relating to the admissibility of communications before the African Committee. Consequently, in the *Nubian Children* communication, the African Committee relied on its guidelines for the consideration of communications and sought guidance wholly from the admissibility provision in article 56(5) on the exhaustion of local remedies of the African Charter in arriving at its decision. The African Commission over the years has developed a rich jurisprudence regarding the conditions contained in article 56 dealing with the admissibility of communications. Although the African Commission has emphasised in a number of cases the importance of this provision, in some situations the Commission has adopted a flexible or generous approach to interpreting the provision.<sup>23</sup>

In the *Nubian Children* communication, the African Committee noted that the Nubian community had filed a case before a High Court in Kenya which had been pending for six years but that no decision had yet been reached. It was further noted that within 15 months of filing the case, five different judges had attempted without success to preside over the case.<sup>24</sup> Given the long period this case has been in court and considering the fact that children are among the victims of the human rights violations experienced by the Nubian people, the African Committee decided to adopt a progressive, albeit purposive, approach to redefine the need for the exhaustion of local remedies to take account of the underlying principles of children's rights. In arriving at its decision, the African Committee invoked the best interests of the child principle in article 4 of the African Children's Charter as part of its justification for finding that local remedies were unduly prolonged and hence ineffective.

According to the African Committee, one year in the life of a child means a lot; hence the delay by the High Court in Kenya to resolve the case instituted by the Nubian community has resulted in grave consequences for the rights of Nubian children. In the African

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21 See eg art 56(6) African Charter.

22 See para 26 of the decision (n 20 above).

23 See eg *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Civil Liberties Organization v Nigeria* (2000) AHRLR 186 (ACHPR 1995); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

24 See para 20 of the decision (n 20 above).

Committee's view, this is a clear indication that no effective local remedy exists in Kenya. The Committee relies extensively on the *Jawara* communication<sup>25</sup> to illustrate its point. In that case, the African Commission had noted that 'only local remedies that are available, effective and adequate (sufficient) need to be exhausted'. The African Commission further reasoned that a remedy is considered available if the complainant can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint.<sup>26</sup> Based on this decision, the African Committee then concludes that the local remedies rule is not etched in stone.<sup>27</sup>

The African Committee proceeded to distinguish the *Nubian Children* communication from a similar communication decided by the African Commission, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,<sup>28</sup> where the Commission declined to hear a communication in which a claim had been filed but not yet resolved by domestic courts in Nigeria. In justifying its position, the African Committee notes as follows:<sup>29</sup>

[I]t cannot be in these children's best interests (a principle domesticated by the Children's Act of 2001) to leave them in a legal limbo for such a long period of time in order to fulfil formalistic legal procedures. As an upper guardian of children, the state and its institutions should have proactively taken the necessary legislative, administrative and other appropriate measures in order to bring to an end the current situation children of Nubian descent in Kenya find themselves in.

The African Committee of Experts, echoing the decision of the African Commission in the *Jawara* case, further reasons that an unduly prolonged remedy cannot be said to be 'available, effective and sufficient'. Hence it submits:<sup>30</sup>

[T]he unduly prolonged court process in the present communication is not in the best interests of the child principle (article 4 of the Charter), and warrants an exception to the rule on exhaustion of local remedies.

There is no doubt that the progressive approach by the African Committee in interpreting the provision on the exhaustion of local remedies is commendable as it is capable of advancing the rights of children under the African Children's Charter. The problem of delay in the administration of justice is not peculiar to Kenya, and applies to

25 *Jawara v The Gambia* (n 23 above).

26 As above.

27 See para 28 of decision (n 20 above).

28 (2000) AHRLR 186 (ACHPR 1995).

29 See para 29 of the decision (n 20 above).

30 See para 32 of the decision (n 20 above).

many other African countries.<sup>31</sup> Experience has shown that in many African countries, cases take an unduly long period before they are resolved. Consequently, courts of law, that ought to be beacons of hope and justice for the disadvantaged and marginalised, have become a nightmare. Given this situation, one tends to share the concern and sentiment of the African Committee. This is even more so given the disadvantaged position of children. Therefore, the expansive interpretation of the 'best interests principle' by the Committee is a welcome development. The interpretation is capable of realising access to justice for African children whose rights historically have not been given attention. However, this approach should be applauded with caution.

As noted earlier, the purpose of the exhaustion of local remedies clause is to ensure that a state that is alleged to be in violation of human rights has been given the opportunity to deal with the case domestically before an international or regional human rights body assumes jurisdiction. This is very important bearing in mind the doctrine of state sovereignty under international law. More importantly, the rule is founded on the premise that 'the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level'.<sup>32</sup> While it is admitted that a rigid approach to this rule should be avoided, at the same time the rule should not be too relaxed so as to defeat its purpose. The invocation of the best interests of the child principle to evade the exhaustion of local remedy rule should only be based on the peculiarity of a case and should never become a general rule of the African Committee. Otherwise, the best interests of the child principle may become a 'magic wand' to prospective litigants who may jettison the need to exhaust local remedies before approaching the Committee for redress for human rights violations.

#### 4 Indivisibility of human rights

An interesting aspect of the *Nubian Children* communication is the fact that it touches on both the violations of civil and political rights, on the one hand, and social and economic rights, on the other. The African Committee of Experts deserves commendation for its faithfulness to the indivisibility, interdependence and interrelatedness

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31 A report has shown that in many parts of Africa a delay in the administration of justice is one of the major barriers to access to justice for vulnerable and marginalised groups.

32 See NJ Udombana 'So far, so fair: The local remedies in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 8.

of human rights guaranteed in the African Children's Charter. In the African Committee's view, the displacement and denial of the right to registration of birth to Nubians by the Kenyan government can have implications for the right to health of Nubian children as guaranteed in article 14 of the African Children's Charter. This approach coincides with a growing consensus under international human rights law. In the Vienna Programme of Action,<sup>33</sup> the international community agreed that all human rights – civil, political, social and economic rights – are indivisible, interdependent and interrelated. Prior to this declaration, most countries have tended to treat social and economic rights with less attention compared with civil and political rights. Some of the arguments to justify this neglect relate to the fact that social and economic rights are vague and often require the availability of resources for their proper implementation.<sup>34</sup>

However, recent developments, including clarifications by treaty-monitoring bodies and decisions of national courts and regional human rights bodies, have tended to debunk this claim and have reaffirmed that all human rights, whether civil and political or social and economic, are equally important. For instance, the Human Rights Committee, charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has explained in its General Comment 6<sup>35</sup> that the right to life guaranteed under ICCPR should not be interpreted narrowly but should be defined broadly to include the rights to food, housing and health. Also, the Committee on Economic, Social and Cultural Rights (ESCR Committee), in General Comment 14 on the right to health<sup>36</sup> has explained that the enjoyment of the right to health is dependent on other rights, such as the rights to dignity, life, privacy and non-discrimination.

At the regional level, the African Commission in a number of cases has supported the indivisibility, interdependence and interrelatedness of human rights in its decisions. For example, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>37</sup> the Commission found the Nigerian government in violation of the right to life, health, non-discrimination, a healthy environment, food and housing when it failed to prevent environmental degradation and wanton destruction of property of the Ogoni people by multi-national oil companies. Thus, for the first time the African Commission adopted a broad and purposive interpretation of the rights guaranteed under the African Charter. Again, in *International Pen and Others (on behalf of Saro-Wiwa)*

33 Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 ch III.

34 See eg L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353; DP Fidler *International law and infectious diseases* (1999).

35 'The right to life' UN GAOR Human Rights Committee 37th session Supp 40.

36 'The right to the highest attainable standard of health', UN ESCR Committee General Comment 14, UN Doc E/C/12/2000/4 para 12.

37 n 23 above.

*v Nigeria*,<sup>38</sup> the African Commission found that the appalling living conditions in prisons and the lack of medical attention for prisoners were not only threats to their right to health, but also the rights to life and human dignity guaranteed under the African Charter. The Commission reasons that the right to life will be almost meaningless if a prisoner is denied access to medical attention when in need. In summing up its position, the African Commission notes as follows:

The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4.

These decisions are clear indications of the African Commission's commitment to affirming the indivisibility, interdependence and interrelatedness of all the rights guaranteed under the African Charter.

Furthermore, the Indian Supreme Court has applied the indivisibility approach to a case involving *Pachim Banga Khet Majoor Samity v State of West Bangal*.<sup>39</sup> In that case, the plaintiff suffered an injury arising from an accident and was rushed to hospital but was denied treatment. He brought an action to challenge this denial of treatment. The Indian Supreme Court held that a denial of access to emergency treatment would result in the violation of the right to life guaranteed under article 21 of the Indian Constitution. This creative approach tends to infer the violation of socio-economic rights by relying on civil and political rights.

In the Nubian case, the African Committee of Experts reasons that the inability of Nubian children to live a worthy life like every other child due to their displacement and non-registration at birth amounted to a violation of their rights to non-discrimination, dignity and health. In finding the Kenyan government in breach of its human rights obligations under international law, the African Committee adopted a progressive and purposive approach to interpreting the provisions of the African Children's Charter. The African Committee adopted the indivisibility, interdependence and interrelatedness of human rights guaranteed in the African Children's Charter to hold that the Kenyan government's lengthy displacement of the Nubian people was in violation of the right to health of Nubian children as guaranteed in article 14 of the Charter. This is a commendable approach given that children who have been excluded from registration at birth may experience difficulties in accessing health care services. This can in turn pose a grave threat to their physical and mental well-being. It must be noted that the ESCR Committee in its General Comment 14<sup>40</sup> stated

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38 (2000) AHLR 212 (ACHPR 1998).

39 [1996] AIR (SC) 2426.

40 General Comment 14 (n 36 above).

that the enjoyment of the right to health is dependent on other rights, such as housing, food and dignity. Moreover, one of the underlying determinants of the right to health is that states should ensure access to housing and potable water to the people.

The ESCR Committee further notes that access to health care services must be guaranteed to vulnerable and marginalised groups, including migrant workers, women, children and people with disabilities. Children who have been excluded from registration at birth or accorded citizenship by their host country will no doubt be considered vulnerable and marginalised. Therefore they deserve special attention and must be treated with dignity. As the ESCR Committee noted, the enjoyment of the right to health must be guaranteed on a non-discriminatory basis. Indeed, ensuring that discriminatory practices are avoided in the provision of health care services is one of the core contents of the right to health. A state may not be able to justify a policy that encourages disparity or double standards in the provision of essential services. Considering the fact that registration at birth is crucial for the enjoyment of many other services, the Nubian children would seem to have been implicitly excluded from benefiting from some of the essential services they ordinarily should have been entitled to.

Furthermore, the African Committee found that the displacement of Nubian children and their non-registration could implicate their right to education guaranteed under article 11 of the African Children's Charter. The Committee is of the view that denying the right of registration to Nubian children has adversely affected their right to be educated. Given the importance of education to the development of a child, it is incontestable that any impediment to access to education will amount to human rights violations. The obligation to respect the right to education requires a government to refrain from interfering with the enjoyment of this right. In the *Nubian Children* communication, the non-registration of the Nubian children by the Kenyan government is an indirect interference with their right to education. According to the Limburg Principles on the Implementation of Socio-Economic Rights, a state should refrain from adopting any policy that may interfere with the enjoyment of socio-economic rights.<sup>41</sup> Coomans argues that states have both negative and positive obligations as regards the right to education.<sup>42</sup> He notes that states must not only refrain from interfering in the enjoyment of this right, but must also ensure a supportive legal and policy framework environment, which will guarantee access to education to all without discrimination.

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41 Limburg Principles E1991/23 annex III.

42 F Coomans 'In search of the core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 159-182.

The indivisibility approach in this case is not only faithful to the spirit of the Convention on the Rights of the Child (CRC) and the African Children's Charter, but can also strengthen the protection of children's rights across the region. It should be noted that in many countries in Africa, socio-economic rights remain unenforceable, thereby limiting the rights of children to education, health and housing. By invoking the indivisibility and interrelatedness of rights, the African Committee of Experts would seem to be laying a good foundation towards advancing the human rights of African children in general and socio-economic rights in particular.

## 5 Gaps in the decision

Whilst the radical and progressive stance of the African Committee in the *Nubian Children* communication has been applauded, it is important to note that the African Committee of Experts fails to adopt a gender-sensitive approach in its judgment. Much as it is agreed that the rights to health and education of all Nubian children may be adversely affected by non-registration at birth, it is crucial to state that the consequences of such denial are far greater for girls than for boys. Experience has shown that access to health services for the girl child is difficult in many African countries due to a number of reasons, including cultural or religious beliefs, the requirement of parental consent and judgmental attitudes on the part of health providers.<sup>43</sup>

Understanding the social position of girls and young women within societies and population sub-groups is crucial to identifying strategies for the effective provision of essential services to all children, especially the girl child. In many African societies where a belief in male supremacy co-exists with restrictive social structures that limit women's economic, social and legal independence, men often maintain strong control over female sexuality.<sup>44</sup> This predisposes the girl child to sexual ill-health and further undermines their right to equality.<sup>45</sup> Equally, studies have shown imbalances in school enrolment between girls and boys across the region. Also, studies have shown that girls often drop out of school due to a number of reasons, including poverty, sexual violence, early pregnancy and domestic

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43 International Women's Health Coalition *Young adolescents' sexual and reproductive health and rights: Sub-Saharan Africa* (2007) 3.

44 MN Kisekka *The culture of silence. Reproductive tract infections among women in the Third World* <http://www.iwhc.org/docUploads/CULTUREOFSILENCE.PDF> (accessed 11 April 2012).

45 S Singh *et al* 'Evaluating the need for sex education in developing countries: Sexual behaviour, knowledge of preventing sexually-transmitted infections/HIV and unplanned pregnancy' (2005) 5 *Sex Education: Sexuality, Society and Learning* 307-331.

responsibilities.<sup>46</sup> The denial of access to health and education services for the girl child can have serious implications for their development, including sexual and reproductive well-being.<sup>47</sup> In particular, the denial of education opportunities to girls may not only perpetuate the low status of women and girls, but may also lead to the vicious cycle of poverty. This can almost be aggravated by statelessness.

In General Comment 1, the UN Committee on the Convention on the Rights of the Child (CRC Committee) noted that education directed towards the development of the child's personality must be gender-sensitive.<sup>48</sup> The Committee has also explained that discrimination against girl children often led to a denial of access to sexuality information and services.<sup>49</sup> Furthermore, the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) urged states to eliminate discrimination in health care services to women and girls in their jurisdictions.<sup>50</sup> This position has been reiterated in the Committee's concluding observations to state parties.<sup>51</sup> It is hoped that in future this oversight will be avoided.

While it may be argued that the rights of African children have generally been undermined in general in the past, the situation is even worse for female children who have had to put up with patriarchal traditions that threaten their rights. Therefore, a failure to consider this socio-cultural situation may further perpetuate gender inequality and undermine the right of the girl child in the region. The African Committee of Experts misses the opportunity to lend its voice to the need to pay greater attention to human rights violations experienced by the girl child and to end discrimination against them. More often than not, policies and programmes have been developed in Africa to address the needs of children without taking into consideration the peculiar situation of the girl child.

It should also be noted that, although the African Committee of Experts did refer to international human rights principles and standards in the *Nubian Children* communication, surprisingly it made little use of the General Comments of the CRC Committee, particularly General

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46 PLAN International *Because I am a girl: The state of the world's girls 2012* (2012) 14.

47 Singh *et al* (n 45 above).

48 UN CRC Committee on the Rights of the Child General Comment 1: The aims of education, 17 April 2001, CRC/GC/2001/1.

49 General Comment 3 paras 7 & 8.

50 General Recommendation 24 on Women and Health.

51 See eg Concluding Observations to Burkina Faso 31 January 2000, UN Doc A/55/38 (2000); Equatorial Guinea, para 205, UN Doc A/59/38 (2004); Ethiopia, para 160, UN Doc A/51/38 (1996); Georgia, para 111, UN Doc A/54/38 (1999); Ghana, para 31, UN Doc CEDAW/C/GHA/CO/5 (2006).

Comments 1 on education, 3 on HIV/AIDS<sup>52</sup> and 4 on adolescent health.<sup>53</sup> Given the significance of these General Comments in clarifying the contents of the Convention and the nature of states' obligations, one would have expected the African Committee to draw more on the experience of the CRC Committee in interpreting the provisions of the African Children's Charter in the *Nubian Children* communication. In addition, the African Committee should have elucidated its decision on the rights to education and health by making reference to General Comments 13 (education) and 14 (health) of the ESCR Committee.

## 6 Conclusion

No doubt the African Committee of Experts made an important first impression in its decision in the *Nubian Children* case. The African Committee has demonstrated its willingness to adopt a purposive and progressive interpretation of the rights of children guaranteed under the African Children's Charter. Unlike certain regional human rights bodies, such as the African Commission, that started on a negative note,<sup>54</sup> the African Committee of Experts has shown its capacity to advance the rights of children in the region. It is worth noting that the African Committee ordered the Kenyan government to report back within six months on steps taken to implement this decision. One of the major challenges with decisions of human rights bodies has remained the poor implementation or enforceability on the part of states. To this extent, the Committee of Experts deserves commendation. However, there is an opportunity for improvement in the future. The African Committee can make better use of interpretative guidance such as the General Comments of the CRC Committee and it can adopt a gender-sensitive approach in its decisions.

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52 CRC Committee General Comment 3: HIV/AIDS and the right of the child.

53 CRC Committee General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child.

54 The African Commission has been criticised by different authors for its false start at its earlier stage. See eg M Mutua 'The African human rights system: A critical evaluation' <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 2 May 2012); R Murray 'The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 1; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465.