

---

# AFRICAN HUMAN RIGHTS LAW JOURNAL

---

To cite: GM Quan 'Understanding the right to education under the African Charter on the Rights and Welfare of the Child, within the four pillars of interpretation' (2024) 24  
*African Human Rights Law Journal* 502-532  
<http://dx.doi.org/10.17159/1996-2096/2024/v24n2a5>

## Understanding the right to education under the African Charter on the Rights and Welfare of the Child, within the four pillars of interpretation

Gertrude M Quan\*

Postdoctoral research fellow under the NRF South African Research Chair in Equality, Law and Social Justice, University of the Witwatersrand, South Africa  
<http://orcid.org/0000-0002-1039-2680>

**Summary:** *The African Committee of Experts on the Rights and Welfare of the Child has received several communications alleging violations of the right to education under the African Charter on the Rights and Welfare of the Child. This has led to significant development on the jurisprudence on education and on education-related rights. Like every right under the African Children's Charter, the right to education is subject to the four pillars of interpretation: non-discrimination; best interests; child participation; and survival and development. The aim of this article is to explore how the African Children's Committee has interpreted the right to education within the four pillars of interpretation and how that has shaped the growing jurisprudence on education under the African Children's Charter. The article also draws on examples on educational rights and interpretive provisions from the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.*

\* BA LLB (Rhodes) LLM LLD (Pretoria); [gertrudequan91@gmail.com](mailto:gertrudequan91@gmail.com)

**Key words:** *education; children's rights; African Children's Charter; African Children's Committee; best interests; non-discrimination; survival and development; child participation; jurisprudence; interpretation*

## 1 Introduction

The importance of education both as a human right and as a tool to promote economic and social well-being has long been accepted.<sup>1</sup> Globally, it is known that education is necessary for the advancement of an individual and as an instrument to foster the importance of human rights and fundamental freedoms.<sup>2</sup> Education is a key to unlocking other rights and a means of acquiring skills for individuals to rise above circumstances such as poverty.<sup>3</sup> According to a report by the United Nations Children's Fund (UNICEF) in 2021, many African children were out of school.<sup>4</sup> This highlights an underlying problem of access to basic education in general in Africa. Moreover, the report also revealed that some of the children who were in school were not acquiring basic literacy and numeracy skills, demonstrating that the education being received by some African children is inadequate.<sup>5</sup> The fact that education is inaccessible and inadequate to some African children only exacerbates the potential for poverty for some children. For the African child, education is important, not only for its intrinsic value, but also for its instrumental value, in that education can break the cycle of poverty.<sup>6</sup>

The African Union (AU)'s theme for the year 2024 is education, with the aim of 'building resilient education systems for increased access to inclusive, lifelong, quality and relevant learning in Africa'.<sup>7</sup> This is intended to accelerate the achievement of Sustainable Development Goal (SDG) 4. Recognising the need for transformation in education on the African continent, the Continental Strategy for Education in

1 C Chürr 'Realisation of a child's right to basic education in the South African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2405.

2 Chürr (n 1) 2406. See also art 11(2)(b) of the African Children's Charter, where the aims of education in the African Children's Charter are discussed.

3 African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights', <https://achpr.au.int/index.php/en/node/871> (accessed 15 May 2024).

4 UNICEF and African Union Commission 'Transforming education in Africa: An evidence-based overview and recommendations for long-term improvements', <https://www.unicef.org/media/106686/file/Transforming%20Education%20in%20Africa.pdf> (accessed 4 May 2024).

5 As above.

6 African Commission Principles and Guidelines (n 3).

7 African Union 'Theme of the year 2024: Educate and skill Africa for the 21st century', <https://au.int/en/theme/2024/educate-african-fit-21st-century> (accessed 6 May 2024).

Africa (CESA) and SDG 4 prioritise the education of marginalised groups such as girl children, children in rural areas, children with disabilities, children on the move, and those in 'fragile' countries and situations in Africa.<sup>8</sup>

The four pillars of interpretation in the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>9</sup> are found at articles 3, 4 and 5 of the Children's Charter.<sup>10</sup> The four principles, non-discrimination (article 3), best interests of the child, child participation (article 4) and survival and development (article 5) lay the foundation for how the rights in the African Children's Charter should be interpreted. It is important to state here that the four pillars of interpretation are the four general and fundamental principles that guide the interpretation of the rights in the African Children's Charter. Like the Convention on the Rights of the Child (CRC), the four principles or pillars of interpretation is also found in the African Children's Charter. Therefore, all the rights in the Children's Charter must be interpreted by considering the four pillars, including the right to education. Gose submits that the four pillars 'can be seen as the soul of children's rights'.<sup>11</sup> There is no doubt about the fact that the human rights of children are underpinned by the four pillars of interpretation and, therefore, every right must be interpreted in conjunction with the four pillars.<sup>12</sup> Therefore, it may be argued that rights in the Children's Charter are activated by the four pillars during interpretation.

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has received five communications in which the Children's Committee has found direct violations of the right to education.<sup>13</sup> The total number of communications received by the African Children's Committee in which the views of the Committee have been given on the merits are seven. Therefore, the five cases represent a relatively high percentage of the total number of cases when looked at against the total number

8 African Union 'Concept note on education as the theme of the year for 2024', [https://au.int/sites/default/files/documents/43425-doc-EX\\_CL\\_1476\\_XLIV\\_Rev\\_1\\_-\\_CONCEPT\\_NOTE\\_with\\_Roadmap\\_AU\\_Theme\\_E.pdf](https://au.int/sites/default/files/documents/43425-doc-EX_CL_1476_XLIV_Rev_1_-_CONCEPT_NOTE_with_Roadmap_AU_Theme_E.pdf) (accessed 3 May 2024).

9 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

10 It should be noted that the four pillars of interpretation are also substantive rights found in the Charter. Therefore, arts 3-5 are substantive rights in and of themselves, and they are also the four pillars and interpretative guidelines.

11 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 17.

12 Gose (n 11) 25.

13 African Committee of Experts on the Rights of the Child 'Communications', <https://www.acerwc.africa/en/communications/table> (accessed 20 January 2024).

of cases.<sup>14</sup> The theme of education presents cases in various settings, including in the school environment, in extraordinary circumstances such as armed conflict and unrest, trafficking and slavery, and in situations where a lack of documentation has impeded access to socio-economic rights, including education.<sup>15</sup>

On exceptional occasions the African Children's Committee has developed various tests to determine whether under certain circumstances a state party's failure to realise a child's right to education can be justified. For example, in *Northern Ugandan Children* the Children's Committee has found that a state party acted reasonably to realise the right to education during unrest.<sup>16</sup>

This article examines cases on the right to education under the jurisprudence of the African Children's Committee. The article first introduces the right in part 2 whereafter moving to an analysis of the interpretive framework of the right in part 3. This requires the right to be interpreted in terms of the four pillars, namely, non-discrimination, best interests, survival and development, and child participation.<sup>17</sup> Thereafter the article analyses the cases against the four pillars.

To the extent that the right to education has developed under the African Children's Charter, the article argues that the time is now ripe for a General Comment on the right to education. It concludes with observations on how the right to education has been interpreted in the African Children's Charter.

## 2 Right to education under the African Children's Charter

The right to education is covered in article 11 of the African Children's Charter. Article 11 opens by recognising the right of each child to education. This approach is important because it sets a clear tone that the provisions that follow are applicable to every child on the African continent, without discrimination.<sup>18</sup> Therefore, in theory,

14 As above.

15 African Children's Committee 'Communications' (n 13).

16 See *Hansungule & Others (on behalf of Children in Northern Uganda) v Uganda*, No 1/Com/001/2005, decided April 2013 (*Northern Ugandan Children*).

17 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*) paras 54, 55 & 70.

18 Art 11(1) African Children's Charter.

every child on the continent should receive education regardless of their personal or family circumstances.<sup>19</sup>

Article 11(2) defines the aims of education, which include to promote and develop the child, foster human rights and fundamental freedoms, preserve and strengthen positive African morals and tradition, and prepare the child for a responsible life.<sup>20</sup> While CRC places similar emphasis on the aims of education, the African Children's Charter is unique in stating that education shall preserve and strengthen positive African morals and traditions in the child.

Olowu notes that the African Children's Charter is stronger on the right to education compared to other international law instruments.<sup>21</sup> The Children's Charter is devoid of traditional confinements that limit the realisation of socio-economic rights to 'progressive realisation'.<sup>22</sup> Although the language used in article 11 does not explicitly refer to the fact that the right to education should be realised progressively, in the African Children's Committee's General Comment 5 on state party obligations the Children's Committee has stated that 'the nature of the obligation involves progressively realising children's rights to secondary education'.<sup>23</sup> Elsewhere in the same General Comment, the ACERWC mentions:<sup>24</sup>

The Committee underlines that there is no reference in article 1 to 'progressive realisation of rights', or to the degree of realisation within the 'maximum extent' of available resources. These phrases have often been adduced with respect to the fulfilment of social and economic rights which appear, at first glance, to entail more intensive dedication of resources, and which also require investment in the systems needed for their administration or delivery (eg health systems, educational systems, and systems for the disbursement of poverty alleviation measures such as social cash transfers).

The above confirms the lack of reference to progressive realisation in the jurisprudence of the African Children's Committee when it

19 Art 3 of the African Children's Charter on non-discrimination emphasises that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the African Children's Charter irrespective of the following: the child or their parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or other status.

20 Art 11(2)(a)-(d) African Children's Charter.

21 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) *International Journal of Children's Rights* 130.

22 As above.

23 African Children's Committee General Comment 5 on state party obligations under the African Charter on the Right and Welfare of the Child (art 1) and system strengthening for child protection 2018 para 27.

24 General Comment 5 (n 23) paras 6-7.

comes to the right to primary education, and highlights the fact that the right to primary education is not to be realised within available resources. On secondary education, the concept of progressive realisation is not completely eliminated, as General Comment 5 of the African Children's Committee confirms.<sup>25</sup> This point is elaborated upon below.

It is clear that socio-economic rights, such as the right to education, in the African Children's Charter are in principle not limited to progressive realisation, but the concept of progressive realisation is neither completely excluded from the Charter, nor is it irrelevant in all instances. In contrast, the CRC provision on education explicitly states that 'states parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity'.<sup>26</sup>

Article 11(6) is specifically directed at girl children who fall pregnant while in school. It recognises the pregnant schoolgirl's right to complete their education based on their individual ability. Chirwa highlights the fact that the African Children's Charter is the first to pay attention to the rights of schoolgirls who fall pregnant and, as such, the Children's Charter must be commended 'for taking the lead in focusing states parties' resources on gender discrimination in education'.<sup>27</sup>

Indeed, while CRC envisages protection for pregnant schoolgirls, it does not explicitly do so in the Convention, nor does the International Covenant on Economic, Social and Cultural Rights (ICESCR). The African Children's Charter's explicit protection of the girl child is strengthened in article 11(3)(e) which mentions female children in the categorisation of children who may find themselves in extraordinary situations, which may pose threats to their education. By such inclusion, the drafters recognise the vulnerability of the African girl child, as compared to boy children, in accessing education.

Article 11(3)(e) includes protection for all children in extraordinary situations by providing that

state parties to the Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular ... take special measures in respect of female, gifted and disadvantaged

<sup>25</sup> General Comment 5 (n 23) para 27.

<sup>26</sup> Art 28 CRC.

<sup>27</sup> D Chirwa 'The merits and demerits of the African Charter' (2002) 10 *International Journal of Children's Rights* 162.

children, to ensure equal access to education for all sections of the community.

The African Children's Committee has interpreted 'disadvantaged children' to include children who are affected by armed conflict, by stating that special measures must be provided for disadvantaged children to ensure the realisation of their right to education.<sup>28</sup> However, this is an open-ended list that is not limited to children in situations of armed conflict but can be extended to all children, in all situations. Put simply, extraordinary situations should not disrupt the African child's right to education, except where the state party can show that it has provided all reasonable measures and has acted with due diligence,<sup>29</sup> to ensure that a child's education is not disrupted.<sup>30</sup>

The right to education in the African Children's Charter, however, is not devoid of criticism. Here Chirwa has identified two gaps: First, he points out that the Children's Charter fails to make provision for pre-school children; and, second, he notes that its provisions on secondary education are weak.<sup>31</sup> He elaborates that the Charter does not place an obligation on state parties to progressively provide for free secondary education.<sup>32</sup> Subsequent to this critique, the African Children's Committee's General Comment 5 shows that the concept of progressive realisation for secondary education is not completely eliminated from the African Children's Charter.<sup>33</sup> It is further submitted that the Children's Charter's provision on basic education impliedly incorporates pre-school and, therefore, a provision on pre-school is not necessary. For example, ICESCR does not make explicit provision for the right to pre-school education,<sup>34</sup> but recognises pre-school as part of basic education. Likewise, CRC simply provides for the right to a basic education, thus implying that pre-school is part of basic education.<sup>35</sup>

The following part discusses the four pillars within which the right to education and, indeed, all other rights in the African Children's Charter must be interpreted.

---

28 *Northern Ugandan Children* (n 16) para 53.

29 *Northern Ugandan Children* (n 16) para 38.

30 *Northern Ugandan Children* (n 16) paras 61-70.

31 Chirwa (n 27) 162.

32 As above.

33 General Comment 5 (n 23) para 27.

34 See art 13 of ICESCR.

35 See art 29 of CRC.

### 3 Interpretation of the right to education through the four pillars

Underpinning the rights contained in the African Children's Charter are four cross-cutting general principles that guide the interpretation of the rights contained in the Charter: protection against discrimination (non-discrimination);<sup>36</sup> the best interests principle;<sup>37</sup> protection of the child's right to survival and development;<sup>38</sup> and child participation (or respect for the views of the child).<sup>39</sup> The African Children's Committee requires that the rights in the African Children's Charter be interpreted through the lenses of the four pillars.<sup>40</sup> Due to the general nature and broad scope of the four core principles, it can be argued that they are applicable to, and serve as the starting point for, every right in the African Children's Charter.<sup>41</sup>

Thus, the right to education under the African Children's Charter must be interpreted against the four principles. In general, this means that there should be no discrimination in accessing or enjoying the right to education; it remains in the best interests of the child to receive basic education and to have the best quality education; the right to education should, among other things, contribute to the survival and, more particularly, the development of the child; and decisions on the right to education in terms of access, content and school governing rules should consider the views of the child.

The following sub-sections consider how the right to education has been interpreted by the African Children's Committee. Using the four pillars as a yardstick, the discussion analyses selected cases before the Children's Committee to evaluate whether and how the Committee has adhered to its own standards of rights interpretation.

36 Art 3 African Children's Charter.

37 Art 4 African Children's Charter.

38 Art 5 African Children's Charter.

39 Art 4(2) African Children's Charter.

40 *Tanzanian Girls* (n 17) paras 52 & 70. Sec IV of General Comment 5 (n 23), where the Committee recognises that four key principles as general principles based on which the entire Charter should be interpreted. See also A Getachew Assefa & K Ngankam 'Celebrating 25 years of the African Charter on the Rights and Welfare of the Child: Looking back to look ahead', [https://au.int/sites/default/files/documents/31520-doc-celebrating\\_25\\_years\\_of\\_the\\_african\\_charter\\_on\\_the\\_rights\\_and\\_welfare\\_of\\_the\\_child\\_by\\_ayalew\\_getachew\\_assefa\\_and\\_kameni\\_ngankam.pdf](https://au.int/sites/default/files/documents/31520-doc-celebrating_25_years_of_the_african_charter_on_the_rights_and_welfare_of_the_child_by_ayalew_getachew_assefa_and_kameni_ngankam.pdf) (accessed 13 May 2024).

41 T Kaime 'The struggle for context in the protection of children's rights: Understanding the core concepts of the African Children's Charter' (2008) 40 *Journal of Legal Pluralism and Unofficial Law* 34.



### 3.1 Non-discrimination as a substantive right and the first pillar of interpretation

As the African Children's Committee has rightly noted, the right to non-discrimination is a substantive right by itself that is recognised for every child not only under the African Children's Charter, but also by CRC.<sup>42</sup> It is also one of the pillars of interpretation of the rights in the African Children's Charter.<sup>43</sup> I will address the right and the principle separately.

First, on its substantive meaning, the African Children's Committee has stated that the reading of the right to non-discrimination as a substantive right comprises three complementary elements. The first component is differential treatment; the second is interference; and the third is rights and freedoms in the Charter.<sup>44</sup> The Children's Committee also notes that the three stated elements are essential elements of the right to non-discrimination, not only under the African Children's Charter, but also under CRC and other international instruments.<sup>45</sup>

General Comment 5 of the African Children's Committee on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening on Child Protection sets out the general content of the right to non-discrimination. According to the General Comment, the right to non-discrimination obliges state parties to intentionally identify children for whom special measures may be required in the recognition and realisation of their rights. The Children's Committee has further explained that

[t]he application of the non-discrimination principle of equal access to all does not mean identical treatment. It may require taking special measures in order to diminish or eliminate conditions that cause discrimination, whether it is discrimination in the context of civil or political rights, in relation to the fulfilment of social, economic and cultural rights, or in relation to specific measures of protection.<sup>46</sup>

The African Children's Charter by its language purports to extend the rights in the Charter to all children, without discrimination.<sup>47</sup> Article 3 on non-discrimination therefore applies to all children, everywhere on the African continent, and is also applicable to all the rights and

42 See art 2 of CRC.

43 *Tanzanian Girls* (n 17) para 52.

44 *Tanzanian Girls* (n 17) para 53.

45 As above.

46 General Comment 5 (n 23) paras 9-10.

47 Art 3 African Children's Charter.

freedoms contained in the African Children's Charter.<sup>48</sup> The African Children's Committee has noted that the right to non-discrimination is an absolute right 'as the wordings of the provision do not include a "balancing test" which gives room for states to justify an act which amounts to differential treatment on the prohibited grounds and which impair the enjoyment of the rights under human rights laws'.<sup>49</sup>

General Comment 18 of the Human Rights Committee (HRC) on non-discrimination<sup>50</sup> notes that notwithstanding its absolute nature, states may use defence as justification for differential treatment. However, according to the African Children's Committee, differential treatment can only be used where it is reasonable and objective with the aim of achieving a purpose, which is legitimate under the African Children's Charter.<sup>51</sup> Therefore, a complainant who alleges discrimination must prove differential treatment on prohibited grounds, and the respondent state must justify how the differential treatment is necessary for the advancement of a right in the African Children's Charter.<sup>52</sup>

In contrast to the substantive right, but with a similar meaning, the principle of non-discrimination means that state parties prioritise the implementation of the rights of poor and marginalised children such as rural children. The African Children's Committee has also emphasised that the non-discrimination principle requires that the right of the girl child be prioritised to achieve gender equality.<sup>53</sup> The Children's Committee has noted its disapproval of free primary education policy in Eswatini which excludes foreign children. According to the Committee, an education policy intended only for Swazi children discriminates on the basis of nationality and hinders the enjoyment of the right to education. The Committee reaffirmed its view that 'primary education should be universal, compulsory and free, it should be granted to all children in the state party irrespective of their nationality and status as an irregular/undocumented migrant'.<sup>54</sup> It is submitted that the African Children's Committee's

48 Kaime (n 41) 36.

49 *Tanzanian Girls* (n 17) para 53.

50 Human Rights Committee General Comment 18 on non-discrimination, para 13.

51 *Tanzanian Girls* (n 17) para 53.

52 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*, No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*) para 56.

53 As above.

54 Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Report of the Republic Kingdom of Eswatini on the Status of Implementation of the African Charter on the Rights and Welfare of the Child paras 42-43. See also Concluding Observations and Recommendations of the African Committee of Experts on

Concluding Observations to Eswatini are in line with its jurisprudence that primary education is free and compulsory to all.

General Comment 20 of the Human Rights Committee on non-discrimination in economic, social and cultural rights has remarked on the right to education for all children living in a state, including undocumented children.<sup>55</sup> It also notes the need for special measures to be taken for children without discrimination,<sup>56</sup> and emphasise the provision in article 13 of ICESCR that 'primary education shall be compulsory and available free to all'.<sup>57</sup> In its introductory remarks General Comment 20 also highlights the fact that non-discrimination and equality are important aspects of international human rights law, and essential to the enjoyment of socio-economic rights, including the right to education.<sup>58</sup>

*Tanzanian Girls* concerned the mandatory pregnancy testing, expulsion and denial of re-entry into school of school girls who fell pregnant. Considering the right to non-discrimination as a substantive right, the African Children's Committee had to decide, among others, whether the treatment of the girls amounted to discrimination. The Children's Committee noted that there was no contestation on differential treatment based on pregnancy and marital status and, further, that the differential treatment had resulted in the infringement of other rights, including the right to education. The Children's Committee considered the respondent state's submission that there was a legitimate purpose for the differential treatment of pregnant and married girls.<sup>59</sup> According to the state party, the purpose was to deter sexual relations among school children. The Children's Committee reasoned that for any defence to be justified, the differential treatment should be necessary to achieve the objective. However, it noted that a differential treatment amounted to discrimination if it does not have an objective or reasonable justification and there is no proportionality between the aim sought and the means used to achieve the objective.<sup>60</sup>

Therefore, the African Children's Committee found that the expulsion and denial of re-entry of pregnant and married girls in school were not a necessary measure to deter sexual relations among

---

the Rights and Welfare of the Child to the Government of the Republic of South Africa on its Second Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child para 13.

55 General Comment 20 of the HRC para 30.

56 As above.

57 As above.

58 General Comment 20 para 2.

59 *Tanzanian Girls* (n 17) para 53.

60 As above.

adolescents.<sup>61</sup> In view of this, the Children's Committee found a violation of the right to protection against non-discrimination. The Committee reasoned that the expulsion of pregnant and married girls from school without an opportunity of re-entry

creates a vicious cycle of gender-based discrimination as these girls will be excluded from the benefits of education. This is because education is not only a substantive right, but the enjoyment of the right to education also facilitates the realisation of other rights of children and the elimination of discrimination against girls.<sup>62</sup>

Another reason on which the African Children's Committee based its finding of a violation on the right to protection against non-discrimination was that the school had adopted a policy that excludes pregnant and or married girls from school.<sup>63</sup>

It is noted that the Children's Committee did not make a clear distinction between the right to non-discrimination as a substantive right and as a principle of interpretation in its views in *Tanzanian Girls*, but discussed the two separate issues together. However, as mentioned earlier, the two are discussed as separately here.

On non-discrimination as an interpretive principle, the African Children's Committee recalled state parties' obligations to ensure special measures of protection when it comes to the education of girl children and gifted children. In particular, the Children's Committee recalled article 11(6) of the African Children's Charter which obliges state parties to ensure that girls who become pregnant before completing their education are given the opportunity, based on their individual ability, to complete their education.<sup>64</sup> The Children's Committee also noted articles 11(5) and (6) which provide that the right to education should be for all with no conditions attached. The provision in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol)<sup>65</sup> that state parties should prevent discriminatory practices such as the exclusion of learners from school was also referred to by the Children's Committee.<sup>66</sup> The Committee cited international instruments such as the Convention on the Elimination of All Forms

61 *Tanzanian Girls* (n 17) para 55.

62 As above.

63 *Tanzanian Girls* (n 17) para 49.

64 *Tanzanian Girls* (n 17) para 40.

65 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 (African Women's Protocol).

66 As above.

of Discrimination against Women (CEDAW) and CRC on aspects that deal with discrimination against pregnant girls.<sup>67</sup>

The following case deals with non-discrimination in education during times of unrest. The language of article 3 of the African Children's Charter highlights the drafters' intention, which is that state parties should ensure non-discrimination in education, be it in access or otherwise. Therefore, even in times of unrest, state parties are expected to protect the right to education, where such protection can be reasonably expected of a state party. In *Northern Ugandan Children* the children in Northern Uganda's rights were violated during a period of unrest between the Ugandan People's Defence Forces (UPDF) and the Lord's Resistance Army (LRA). The unrest was between 2001 and 2005 and Ugandan children were abducted and recruited as child soldiers in the unrest, thus violating several rights guaranteed to children by the African Children's Charter, including the right to education (article 11, in that children's education was disrupted during the unrest).<sup>68</sup> The African Children's Committee held that the Ugandan government had made efforts during the unrest to realise the rights of the children to education and, therefore, the Committee applied the 'reasonableness test' which required it to consider whether the government of Uganda had taken all reasonable steps to fulfil its obligations under the African Children's Charter. The Committee concluded that it found no evidence to believe that the Ugandan government did not take reasonable steps to fulfil its obligations.<sup>69</sup>

In addition to the reasonableness test, the African Children's Committee also referred to the principle of due diligence, where it asserted that the effective implementation of laws with due diligence was part of state parties' obligations.<sup>70</sup> The Committee interpreted due diligence on the part of the state party in the present case to mean that protection of rights should lead to the well-being and welfare of children, in that in protecting children's rights, the actions of state parties should 'promote and improve the lived reality of children on the ground'.<sup>71</sup> This the Children's Committee saw as a

<sup>67</sup> African Women's Protocol (n 65) para 41. See also CEDAW General Recommendation 36 on the rights of girls and women to education, UN Doc CEDAW/C/GC/36, 27 November 2017 para 24; CRC General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc CRC/C/GC/15, 17 April 2013 para. 56; CRC General Comment 4 on adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4, 21 July 2003.

<sup>68</sup> *Northern Ugandan Children* (n 16).

<sup>69</sup> *Northern Ugandan Children* (n 16) paras 61-70.

<sup>70</sup> *Northern Ugandan Children* (n 16) para 38.

<sup>71</sup> As above.

fundamental duty of the state party under article 1(1) of the African Children's Charter.<sup>72</sup> It must be noted that the principle of due diligence was discussed as a general and cross-cutting issue in the case and not exclusively linked to education. Although the Children's Committee did not explicitly state that the state party had acted with due diligence in protecting and realising the rights of the Ugandan children during the unrest, the duty to act with due diligence, as mentioned, must impact the lived realities of children. Therefore, the Committee's finding that the state party had acted reasonably to protect and realise the rights of the children during the unrest implies due diligence through the setting up of schools and learning centres in the camps for children to continue with their education.<sup>73</sup>

It is submitted that the reasonableness test is important to the discussion of the right to and principle of non-discrimination in education because the test aims to prove whether conduct on the part of the state party during the unrest was sufficient to justify non-discrimination by the state party.

Another communication in which discrimination in education has been assessed by the African Children's Committee is *Children of Nubian Descent*,<sup>74</sup> which concerned children of Nubians who had been in Kenya for over 100 years. Since the Nubian children were not ethnic Kenyans, they encountered difficulties in attempting to obtain Kenyan citizenship. They struggled for years without success, leading to several limitations in their daily lives, including access to land, education and healthcare services. The central issue in this case was that Nubian children were stateless because they were not accorded Kenyan citizenship, as they should have been. Many Nubian descent parents could not obtain identity cards, which prevented them from registering the births of their children.<sup>75</sup>

It is noted that *Children of Nubian Descent* presented several violations of the African Children's Charter. However, the scope of this article requires that only the right to education be explored. It is also noted that non-discrimination is discussed in the *Children of Nubian Descent* only as a substantive right and not as an interpretive principle. The lack of birth registration resulted in consequential violations of the rights of the Nubian children, including their rights to education.<sup>76</sup> The Nubian children did not have birth certificates that

72 *Northern Ugandan Children* (n 16) para 37.

73 *Northern Ugandan Children* (n 16) para 66.

74 *Children of Nubian Descent* (n 52).

75 *Northern Ugandan Children* (n 16) paras 1-6.

76 *Northern Ugandan Children* (n 16) paras 58 & 63.

were required for school registration and this lack of documentation caused the consequential infringement of their right to education in that, unlike children that were not of Nubian descent, the Nubian children did not have equal access to education.<sup>77</sup>

The African Children's Committee found a violation of article 11(3) in that children of Nubian descent have less access to educational facilities as compared with communities where children are not of Nubian descent.<sup>78</sup> The state party had failed to take special measures to ensure that the Nubian children, a disadvantaged group, had equal access to education.<sup>79</sup> Most importantly, the state party had discriminated against the Nubian children due to their ethnic origins, without legitimate justification.

The Children's Committee also found a violation of article 3, due to the discriminatory treatment faced by Nubian children, in the so-called vetting process where they were required to prove the nationality of their grandparents and seek the approval of Nubian elders and government officials. In particular, the Committee mentioned that the discrimination violated the dignity and best interests of children.<sup>80</sup>

Fokala and Chenwi submit that the Children's Committee's decision highlights the importance of protecting the rights of all persons, in particular children, without discrimination as to race or ethnicity.<sup>81</sup> They also submit that an aspect of the Committee's decision that is revolutionary is the finding that the state party can only show that discriminating against Nubian children is fair and justifiable if there is 'sincere, convincing and indisputable evidence indicating with certainty that granting them Kenyan nationality will be incompatible with the best interests of the child principle enshrined in the African Children's Charter and founded on legitimate state interest'.<sup>82</sup> According to them, by this requirement the Committee has introduced a burden of proof that will be difficult to meet for state parties that refuse to grant nationality to any child who faces statelessness if denied a nationality.<sup>83</sup>

---

77 *Northern Ugandan Children* (n 16) paras 63-68.

78 *Northern Ugandan Children* (n 16) para 65.

79 Art 11(e) African Children's Charter.

80 *Northern Ugandan Children* (n 16) para 57.

81 E Fokala & L Chenwi 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 *African Journal of Legal Studies* 372.

82 As above.

83 As above.

It is submitted that the African Children's Committee found a violation of article 3, in general, due to the failure of the state party to register the Nubian children. Had the complainants not alleged a violation of the right to education, the Children's Committee would still have found a violation of article 3 because the failure to register the births of children of Nubian descent was inherently discriminatory. Therefore, the violation of article 11(3)(e) should have constituted a separate issue against which article 3 should have been interpreted. Put simply, discrimination in education is a separate violation from discrimination by reason of refusal to register births. Such an approach would have found that by not providing equal access to education for the Nubian children, the state party had discriminated against them. Perhaps the Children's Committee did not inquire into discrimination in access to education as a separate violation because it was a consequential violation and not the main violation.

On the implementation of remedies, Sloth-Nielsen submits that Nubian children have been integrated into the community and have no issues with birth certificates and registrations. Most importantly, Nubian children are attending schools similarly to all other children in Kenya.<sup>84</sup>

According to Mezmur and Khabila, 'follow-up has been found to be important, because it has a huge potential to influence implementation and also nurture the much needed political will. It has been argued that follow-up and implementation require a 'multi-tiered approach and a coalition of actors' at both national and international levels.'<sup>85</sup> It is submitted that follow-up is the only means through which the African Children's Committee (and, indeed, all human rights treaty bodies) can ensure that remedies are implemented. Most importantly, when the victims are children, follow-up ensures that governments are held accountable and that infringements are remedied.

The African Children's Committee has given its views on discrimination on education based on child slavery. In *Mauritanian Enslaved Brothers*<sup>86</sup> the Children's Committee considered that the state's duty to protect the right to education includes the obligation

84 J Sloth-Nielsen 'Remedies for child rights violations in African human rights systems' (2023) *De Jure* 632.

85 BD Mezmur & MU Khabila 'Follow-up as a "choice-less choice": Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *African Human Rights Yearbook* 212.

86 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*).



to prevent and redress the exclusion of children from education by private actors.<sup>87</sup> The Committee noted that the state party had failed to take special measures to assist the boys in attending school, both during their stay in the slave master's house and after they were freed, since it took four years to enrol the boys in school after they were freed. The African Children's Committee noted that the obligation on state parties to ensure that the right to education is realised without discrimination is immediate and requires concrete and deliberate action. More importantly, it also held that deprivation of access to education through exclusion is discriminatory.<sup>88</sup> Therefore, the Committee concluded that the state party had failed to take special measures to assist the vulnerability of the children, to protect their rights to education from being violated by private people and, therefore, violated article 11 on the right to education.<sup>89</sup> At the implementation hearing, the Mauritanian government reported that by 2019 the two boys were in their final year of high school and that they had been compensated for 3 million Mauritanian Ougiya, that identity cards had been provided for the boys and that the perpetrators were held accountable.<sup>90</sup>

The status of the non-discrimination provision as a general principle in the African Children's Charter is derived from the fact that it is autonomous, in that '[i]t has no independent existence, yet it qualifies all of the other substantive provisions of the Charter as if it were a part of each one. Thus, it governs all the rights and freedoms recognised and guaranteed in the Charter.'<sup>91</sup> Non-discrimination as a general principle means that all children should enjoy all the rights in the African Children's Charter, without being subjected to discrimination. The African Children's Committee has kept to the requirement of interpreting the rights in the Charter using the non-discriminatory principle as a guideline in all cases discussed in this part. In the cases discussed above, the African Children's Committee often interpreted the substantive aspect of the right to non-discrimination together with non-discrimination as an interpretive principle without making a clear distinction between the two. The analysis above has attempted to separate non-discrimination as a right and as an interpretive principle. The following part discusses the best interests principle in light of the right to education.

---

87 *Mauritanian Enslaved Brothers* (n 86) para 74.

88 As above.

89 As above.

90 Sloth-Nielsen (n 84) 637.

91 Kaime (n 41) 36.

### 3.2 The best interests principle: A substantive right, an interpretive principle and a rule of procedure

The best interests principle is threefold: First it is a substantive right; second an interpretive right; and third a rule of procedure.<sup>92</sup> It is a substantive right in that a child has a right to protection against infringements on their best interests; an infringement of the substantive rights in the African Children's Charter is an infringement of the child's best interests. As a rule of interpretation, the best interests principle means that the rights contained in the African Children's Charter should be interpreted through application of the best interests principle; in other words, children's rights should be interpreted in line with and within the lenses of the best interests principle. To this end, the African Children's Committee urges all state parties to include the best interests principle in their constitutions as an interpretive guide for all laws, actions and decisions concerning children.<sup>93</sup> Seen as a rule of procedure, the best interests principle requires that a child be given the opportunity to express themselves where they can and that decisions concerning children should be made after assessing the possible implications on the rights and welfare of the child.<sup>94</sup> Hence, all actions or inactions concerning children must be taken only if they are in the best interests of the child.<sup>95</sup>

While CRC proposes that the best interests principle must be 'a primary consideration' in all matters and decisions affecting children, the African Children's Charter considers that the best interests principle 'shall be *the* primary consideration'. By this assertion, the African Children's Charter places the best interests principle as the overriding consideration in matters concerning children. Thus, it can be argued that the best interests principle is used in a manner that offers better protection to children under the African Children's Charter as compared to CRC.<sup>96</sup>

92 CRC Committee General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1), CRC /C/ GC/14, 29 May 2013 para 6. See also *Tanzanian Girls* (n 17) para 70, where the African Children's Committee refers to the three-fold nature of the best interests principle.

93 The African Children's Committee's Concluding Observations and recommendations to Eswatini (n 54) para 6.

94 CRC Committee General comment 14 (n 92) para 6(c).

95 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*, No 3/Com/001/2012, decided 15 April 2014 (*Senegalese Talibés*) para 35.

96 G van Beuren *The international law on the rights of the child* (1995) 46. See also F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 219.

The scope and significance of the best interests principle is further magnified by the provision that it must be the primary consideration in *all* matters affecting children. Put simply, the best interests principle must be applied in all cases affecting children and must be the basis upon which a decision should be reached by a judicial or administrative authority. Furthermore, the African Children's Committee's General Comment 5 states that the best interests principle has no any conditions attached that would 'dilute its scope, reach or standard of application'.<sup>97</sup> The same General Comment also notes that the best interests principle is applicable across all settings, including cultural, political and geographic, as well as to all ethnic groups.<sup>98</sup> General Comment 5 also lists matters in which the best interests principle should be considered, which includes the child's right to education.<sup>99</sup>

In *Tanzanian Girls* the African Children's Committee had to decide whether the mandatory pregnancy testing, expulsion and denial of re-entry were in the best interests of the girls concerned. The Committee rightly acknowledged that the best interests principle as a rule of procedure required that the decision to expel a pregnant girl involves administrative proceedings that should involve the views of the child.<sup>100</sup> The Committee noted that this required a consideration of the impact on the child concerned before making a decision.<sup>101</sup>

As a rule of procedure, article 4(2) of the African Children's Charter in this instance pertains to the expulsion of a pupil from school as an administrative proceeding and requires that a child implicated in such proceedings must be allowed to have their views heard. This is a core component of the best interests of the child as a procedural rule, which – at a minimum – requires the consideration of the impact on the child concerned before making decisions affecting them.<sup>102</sup>

The African Children's Committee noted that a child who is forced to have a pregnancy test and then expelled due to the results of the test is put in an extremely vulnerable position which can lead to violations of their civil, economic, social and cultural rights.<sup>103</sup> Therefore, it was in the best interests of such a child to be allowed, at the very least, to be heard.

---

97 General Comment 5 (n 23) para 4.2.

98 As above.

99 As above.

100 *Tanzanian Girls* (n 17) para 70.

101 As above.

102 As above.

103 As above.

The African Children's Committee further considered that since it always is in the best interests of the child to have access to quality education free of charge, expelling pregnant and married girls from school is not in their best interests as it prevents access to quality education.<sup>104</sup> It is submitted that a finding of a violation of the right to protection against discrimination will always imply a finding of a violation of the child's best interests since discrimination will never be in the best interests of the child. Thus, the finding of violations of the right to protection against discrimination in *Northern Ugandan Children*, *Mauritanian Enslaved Brothers* and *Senegalese Talibés* follows violations of the best interests principle.

In *Children of Nubian Descent*, for example, the African Children's Committee also held that discrimination violated the dignity and best interests of children.<sup>105</sup> The fact that the government of Kenya did not appear before the Children's Committee on several occasions was seen to be contrary to the best interests principle and was used as grounds to proceed with the matter in the absence of the state party.<sup>106</sup> By so doing, the Children's Committee confirmed the best interests principle as a rule of procedure.<sup>107</sup> According to Fokala and Chenwi, the decision by the African Children's Committee in *Children of Nubian Descent* also 'reiterates the Committee's elevation of the best interests of the child principle to a general/cross-cutting principle'.<sup>108</sup>

### 3.3 Child participation as a third pillar of interpretation and as an element of the best interests principle

Closely linked to one of the elements of the best interests principle is child participation or respect for the views of the child. The right of the child to present their views in matters affecting them is explicitly seen in article 4(2) of the African Children's Charter:

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

104 *Tanzanian Girls* (n 17) para 73.

105 *Children of Nubian Descent* (n 52) para 57.

106 *Children of Nubian Descent* (n 52) paras 14 & 56.

107 BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 144.

108 Fokala & Chenwi (n 81).

Also, article 7 of the African Children's Charter on freedom of expression is relevant to child participation.<sup>109</sup> According to article 7, '[e]very child who is capable of communicating his or her own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws'.

Article 7 complements article 4(2) by confirming that a child who can express their own views shall be assured the right to express their opinion. While article 4(2) provides the child with 'an opportunity' for their views to be heard, article 7 guarantees that the child will be heard by the term 'assured', which is a stronger word than 'opportunity'. Therefore, the right of the child to express their own opinion in matters affecting them is guaranteed by the African Children's Charter.

The two participatory rights found in articles 4(2) and 7 are applicable to all matters concerning children. While article 4(2) refers to matters of administrative and judicial nature, article 7 broadens the scope of protection without limitation by employing the term 'all' to suggest an infinite number of situations. It is noted that the fact that articles 4(2) and 7 apply to all situations qualifies the participatory principle as a general principle, cutting across all rights in the African Children's Charter. Kaime has described the participatory principle as a 'lynchpin in the scheme set up by the Charter'.<sup>110</sup>

General Comment 5 of the African Children's Committee on state party obligations highlights the role of the child as an active participant in matters that affect them. It notes that government processes to secure the views of the child should be transparent and accessible to children to allow for their participation and should be consistent with their evolving capacities.<sup>111</sup> The African Children's Committee further notes that, for effective child participation, there is a need to integrate the principle of child participation into formal government processes so that office bearers such as teachers can be held accountable.<sup>112</sup> According to the Children's Committee, child participation should comprise nine basic principles, namely, being transparent; informative; voluntary; respectful; relevant; child friendly; inclusive; supported; safe; sensitive to risk; and accountable.<sup>113</sup>

---

<sup>109</sup> General Comment 5 (n 23) para 4.4.

<sup>110</sup> Kaime (n 41) 57.

<sup>111</sup> General Comment 5 (n 23) para 4.4.

<sup>112</sup> As above.

<sup>113</sup> As above.

Other participatory provisions include article 13 where the rights of children with disabilities to participation are documented. Article 13(1) is inclusive in that it recognises the rights of children with disabilities to participate in their communities. Articles 8, 9 and 12 arguably are participatory rights in that they allow the African child the right to freedom of association, freedom of thought, conscience and religion and the right to freely participate in cultural life, respectively.

While the African Charter on Human and Peoples' Rights (African Charter)<sup>114</sup> recognises the right to seek, receive and disseminate information,<sup>115</sup> the African Children's Charter has not included children's participatory rights in terms of the right to information. Whether this was intentional or an oversight on the part of the drafters is unknown. Whereas child participation is often highlighted in the CRC Committee's jurisprudence,<sup>116</sup> the principle is not often seen in the jurisprudence of the African Children's Committee, at least not in interpretation of education rights cases currently before the Committee. It has been argued that accounts of children's rights in Africa often show a restriction of participatory rights.<sup>117</sup>

By its own jurisprudence, and perhaps intentionally and strategically placed under the best interests principle, article 4(2) of the African Children's Charter provides that the views of the child must be considered in all judicial and administrative decisions concerning the child. *Tanzanian Girls* highlights the correlation between the best interests principle and the right to child participation. Indeed, it would be repetitive to discuss the African Children's Committee's views on child participation here because it is analogous to the best interests principle. The Children's Committee emphasised in *Tanzanian Girls* that the state party made no effort to obtain the views of the girls before the mandatory pregnancy tests were conducted. This, the Committee found it to be in contradiction with the view that children should be given the opportunity to give their consent in an informed manner, in situations where their health and well-

114 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) 27 June 1981.

115 See art 9(1) of the African Charter.

116 See CRC Committee Concluding Observations: Liberia, 1 July 2004, CRC/C/15/Add.236, para 28; CRC Committee Consideration of reports submitted by state parties under article 44 of the Convention: Mauritania UN Doc CRC/C/8/Add.42 paras 18-29 & 47-48.

117 See Chirwa (n 27) 157. See also C Hamonga 'The right of the child to participate in decision making: A perspective from Zambia' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 95.

being are implicated, thereby giving effect to the child's right to participation.<sup>118</sup>

In *Children of Nubian Descent* the requirement of child participation as a general principle of interpretation was not explicitly applied by the African Children's Committee in its interpretation. However, the Committee recommended that the state party should, in consultation with the affected beneficiary communities, adopt legislative, administrative and other measures to ensure the fulfilment of the right to education and health.<sup>119</sup> It is hoped that the Committee's recommendation to consult with affected communities envisaged an inclusion of Nubian children who were principally the victims of the violations. Such an inclusion will not only ensure that child participation as a general principle of interpretation is maintained in the case, but also ensure that the voices of the Nubian children are heard in consultation to adopt legislative and administrative measures on their rights to a nationality that will affect their lives as provided for under articles 4(2) and 7 of the African Children's Charter. Although the African Children's Committee has not explicitly mentioned child participation in the cases discussed in this article, Mezmur has observed that where appropriate and possible, child participation has informed the processes of communications, in that in *Children of Nubian Descent*, *Northern Ugandan Children* and *Senegalese Talibés* the Committee conducted on-site investigations, and follow-up on implementations has also been carried out.<sup>120</sup> These processes allow the child victims the opportunity to express their views.

### 3.4 Survival and development as the fourth pillar and an aspect of the right to education

For purposes of this article, the development aspect of article 5 is the central focus as the article considers the right to education an essential element of the right to development. Article 5 of the African Children's Charter contains the right to survival and development, two separate but closely-related rights. It is important to note the difference between the right to survival and the right to development. The right to survival denotes, first, the inherent right to life, to which every child shall be entitled, and which state parties must protect.<sup>121</sup>

118 CRC Committee General Comment 14 (n 92) para 77.

119 E Durojaiye & E Amarkwei Foley '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' (2012) 12 *African Human Rights Law Journal* 569.

120 Mezmur (n 107) 144.

121 Art 5(1) African Children's Charter.

The child's right to life is important because to enjoy the rights in the Charter, a child must be alive. Therefore, the right to survival and development is an important pillar as all other rights can be enjoyed only by virtue of being alive.

Second, it also includes the prohibition on the death sentence for children.<sup>122</sup> The African Children's Charter gives a generalised provision on the right to development by stating in article 5(2) that 'state parties should ensure to the maximum extent possible, the survival, protection and development of the child'.

However, some meaning can be derived from the Preamble to the Children's Charter and from the Charter in general. For example, the Preamble states that due to the needs of a child's physical and mental development, care with regard to health, mental, moral, physical and social development are required to be protected.<sup>123</sup> The same Preamble recognises the child's position as a 'unique and privileged member of African society' whose full and harmonious development requires that they grow up in a family environment.

Moreover, article 11 on the right to education recognises that education shall be directed to, among others, the 'promotion and development of the child's personality, talents, mental and physical abilities to their fullest potential'.<sup>124</sup> Elsewhere in the African Children's Charter we gain a similar understanding of the African child's right to development with regard to children with disabilities, in article 13(2) of the Children's Charter, in the provision that state parties must ensure the provision of resources that will prepare the disabled child in a manner that will help them achieve their fullest individual, cultural and moral development.

General Comment 5 of the African Children's Committee on state party obligations highlights that the implementation of rights in the African Children's Charter should aim to achieve optimal development for children in all aspects.<sup>125</sup> The African Children's Committee has explained the role of Sustainable Development Goals (SDGs) as complimentary to the right to development for the African child, in particular in the realisation of socio-economic rights. General Comment 5 also emphasises the importance of all rights

<sup>122</sup> Art 5(2) African Children's Charter.

<sup>123</sup> See the Preamble to the African Children's Charter.

<sup>124</sup> Art 11(2) African Children's Charter.

<sup>125</sup> General Comment 5 (n 23) para 4.3.



in the African Children's Charter to facilitate the development of children from childhood to adulthood.<sup>126</sup>

The African child's right to development encompasses a realisation of the rights contained in the African Children's Charter. As Kaime notes, the broad nature of the right to survival and development necessitates the realisation of a range of civil, socio-economic and cultural rights.<sup>127</sup> Thus, as a socio-economic right, the right to education places an obligation on state parties to provide access to adequate education that will develop the intellectual capacities of the African child and allow them to participate in society.

In *Children of Nubian Descent* the African Children's Committee reasoned that education was an important aspect of a child's development. Therefore, by promulgating laws that prevented Nubian children from having access to education, the state party had infringed on their right to education.<sup>128</sup> Durojaye and Amarkwei Foley submit that the obligation to respect the right to education burdens the government to refrain from interfering with the right. Therefore, the failure to register the Nubian children is an indirect interference of their right to education.<sup>129</sup> It must be noted that the nature of education as a socio-economic right places both negative and positive obligations on a government: a positive obligation in the sense that the government must intentionally create laws and policies that will bring about the realisation of the right, including access without discrimination, and a negative obligation by refraining from interfering with the enjoyment of the right.<sup>130</sup> They further submit that by taking an interdependence, interrelated and indivisibility approach to interpreting the right to birth registration and citizenship, the African Children's Committee viewed the rights in the Children's Charter as related, and came to the conclusion that the delay on the part of Kenya in granting the Nubian children citizenship had violated the children's rights, including their rights to education.<sup>131</sup>

*Senegalese Talibés*<sup>132</sup> concerned 100 000 children from Senegal and its neighbouring countries. The children were boys between the ages of 4 and 12, called the Talibés, who were taken from

---

126 As above.

127 Kaime (n 41) 53.

128 *Children of Nubian Descent* para 65.

129 Durojaye & Amarkwei Foley (n 119) 575.

130 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.

131 Durojaiye & Amarkwei Foley (n 119) 574.

132 *Senegalese Talibés* (n 95).

their families by the *marabouts* (instructors) so that they would be given Qur'anic religious education in cities in Senegal. The Talibés children were forced to beg on the streets for long hours to benefit the *marabouts*. The children were often beaten when they failed to meet their daily quotas (in the form of rice, money or sugar) which they were supposed to make from begging, and were often injured by speeding vehicles. They lived in deplorable conditions in unsafe and overcrowded houses. They were exposed to illnesses, assault; they were malnourished and exposed to sexual abuse, and were not allowed contact with their families.<sup>133</sup> The case resulted in violations of several rights of the children. However, only the right to education will be discussed here.

The African Children's Committee found a violation of the right to education under article 11 of the African Children's Charter. The Committee held that children had a responsibility towards their family, nation and society and that such responsibility can only be fulfilled if they have the necessary education.<sup>134</sup> The African Children's Committee further recognised that 'education is a tool to enhance the protection of children from dangerous and hazardous labour'.<sup>135</sup> It is submitted that by this reasoning and finding, the Children's Committee recognises the right to education as necessary to the development of children. Therefore, by failing to ensure the realisation of the rights of the Talibés boys to education, the state party had impeded on their right to development.

The above view is substantiated when the African Children's Committee referred to General Comment 1 of the CRC Committee on the aims of education, which states that education should be aimed at empowering the child to develop skills, learning and other capacities. The Committee held that the failure on the part of the state party to provide free and compulsory education for the Talibés had forced them to attend the *daaras* where they were not asked to pay school fees except for the daily quotas. The Committee concluded that the government had failed to ensure that education was available, accessible and acceptable to the Talibés, thus violating article 11 of the African Children's Charter.<sup>136</sup> Mezmur and Kahbila note that it was surprising that the African Children's Committee failed to make a finding on the gender dimension of the case, since the forced begging by children on the streets, as well as education,

<sup>133</sup> *Senegalese Talibés* (n 95) paras 1-10.

<sup>134</sup> *Senegalese Talibés* (n 95) para 46.

<sup>135</sup> *As above*.

<sup>136</sup> *Senegalese Talibés* (n 95) paras 47-50.

health and abduction, differently affect girl and boy children.<sup>137</sup> I agree that it would have been interesting to see the views of the Children's Committee on the gender dimension of this case, as the children involved were all boys. Therefore, the Committee in my view missed an opportunity to pronounce on the gender dimensions of the right to education of boy children.

The African Children's Committee also noted in *Senegalese Talibés* that the 'survival and development encapsulate the right to life and imposes an obligation on states to ensure an adequate standard of living for children, including the right to life and their physical, mental, spiritual, moral, psychological and social development'.<sup>138</sup>

The African Children's Committee also emphasised the responsibility on state parties to protect children by setting minimum standards for educational institutions including for the *daaras*, in accordance with article 11(5) of the African Children's Charter, which provides that children who are subject to school or parental discipline, are treated with humanity and dignity.<sup>139</sup> According to Sloth-Nielsen, the government of Senegal has undertaken measures to implement the African Children's Committee's recommendation to remove the Talibés children from the streets and to ensure the realisation of their right to education.<sup>140</sup> These measures include budgetary allocations, the signing of bilateral agreements to return the children to their homes and accelerating the adoption of a child rights code. On education specifically, new curricula have been drafted for the schools that formerly denied the children their rights to education, and time frames as well as norms and standards for the schools have been set up.<sup>141</sup> Furthermore, a total of 1 147 children were withdrawn from the streets, there has also been an increase in the number of children enrolled in schools, and a better quality of education has been seen.<sup>142</sup>

The cases discussed in this article have illustrated the extent of the development of educational rights within the jurisprudence of the African Children's Committee, in particular as it relates to girl children. Notwithstanding this fact, the Children's Committee is

137 Mezmur and Khabila (n 85) 210.

138 *Senegalese Talibés* (n 95) para 42.

139 *Senegalese Talibés* (n 95) para 47.

140 Sloth-Nielsen (n 84) 634. See also the 29th session of the African Children's Committee para 62. refer also to the Committee report where this was reported as primary source

141 Sloth-Nielsen (n 84) 633. See also the 29th session of the African Children's Committee para 62. refer also to the Committee report where this was reported as primary source

142 As above.

yet to develop a General Comment on the right to education. The following part argues that the extensive development of the right to education under the Children's Committee's jurisprudence calls for a General Comment on education.

#### 4 The need for a General Comment on the right to education by the African Children's Committee

The African Children's Committee currently does not have a General Comment on the right to education, although it regularly refers to the CRC Committee's General Comment on education. The purpose of a General Comment is to provide meaning for rights in a treaty or a charter, by providing interpretations of the provisions in the treaty.<sup>143</sup> General Comments are also authoritative guides on interpretations of treaties and may deal with substantive rights or provide guidance on the information that state parties must submit to treaty bodies in their reports. General Comments also deal with wider issues that may be cross-cutting such as the protection of girl child education.<sup>144</sup>

Based on the extensive level of interpretation on the right to education, particularly in *Tanzanian Girls, Children of Nubian Descent* and *Northern Ugandan Children*, the African Children's Committee should consider developing a General Comment on education to give meaning to article 11. The fact that the right of the girl child to education is high on the agenda of the African Children's Charter is commendable and adds to the need for a General Comment since, arguably, no other international treaty has devoted as much attention to girl child education.<sup>145</sup> The recognition that the girl child is part of a vulnerable group, whose right to education deserves special protection, has been elaborated on in detail in *Tanzanian Girls*. This has added meaning to the existing provisions in the Children's Charter on the right to education in so far as the girl child is concerned. The African Children's Committee can go a step further by extracting the 'developed meanings' into a General Comment.

Moreover, there is a case pending against Ghana on behalf of school girls living in villages along a river.<sup>146</sup> Although the case is

143 United Nations Office of the High Commissioner on Human Rights 'General Comments', <https://www.ohchr.org/en/treaty-bodies/general-comments> (accessed 12 February 2024).

144 As above.

145 Chirwa (n 27) 157-178.

146 *Institute for Human Rights and Development in Africa and Mr Solomon Joojo Cobbinah (on behalf of school girls living in villages along the River Offin in the Ashanti Region of Ghana) v Ghana*, No 19/Com/001/2022, admissibility decision May 2023 (*Ghanaian Girls Crossing River Offin*).

still pending, it invokes violations of the right to education for yet another group of girls. Undoubtedly, the African Children's Charter's special provisions on girl children will bring communications before the African Children's Committee on girl children and will demand further interpretations on the rights provided in the Charter.

The development of the reasonableness test to determine a state party's compliance with the right to education under unusual circumstances or in situations of unrest, which was mentioned in the *Northern Ugandan Children*,<sup>147</sup> cannot be found elsewhere in the African Children's Charter. A General Comment on the right to education to expand on the test will help state parties to measure and self-assess their compliance against the right to education in situations of unrest. It will also add meaning to the African Children's Charter's provision that 'every child' has the right to education, in that 'every child' is inclusive of children who find themselves under unusual circumstances, where the right to education ordinarily would not be prioritised.

While the African Children's Charter makes extensive provisions on the right to education, the interpretations of these provisions are not always clear through initial readings of them. In fact, some provisions are ambiguous, leaving room for different interpretations.<sup>148</sup> Therefore, the meanings of provisions that cannot be explicitly ascertained by reading the African Children's Charter will become clearer in a General Comment.

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights of the African Commission on Human and Peoples' Rights (African Commission) (Principles and Guidelines)<sup>149</sup> give meaning to free education by providing for measures to eliminate or reduce the costs of attending primary school, such as the introduction of stipends, uniforms, textbooks, transportation and meals in order to encourage attendance.<sup>150</sup> However, the Principles and Guidelines do not expand on the 'compulsory' aspect of basic education. A General Comment by the African Children's Committee can expand on the meaning of compulsory education by providing clarity on for example, who bears the onus for ensuring that education is compulsory. Is the onus on the state, the parent or the child? At what

---

147 *Northern Ugandan Children* (n 16) paras 69-70.

148 See, eg, Chirwa (n 27) 165, where the author argues that the provision in the African Children's Charter on special measures of education for girl children is ambiguous and can be interpreted in various ways.

149 African Commission Principles and Guidelines (n 3) para 69.

150 African Commission Principles and Guidelines (n 3) paras 71(a)-(b).

age should such compulsory education be enforced? When does it begin and when does it end? What are the consequences for those who do not comply with the requirement?

Also, the Principles and Guidelines encourage prohibition on corporal punishment,<sup>151</sup> which is welcomed as the African Children's Charter does not explicitly prohibit corporal punishment. Neither the African Children's Charter nor the Principles and Guidelines introduce positive discipline as a means of replacing corporal punishment in schools. This the Children's Committee can include in a General Comment. Moreover, an explicit prohibition on corporal punishment by the African Children's Charter can also be included in a General Comment.

A General Comment on the girl child's right to education would limit the scope of the General Comment to only girl children. The jurisprudence of the African Children's Committee on education has not only expanded in view of the girl child, but also in relation to children generally. Therefore, it is recommended that the General Comment should cover the right to education of children in general.

## 5 Conclusion

This article sought to outline the development of education rights in the African Children's Charter, through the interpretation of the right to education and its development in the jurisprudence of the African Children's Committee. The article discussed five communications on the right to education on which the African Children's Committee has given its views, and analysed how the Committee has interpreted the right to education by applying the four pillars, namely, non-discrimination, the best interests principle, the right to survival and development, and child participation.

Apart from making a case that the right to education in the African Children's Charter is ripe for a General Comment, the following observations are also made. First, the girl child's right to education has been extensively dealt with by the African Children's Committee. Unless the pending case on behalf of school girls against Ghana introduces new jurisprudence in this area, *Tanzanian Girls* remains the leading case on education and girl children on the African continent. Second, non-discrimination as a substantive right and as a pillar of interpretation is more developed in the jurisprudence of

<sup>151</sup> African Commission Principles and Guidelines (n 3) para 71(q).

the African Children's Committee in terms of the right to education, as compared to best interests, survival and development and child participation. This is because the five cases all make findings of discrimination, and this had led to extensive development in that area. Moreover, although violations of the best interests principle are also found in all five cases, the complex nature of the facts did not always allow for a clear interpretation of the best interests principle against the right to education as other non-educational violations were found. Finally, there is a need to prioritise child participation on the agenda of children's rights in Africa and thereby build on that jurisprudence. As previously argued, child participation is less prevalent in the African Children's Committee's jurisprudence. For example, the Committee prescribed what has been described as 'far-reaching' remedies in *Tanzanians Girls*. The need for participation and respect for the views of the child could have been emphasised through a recommendation that the school's policies be written by engaging learners who will be affected by these. As Mezmur has observed, the views of the African Children's Committee in the cases discussed are proof that 'the individual complaints mechanism under the African Children's Rights Charter holds a very strong potential to protect children in Africa'.<sup>152</sup>

---

<sup>152</sup> Mezmur (n 107) 144.