

Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC

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**Abstract**

*The Convention on the Rights of the Child (CRC) is the first legally binding international instrument to address specifically children's rights comprehensively. It is the most widely ratified human rights treaty in the world. The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990. It is designed to retain the spirit as well as substance of the letter of the CRC while at the same time having special provisions guided by the situations in Africa. There are several similarities in the provisions of the two child's rights instruments. The paper examines the question whether there is need for a regional treaty on the rights of the child apart from the CRC which is global. The objective of the paper is to show whether both treaties have complemented and reinforced each other.*

**Keywords:** Child, Children's rights, Culture, Best interest of the child

**1. Introduction**

The idea of children having rights is viewed as revolutionary.<sup>1</sup> Children have been presumed to lack the capacity of adults and be under the control of their parents. It is argued that at times, parental control and protection for the child could at times be harmful and in some cases be oppressive to children. At times adults make decisions that have far-reaching consequences for children which might not be in the child's best interest.<sup>2</sup> Adults argue that they relate to children in terms of love, friendship, compassion, altruism and that this raises the relationship to a higher plane than one which relies on rights and duties.<sup>3</sup> It is noteworthy that most of the time human rights go beyond the perception of physical needs and include a broader perspective of economic, social cultural civil and political rights. Children face various abuses irrespective of their geographical location whether they live in developing countries or in the Western World. In the Western World, children may face abuses in the form of pornography or domestic violence, and in the developing World abuses may be in the forms of ignoring the right to freedom of speech, child labour, child soldiering, limited or non-access to education and forced marriage. The rights of children are massively violated, in families, schools or on the street, in form of domestic, physical or sexual abuses. A child normally enjoys all the human rights laid down or proclaimed in the constitutions or any other domestic legislation of the child's country, and also the rights in international conventions or declarations. But the rights of the child are those human rights that are specifically granted to the child because 'the child by reason of his or her physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth' which applies to all children.<sup>4</sup> Examples are; the right of the child to the highest attainable standard of health, right to adequate standard of living, right to education and protection from all forms of violence.

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<sup>1</sup>Wald, Michael, (1979) 'Child's Rights: A Framework for Analysis, Vol 12 University of California, Davis Journal ,p.256

<sup>2</sup> ibid

<sup>3</sup> Freeman, M. (2011) 'The Value and Values of Children's Rights' in: A. Invernizzi& J. Williams (eds) *The Human Rights of Children: From Visions to Implementation*, Surrey: Ashgate p.23.

<sup>4</sup>ibid p.31.

## 2. Perception of Children as Rights Holders

Adults argue that, because of children's limited level of development knowledge and experience, children cannot judge what is in their interests or what will be the outcome of their behaviour most of the time.<sup>5</sup> The fact that children are not yet grown up has been and is used as an excuse by parents, and many adults, particularly in Africa, to follow their own interpretation what is in the child's interest. Long after laws protecting animals were enacted there were no legislation on child protection in some jurisdictions. For example in a decided case in New York City in 1874 called 'May Ellen Affair', the parents of the child could only be prosecuted for maltreating their daughter by the prosecutor pleading that a girl was as much a member of an animal kingdom such as a cat or a dog.<sup>6</sup> There are opponents and advocates of children's rights from a range of ideological positions. For example, Hannah More having denounced the rights of man and ridiculed the rights of women continued: 'It follows, according to the actual progression of human beings, that the next influx of irradiation which our enlighteners are pouring on us will illuminate the world with grave descants on the rights of the youth, the right of the babies.'<sup>7</sup> Ironically her remark even though cynical, was a prediction which became fulfilled two centuries later with the enactment of the CRC in 1989. O'Neill's contention was that if there is that much concern about children's lives, instead of clamouring for their rights, the focus should be on looking for ways to improve children's lives by identifying what obligations parents, teachers and the wider community have towards children.<sup>8</sup> In another paper, O'Neill wrote that a child's main remedy is to grow up,<sup>9</sup> meaning that a child is a future adult rather than a young human being, this is O'Neill's perception of children from his description. Another strong opponent against children having rights is Laura Purdy, who equates children's rights to children's liberation.<sup>10</sup> She pictures children's autonomy as a license to do whatever they want without any sort of constraint.<sup>11</sup> In response to Purdy's assertion, Mc Gillivray, a defender of children's rights replies: 'The argument that children should not have rights or should have only some rights is incoherent... It misstates the symbology and nature of rights; it casts rights as the antithesis rather than the essence of relationship and responsibility'.<sup>12</sup>

Mc Gillivray went on further by pointing out that to exempt children from human rights is to designate them as less than human.<sup>13</sup> Baroness Hale articulated her opinion that even in legal disputes which centred evidently on rights of children, they are not given recognition. In her judgment she commented that; '[...] this is, and always has been, a case about children, their rights and the rights of their parents... the battle has been fought on grounds selected by adults.'<sup>14</sup> In most cases and for several reasons, children are not always given the opportunity to make decisions concerning their own welfare.<sup>15</sup> Years before the CRC adoption, Hilary Rodham Clinton pointed out that children's rights seems; 'a slogan in search of a definition.'<sup>16</sup> She recommended careful study of both the psychological and legal issues involved in the idea of rights for children.<sup>17</sup>

<sup>5</sup> De Langen, M., (1992) 'Meaning of Human Rights for Children', in: M. Freeman & P. Veerman (eds), *The Ideologies of Children's Rights*, Dordrecht/ London: MartinusNijhoff, 256.

<sup>6</sup> Van Bueren, G.(1994) *The International Law on the Rights of the Child* (Dordrecht/The Netherlands; MartinusNijhoff Publishers, p. xxi.

<sup>7</sup> More, H. (2004) *Strictures on the Modern System of Female Education: With a View of the Principles and Conduct Prevalent Among Women of Rank and Fortune, (1799)*, culled from *International Library of Essay on Children's Rights Vol1*, Michael Freeman ( ed), Hants: Ashgate, xx.

<sup>8</sup> O'Neill, O. & William R. (1979) *Having Children: Philosophical and Legal Reflections on Parenthood*, Oxford: Oxford University Press, p 5.

<sup>9</sup> O'Neill, O., ' (1998) *Children's Rights and Children's Lives*', 98 *Ethics*, 445-63, at 445.

<sup>10</sup> Purdy, L (1994), 'Why Children Still Shouldn't Have Equal Rights', 2 *International Journal of Children's Rights*, pp 395-98 at 395.

<sup>11</sup> *ibid*

<sup>12</sup> Mc Gillivray, A. (1994) 'Why Children Do Have Equal Rights: In Reply to Laura Purdy', 2 *International Journal of Children's Rights*, pp 243 -58 at 243.

<sup>13</sup> *ibid*, p.258.

<sup>14</sup> *Williamson v. Secretary of State for Education and Employment*, (2005) 2 A C 246 at para 71.

<sup>15</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority*, (1985) 3 All. ER 402. (*Gillick Competence*).

<sup>16</sup> Rodham, H.,(1973) 'Children under the Law', 43 *Harv Ed Rev*.487.

<sup>17</sup> *ibid*

It is a relatively well settled notion today that children have rights in both international and domestic law.<sup>18</sup> This is evidenced by the unanimous adoption of the CRC in 1989 with 198 state parties, willingly endorsing it, and its entry into force less than a year after in 1990.<sup>19</sup> The perception now is that children are no longer mere recipients of services or beneficiaries of adult protections. Rather they are right holders, as well as participants in matters affecting them, and therefore should be respected in their individuality. There is also the concern that children, if given rights will undermine the role of parents in raising their children and this will have a negative effect on the family unit, therefore children having rights is viewed as anti-parent. This fear is unfounded, as both the CRC<sup>20</sup> and the ACRWC<sup>21</sup> have provisions which recognise the family as the fundamental group of society. The two instruments both acknowledge the importance of parents and the family, and the family environment as an atmosphere of happiness love and understanding for the growth and well-being of its children.<sup>22</sup> The attitude of domination over children by adult has continued to determine the destiny of children especially children in Africa. So the perception of children as right holders is difficult to realise in African societies. It is expostulated that this will lead to lack of respect in the African culture and that it is a direct challenge to traditional generational power structures. It should not be forgotten that there are now in Africa, lots of child-headed households especially in HIV Aids endemic areas, with children in charge and looking after the younger ones. Therefore, the generational power structures have ceased to exist under such circumstances, because a child who can head a household should be capable of being a right-holder. Culture has always been used as excuse by several countries in Africa for non-implementation of human rights including the rights of the child. Kaime rightfully points out that culture is not a static, unchangeable concept, but that it is shaped and transformed by the actions and perceptions of individual actors.<sup>23</sup>

### **3. Historical Development of International Law on the Rights of the Child**

A historical retrospect is extremely valuable for expounding the various stages that the rights of children has passed through, and to show that these human rights instruments and documents are a living reality that has acceptance by the vast majority of states in various parts of the world today. Since the beginning of the twentieth century there has been the development of the international law on the rights of the child as far back as over ninety years ago. In order to buttress this, analysis of various international documents on the rights of the child now follows.

#### **3.1 The Declaration of the Rights of the Child 1924**

The Declaration of the Rights of the Child<sup>24</sup> was the first effort to address the rights of the child on an international level which was mentioned in its preamble that; ‘mankind owes to the child the best it has to give.’ The Declaration also known as the Declaration of Geneva was the first document that directed international attention to children’s rights<sup>25</sup>. The Declaration of Geneva was drafted by the Save the Children Fund, an organisation established by EglantyneJebb<sup>26</sup>. The document was submitted to the League of Nations, and was adopted by the League of Nations in November 1924.<sup>27</sup>

<sup>18</sup> Franklin B.,(1995) ‘The Case for Children’s Rights: A Progress Report’, in: The Handbook of Children’s Rights: Comparative Policy and Practice, (London: Routledge).

<sup>19</sup><http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 10 June 2015.

<sup>20</sup>Articles 2, 5, 10, 14, 18, 24 & 37 CRC

<sup>21</sup>Articles 9, 18, 19, 20, 25 & 30 ACRWC

<sup>22</sup> See Preamble of the Convention on the Rights of the Child, G.A. Res 44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc a/Res/44/25 (1989), entered into force 1990 [hereinafter referred to as CRC]. See also preamble of ACRWC, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

<sup>23</sup>Kaime, T.,(2011) The Convention on the Rights of the Child: A Cultural Legitimacy Critique, Europa Law Publishing, p.41.

<sup>24</sup> Declaration of the Rights of the Child, League of Nations Records of the Fifth Assembly, 1924 O.J spec supp. 23 (1924). League of Nation Official Journal.

<sup>25</sup> Cohen, C., (1989), ‘Introductory Note: United Nations Convention on the Rights of the Child’, 28 I.L.M. 1448.

<sup>26</sup> Personal letters of EglantyneJebb cited in Van Bueren, G,(1994)The International Law on the Rights of the Child,Dordrecht:MartinusNijhoff Publishers, p.8.

<sup>27</sup>ibid

The Declaration is important in that it highlights the social and economic entitlements of the child. It lays the foundation for setting future international standards for children's rights.<sup>28</sup>

### 3.2 The Universal Declaration of Human Rights (UDHR) 1948

The UDHR was adopted by the General Assembly of the United Nations (UN) in Paris on 10 December 1948.<sup>29</sup> It was adopted without a dissenting vote, and with few abstentions, by all member states of the UN at that time.<sup>30</sup> It proclaims a catalogue of human rights which apply to all human beings and therefore implicitly to children.<sup>31</sup> It reiterates the rights of children to special care and assistance as was previously canvassed in the 1924 Declaration on the Right of the Child. MacDonald noted that unlike the UN Charter, the UDHR does mention children, within the context of declaring the family to be the 'natural and fundamental group unit of society' and as such entitled to protection by society and the state.<sup>32</sup> The right of parents to choose the kind of education that shall be given to their children is protected in the UDHR.<sup>33</sup> The legal value of the UDHR reposes on its recognition and acceptance by a large number of states, even without binding legal effect it is regarded as 'declaratory of accepted principles within the international community'.<sup>34</sup>

### 3.3 Declaration of the Rights of the Child 1959

The UDHR was followed by the Declaration of the Rights of the Child,<sup>35</sup> which is another important document in the history of the rights of children because it is child-specific. The Declaration proclaimed that the child should enjoy all the rights set forth in the Declaration without any exception whatsoever and without discrimination. The Declaration used the term 'entitled' which is arguably analogous to the term right.<sup>36</sup> Also significant is the phrase 'the child must be given' used in the 1924 Declaration of Geneva,<sup>37</sup> whereas the 1959 Declaration of the Rights of the Child stated that 'The child shall<sup>38</sup> enjoy all the rights set forth in this declaration...' <sup>39</sup> This shows a change in the language from persuasion used in the Declaration of Geneva to entitlement or right in the 1959 Declaration. This, according to Fitzgibbon, reflects a change in the treatment of children from being viewed as objects of international law to being perceived as subjects of the international law.<sup>40</sup> Van Bueren explains that the 1959 Declaration of the Rights of the Child is the 'conceptual parent' of the CRC.<sup>41</sup> This was further confirmed when Poland submitted the first draft of the Convention to the Commission on Human Rights in 1978, the text was very similar to the 1959 Declaration. Tallying, Alston and Tobin described the 1959 Declaration as ground breaking.<sup>42</sup> By 1959 however, children were beginning to emerge no longer as passive recipients but as subjects of international law, recognised as being able to enjoy specific rights and freedoms.<sup>43</sup> The 1959 Declaration was the springboard for the initiative to draft a Convention.<sup>44</sup> This is very significant in the development of children's rights. All the above stated Declarations have no legal binding force; the CRC that is the first legally binding international instrument to address children's rights comprehensively. Nevertheless the Declarations are the 'foundation' on which both the CRC and the ACRWC were built.

<sup>28</sup> Van Bueren, G. The International Law on the Rights of the Child note 6, p 14.

<sup>29</sup> UDHR adopted 10 December 1948, G.A. Res 217A, (III) U.N. Doc A/ 810 at 71 (1948).

<sup>30</sup> Report of the Working Group on the Draft Declaration on Human Right. Doc. E/CN.4/57, see also Summary Records of Group Meeting, Doc.E/CN.4/AC.2/1 -9

<sup>31</sup> Children were specifically mentioned in Articles 25 & 26 UDHR.

<sup>32</sup> Mac Donald, A. (2011) The Rights of the Child: Law and Practice, Bristol: Jordan Publishing Ltd , p.18

<sup>33</sup> Article 26(3) UDHR.

<sup>34</sup> Van Bueren, G. note 6 p.18.

<sup>35</sup> Declaration on the Rights of the Child, G.A. Res 1386 (XIV), 14 U.N. GAOR Supp (No 16) at 19, U.N. Doc.A/4354 (1959).

<sup>36</sup> Cohen, C. (1993). 'The Developing Jurisprudence of the Rights of the Child', 1: 6 St Thomas L. Rev , p.10

<sup>37</sup> Principle 1.1924 Declaration of Geneva.

<sup>38</sup> Emphasis mine

<sup>39</sup> Principle 1, 1959 Declaration of the Child

<sup>40</sup> Fitzgibbon, T.(1998) 'The United Nations Convention on the Rights of the Child: Are Children Really Protected? A case study of China's implementation', 20 Loy L.A. Int'l & Comp L.J 325 at p.332

<sup>41</sup> Van Bueren, note 6 at p. 14.

<sup>42</sup> Alston, P and Tobin, J.,(2005) Laying the Foundation for Children's Rights, New York: UNICEF, p.5.

<sup>43</sup> Van Bueren, note 6 at p. 12.

<sup>44</sup> Detrick et al (eds), (1992) The UNCRC: A guide to TravauxPrepatoires, The Netherland: MartinusNijhoff p.34.

### 3.4 Convention on the Rights of the Child (CRC) 1989

The UN General Assembly unanimously adopted the CRC on November 20 1989.<sup>45</sup> The CRC is the most widely ratified human rights treaty in the world. Only the United States of America and newly created State of South Sudan are yet to ratify the Convention.<sup>46</sup> The CRC does not place children's rights within a hierarchical framework.<sup>47</sup> It is based on the premise that all human rights are indivisible as declared by the Vienna Declaration.<sup>48</sup> The CRC is unique because it protects the broadest scope of fundamental human rights ever brought together within one treaty - economic, social, cultural, civil and political.<sup>49</sup> It is the first binding international treaty to incorporate civil, political, economic, social and cultural rights into one treaty, placing equal emphasis on all these rights.<sup>50</sup> The CRC was adopted by the UN General Assembly, with the intention of protecting the civil political rights and economic social and cultural rights of all children.<sup>51</sup> It encompasses the rights expressed in the ICESCR and the ICCPR but the rights recognised in the CRC are incomparably more expansive.<sup>52</sup> Some of the CRC provisions are discussed in detail later in this paper.

### 4. Issues of Controversy and the need for an African Regional Charter Protecting the Rights of the Child

One of the reasons for having an Africa Children's Charter was the feeling that Africa had been underrepresented during the drafting process of the CRC (only Algeria, Morocco, Senegal and Egypt participated meaningfully in the drafting process). A second reason was the thinking that Africa needed to have a charter for children which reflected the specifics of the African context. The Preamble to the Charter explains that it emerged out of the social and cultural values of Africa, including those relating to family, community and society and takes into consideration the virtues of cultural heritage, historical background and values of the African civilization. It provides as follows:

[...]the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care.<sup>53</sup>

Africa is the only region with a region-specific child's right instrument, namely the African Charter on the Rights and Welfare of the Child (ACRWC). It was claimed that the CRC was initiated and drafted by the Western nations. Muyila argued that the CRC is a western phenomenon and that with the exception of Senegal and Algeria, few African countries participated consistently in its drafting process.<sup>54</sup> Ankut too affirmed this, expressing that; in the drafting process of the CRC, it was claimed that few African countries participated, as a result issues pertinent to African children are not likely to be articulated in as strong and enforceable terms as deserving of problems of such magnitude.<sup>55</sup> This was also confirmed by Viljoen when he stated that the reasons why a regional charter was adopted were the side-lining of Africans from the UN drafting process and the exclusion of Africa-specific issues from the CRC.<sup>56</sup>

<sup>45</sup>Convention on the Rights of the Child. G.A. Res 14/25 UNGAOR, 44<sup>th</sup> Sess., supp No 49 at 167, UNDOC A/44/49 (1989)

<sup>46</sup> Somalia ratified the CRC on 20 January 2015. Available on:

[http://www.africanchildinfo.net/index.php?option=com\\_k2&view=item&id=6915#.VMfuXdIvnYo](http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvnYo) accessed 25 January 2015.

<sup>47</sup> The preamble of the CRC states the rights are equal and inalienable.

<sup>48</sup> Vienna Declaration and Programme of Action, note 110, para 5.

<sup>49</sup> Jan Martenson, under Secretary General for Human Rights Committee in 1991.

<sup>50</sup> Cohen, note 33 at p. 18.

<sup>51</sup> Lopatka, , An introduction to the United Nations Convention on the Rights of the Child', 6 Transnat'l L&ContempProbsp. 251 at 284.

<sup>52</sup> Ibid

<sup>53</sup> Preamble of the ACRWC

<sup>54</sup> Muyilla, J.W. (2006) African Values and Problems of Rights of the Child: A Search for Explanations, Danish Institute of Human Rights.

<sup>55</sup> Ankut, P. (2006) The African Child: Linking Principle with Practice, Open Society Initiative of West Africa (OSIWA) p.8.

<sup>56</sup> Viljoen, F. (1991 'Why South Africa Should Ratify the ACRWC', 16: South Africa Law Journal 660 at 661.

The OAU deliberated and decided that a supplementary instrument would be required in order to guarantee the implementation of the CRC in African countries tailored along the local situations, for example, the socio-economic conditions, widespread occurrence of armed conflict and resultant displacement of populations.<sup>57</sup> Lloyd explained that the ACRWC was intended to be a complimentary mechanism to the CRC in order to enhance the enjoyment of the rights of the child in Africa.<sup>58</sup> She went further, stating that the ACRWC does not replace the existing standard, instead it adds to them.<sup>59</sup> Consequently, the desire for the culturalisation of children's rights has led to calls for a regime of children's rights not only founded upon CRC, but also reflective of and informed by African cultural values and heritage.<sup>60</sup> It is important to note that, in the context of Africa setting, local factors need to be taken into account because children's rights do not seem to enjoy sufficient cultural legitimacy within the various African cultures and respect for children's rights is yet to firmly gain ground.<sup>61</sup> Accordingly, the perception is that international norms with respect to the promotion and protection of children's rights are heavily tilted to a 'Western' rights ideology therefore lacking a meaningful African influence.<sup>62</sup>

### **5. Comparisons of Some of the Core Articles in the Two Treaties**

A comparative analysis is aimed at giving a clearer picture of the two children's instruments and to also present an enlightening picture of the more detailed aspects of the ACRWC. This is to justify the argument for the need for a regional child's rights instrument. Indeed as will be shown, there are several similarities than differences between the two instruments. In some areas the children's rights articulated in the ACRWC are simply mirror images of rights already acknowledged in the CRC. The ACRWC draws a great deal from the CRC and the two instruments are wholly complementary, though there may be instances where one will provide more protection to children than another. Shown as follows are some of the differences between the provisions of the CRC and the ACRWC, highlighting also where the ACRWC is more explicit about issues distinctive to an African context.

#### **5.1 Definition of a Child - Article 1 CRC; Article 2 ACRWC**

##### **The 'Child'**

Even though the ACRWC defines a child as a person below the age of eighteen years, this is at variance with the definition under the African traditional setting where attainment of a particular age is not the only way in which the duration of childhood can be measured. Factors such as the ability to perform certain feats and particular functions such as initiation rites are the more important considerations in African communities.<sup>63</sup> In the traditional African setting, childhood and when it comes to an end is not so much a question of fixed age but is influenced by a number of factors, such as attainment of status. For example, childhood ends upon marriage. Once married, the child is regarded as an adult who will be responsible for running a family irrespective of the fact that the child might have married at an early age (this is pertinent with the female child).<sup>64</sup> Early marriage of the female child is of particular relevance in this regard, because it is a barrier to access to education for the girl child. In the African sense, the definition of a child is a communal assessment. It is not calculated in terms of age by birth but by the role the child can play or plays in the society at any given stage. So the definition of a child is dictated by situational factors under African traditional settings. Different communities all have different structures, legal procedures and institutions, thus cessation of childhood takes different forms in various communities. The definition of the child is perceived and construed around an entity age as opposed to under the African tradition where the definition of a child is determined by a quality or fact.

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<sup>57</sup> OAU Report of the Intergovernmental Expert Group Meeting on the Draft African Charter on the Rights and Welfare of the Child 17-21 April 1990 Addis Ababa.

<sup>58</sup> Lloyd, A. (2002) 'Evolution of the African Charter on the rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet', 10: International Journal of Children's Rights 179 at 184.

<sup>59</sup>Ibid.

<sup>60</sup>Viljoen, F.( 2000) 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) Introduction to child law in South Africa 214 at 218,

<sup>61</sup>Ncube,W. (1998) 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture', in: Welshman Ncube (ed), Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa, Aldershot : Dartmouth, p.8.

<sup>62</sup> Bennett T.W.,(1999) Human rights and African customary law under the South African Constitution ,Juta Publishing Company, p.98.

<sup>63</sup>Omari &Mblinyi, (2000) African Values and Child Rights: Some Case from Tanzania, Dar-es-Salam: DUP, p 7.

<sup>64</sup>Falola,T., (2001)Culture and Customs of Africa, (Connecticut: Greenwood Resources p. 10.

In essence, there is no agreement on the traditional definition of a child in sub-Saharan Africa. Each community in the cultural settings have different age ranges for childhood. Region-wide agreement on the definition of a child is the definition contained in the ACRWC.<sup>65</sup> The ACRWC definition of a child which is based on age is advantageous for the child because it gives legal protection and rights to the child up till the age of eighteen. It also implicitly forbids marriage for a child below the age of eighteen,<sup>66</sup> whereas with the CRC definition of a child, it allows a lower marriageable age of below 18 years.<sup>67</sup> The CRC defines a child as ‘any human being under eighteen unless under laws applicable to the child, majority is attained earlier’.<sup>68</sup> The CRC definition must have been enthused by the awareness of the fact that various communities view duration of childhood differently. The fear in this definition is that it may be used to deny children the rights under the Convention, for example, their right to education in some communities. The ACRWC however defines (without any qualification), a child as any human being below eighteen years.<sup>69</sup> ACRWC’s definition of a child as ‘every human being below the age of 18 years’<sup>70</sup> is clear and concise with no limitations or exceptions. Thus ACRWC has established in clear and unambiguous terms when a child is a child.<sup>71</sup>

Under the two international instruments, age is the sole dominant factor for being a child. But in reality, there are challenges posed by plurality of the African legal systems which will hinder the enforcement of age. African customary law is recognised as law in all African states alongside the received Western system of law.<sup>72</sup> This is as a result of the continent’s colonial heritage. The received laws of the colonial masters were introduced and a large portion of the indigenous legal system (as long as it passes the repugnancy test) was retained. There are a number of challenges regarding who a child is, and or what they are able to do. In some jurisdictions the national laws are still contradictory. Various national legislations in the region define the ‘child’ in different ways depending on the purpose of the particular legislation in which the word is being used. For example, in Nigeria, under the Children and Young Persons Laws,<sup>73</sup> a child is someone below fourteen years, while the Nigerian Child Rights Act<sup>74</sup> defines the child as one less than eighteen years. In Uganda, the Constitution places the age of marriage at 18 years, whereas some marriage laws provide for marriage at the age of 16 years or below. As long as there are these differences the gap between law and practice remains wide. Region-wide agreement on the definition of a child is the definition in the ACRWC.<sup>75</sup> It is noted that provisions relating to duration of childhood are different in the various national legislations in the region, which calls for harmonisation of the laws so that there is a uniform age for childhood.

## 5.2 Best Interests of the Child - Article 3 CRC; Article 4 ACRWC

Article 3 CRC introduces the principle of the ‘best interests of the child as a primary consideration’ in all actions concerning the child. It is noted that this principle resonates in numerous articles in the CRC<sup>76</sup> which is a reflection of the standard with which compliance of the provisions requirements of the CRC will be measured.<sup>77</sup> The most important element of human rights law relating to children is that children’s best interests are given paramount consideration. Article 4(1) of the ACRWC states that the best interests of the child must be ‘the’ primary consideration in all action concerning children and this implies that it is a principle which will usually take priority over others.<sup>78</sup> Article 3 CRC provides that; ‘the principle of the best interests of the child is ‘a’ primary consideration’ meaning that other principles can be taken into account alongside it. Whereas, Art 4(1) ACRWC has a firmer definition and higher standard than that contained in the CRC.

<sup>65</sup> Ibid.

<sup>66</sup> Article 2 ACRWC

<sup>67</sup> Article 1 CRC

<sup>68</sup> ibid

<sup>69</sup> Article 2 ACRWC

<sup>70</sup> ibid

<sup>71</sup> Lloyd, A, (2002) ‘A theoretical analysis of the reality of children’s rights in Africa: An introduction to the ACRWC’, vol2 no1 African Human Rights Law Journal pp11-32 at 20

<sup>72</sup> Park, A.E. (1976), *The Sources of Nigerian Law*, Lagos: African University Press, p.18.

<sup>73</sup> S.2 Children and Young Persons Law of Nigeria

<sup>74</sup> Nigeria Child Rights Act 2003.

<sup>75</sup> ibid

<sup>76</sup> Articles 4, 9, 18, 20, 21 & 37 CRC

<sup>77</sup> Cohen, C.(1993), ‘The Developing Jurisprudence of the Rights of the Child’, 1: 6 *St Thomas L. Rev* at, p. 19.

<sup>78</sup> ibid

The difference in using the definite article ‘the’ instead of the indefinite ‘a’ has significant practical implications.<sup>79</sup> The best interest of the child have been the guiding principle also in matrimonial causes matter, when deciding to whom to award custody of a child on divorce, and also when there are competing interests of other parties- parents, foster care providers and the state. Although the principle of the ‘best interests of the child’ has up till now been part of family law in matrimonial causes as relates to guardianship and custody issues. Both the CRC and ACRWC revolutionise the importance of this principle by extending its application to matters relating to children; in private law (in matters involving parents and families) or public law (on matters by government, public authorities as duty bearers). The best interest under these circumstances as is determined dependently on the context of the case or legislation. It is shown that ‘best interest’ principle in the CRC and ACRWC is in keeping with the long standing history of endeavouring to keep the best interest of the child at the vanguard of judicial and legislative activities.

### 5.3 Right to Education - Articles 28 and 29 CRC; Article 11 ACRWC

Education is an indispensable means of realising other human rights.<sup>80</sup> It is a means for the development of the individual and society. So right to education is a development right. Education is a vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty.<sup>81</sup> The participation rights recognised by the CRC proceed on the premise that the child has a right to be heard. To ensure the child’s right to be heard, the CRC grants the child the right to freedom of expression and also the right to be heard in matters affecting his/her welfare. It should be noted that all these can only be demanded by the child if she/he has at least basic education, also the child’s right to survival such as provision of adequate nutritious food and clean drinking water can only be recognised or learnt through provision and access to basic education. In essence, right to education is crucial to the enjoyment of all the other rights. Article 28 CRC obligates State parties to make primary education compulsory and free to all. Similarly, Article 11(3)(a) ACRWC obligates State parties to provide free and compulsory basic education. ACRWC goes further, requiring states to take special measures to ensure access to education for ‘female, gifted and disadvantaged children.’<sup>82</sup> Furthermore, it places an obligation on states to ensure that pregnant girls are allowed to continue with their education.<sup>83</sup> In Africa, girl child education is not encouraged and pregnant girls drop out of school and their education terminates, but all these have been addressed and taken care of in the ACRWC. In other words, pregnant girls have a right to education after giving birth as pregnancy does not extinguish the child’s opportunity of having access to education. In keeping with its resolve to promote African culture, ACRWC directs state parties to ensure that school curriculum promotes African morals, traditional values and culture.<sup>84</sup> The CRC does not have such a provision.

The CRC Article 28 provides information to students about appropriate secondary vocation and general education. It differs from the ACRWC here because it qualifies the secondary education specifically grouping into general and vocational secondary education. The ACRWC does not mention vocational secondary education. This is a serious omission, because vocational secondary education is useful in Africa education as it will have enabled the child to learn a trade on completion of his or her secondary education. Article 11(5) ACRWC requires State Parties to ensure that school discipline is administered in a manner consistent with child’s human dignity and in conformity with the charter. This can be inferred to mean the prohibition of corporal punishment in schools, which might be controversial in the African traditional setting. Corporal punishment is a child rights violation. The ACRWC inserts this provision because in African traditional setting, use of corporal punishment at school is usually deemed acceptable. Some states have enacted laws banning it. For example, corporal punishment is unlawful in schools and other education institutions under the South African Schools Act.<sup>85</sup> The reality is that corporal punishment still exists in most African States. The big question to be asked is; if adults are not beaten or punished in a painful way when they make mistakes, why should children suffer punishment for making mistakes, considering the fact that they are even younger and more vulnerable than adults?

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<sup>79</sup>ibid at 17

<sup>80</sup> CESCR General Comment 13 The Right to Education E/C.12/1999/10 para 1

<sup>81</sup> ibid

<sup>82</sup> Article 11(3) (e) ACRWC

<sup>83</sup> Article 11(6) ACRWC

<sup>84</sup> Article 11(2)(c) ACRWC

<sup>85</sup> Article 10, 1996 South African Schools Act.



State should promote alternative forms of discipline in family and schools administered in a manner consistent with the child's dignity and in conformity with the ACRWC. CRC does not specifically mention prohibition of corporal punishment in schools, but it obliges States parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse.<sup>86</sup>

#### **5.4 Right to Health - Article 24 CRC; Article 14 ACRWC**

The right to health like right to education, food, clothing and adequate standards of living are included in international human rights law as economic social and cultural (ESC) rights. Article 4 of the CRC provides that; [... ]With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and where needed within the framework of international cooperation. The legal protection of ESC rights including right to health of the child is very important, because Africa is the presently the one of continents in the world that is most in need of ESC rights for its children but sadly the realisation of this is utopian.

Article 24 CRC obligates that; State recognise the right of the child to the enjoyment of the highest attainable standard of health and state parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. The CRC specifically mentions this to be the State Parties responsibility. Though the terms 'recognise' and 'strive to' impose weak obligations.<sup>87</sup> It was remarked that Art 24 is geared especially for health requirements of developing countries.<sup>88</sup> The article requires state parties to take measures to address particular health issues, such as reducing infant mortality, ensure provision of adequate nutrition and safe water, appropriate health care for expectant mothers among several others.

Article 14 ACRWC reads: "Every child shall have the right to enjoy the best attainable state of physical mental and spiritual health." This is suggesting that a child has the right to the "best attainable" state of health means that this is according to available resources. It is asked if it is the parents' available resources or the State Parties' that is meant? The available resource of the country is likely meant, because a poorer country might not be able to afford the level of health services of a country which is far richer. Article 14 ACRWC, fails to mention the issue of quality care, it did not set any minimum standard of quality of care for the health issues the state is to undertake. It means that a State just needs to provide minimum quality of care to its children and says that is its best attainable state of health. ACRWC includes a provision allowing for the participation of NGOs, local communities and the beneficiary population in the planning and management of basic health services for children.<sup>89</sup> The CRC incorporates provisions for the elimination of traditional harmful cultural practices, the development of primary health care and the provision of rehabilitation services.<sup>90</sup> On the issues of abolishing traditional practices which are prejudicial to the health of the child the ACRWC has similar provision<sup>91</sup>. The lack of enjoyment of the right to health has had disproportionate effect on the poor and other vulnerable or disadvantaged children in Africa. This is as a result of poverty, underdevelopment and corruption which are prevalent in the continent. The most important is that States are to undertake all possible measures to ward realisation of the right to health of the child, especially the disadvantaged groups.

#### **5.5 Right of the Child to be protected from Economic Exploitation: Article 32 CRC; Article 15 ACRWC**

Children in Africa are engaged in the worst forms of child labour, particularly in agriculture and domestic service. Children also work as hawkers, carrying heavy loads and the female ones are vulnerable to sexual abuse and sexually transmitted diseases. Poverty remains one of the key factors pushing children to work in Africa as children need to bring in additional income into the family to augment the parents' income. Article 15 ACRWC provides that every child shall be protected from all forms of exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral and social development.

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<sup>86</sup> Article 19(1) CRC

<sup>87</sup>Eide, A, &Eide, W.B., ,(2006) ' Article 24, The Right to Health', in: A. Alen, J. Van de Lanotte, E. Verhellen, F.Ang, E. Berghmans& M. Verheyde (eds), A Commentary on the United Nations Convention on the Rights of the Child Leiden: MartinusNijhoff Publishers, p.1.

<sup>88</sup> ibid

<sup>89</sup> Article 14(2)(i) ACRWC.

<sup>90</sup>Articles 24(3) &39 CRC.

<sup>91</sup> Article 21(1)(a) ACRWC.

Some main concerns inferred from this provisions are; child has a right not to be economically exploited, meaning he should not be used for economic gain e.g. child slavery, prostitutions and begging. A child could also be exploited economically by his employer, working long hours with wages that does not commensurate with the work. A child's right to be free from work likely to be hazardous is prohibited, meaning that the child should be protected from work that is physically dangerous or life threatening; employers are urged from this provision to keep children away from known hazards of the place of work being children they are vulnerable and physically weak.

The CRC obligates States Parties to provide for a minimum age for admission to employment and also to provide for appropriate regulation of the hours and conditions of employment.<sup>92</sup> The ACRWC does not contain such provision. Lots of children in Africa who work as domestic workers are as young as eight years of age. These children working in domestic service do arduous tasks, work long hours. The ACRWC article is not as detailed as the CRC's article on child labour, the CRC includes two other rights<sup>93</sup>; right to be free from work that interferes with a child's education and also right to be free from work harmful to the child's health. A child's education is affected by work that puts excessive time burden during school period, and therefore impedes the child's school work, also excessive long working hours may also have adverse effect on the child's health. A child is denied his or her right to education due to having to manage the dual roles of being a worker and a pupil. ACRWC needs to include the minimum age, and provisions related to light work conforming to international standards.

### **5.6 Protection against Child Abuse and Torture: Articles 19 & 37 CRC; Article 16 ACRWC**

Abuse means any unlawful act or threatened act that results in any physical, mental or sexual injury or harm that causes or likely to cause the child's physical, mental or emotional health to be significantly impaired.<sup>94</sup> Child abuse and neglect rob so many children of their childhood and their sense of security and well-being. In Africa, children are exposed to some form of physical, sexual and psychological abuse in the home, school and community. This happens either in the name of what tradition dictates as discipline by adults Both the CRC and ACRWC have provisions which require that children be protected from physical and mental violence. States Parties to the CRC are obligated to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>95</sup> Similarly, the ACRWC protects the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.<sup>96</sup> From the two child's rights instruments, the child has a right to be protected and State Parties are mandated to take specific legislations, administrative, social and education measures to protect the child from all forms of abuses and torture. In recognition of the African culture, Article 20(1)(c) ACRWC places responsibility on the parents, that in the upbringing of the child, domestic discipline could be administered with humanity and in a manner consistent with the inherent dignity of the child. There is no similar provision in the CRC. In Africa, domestic discipline such as flogging the child when administered by a parent or other authority figure within the child's family has been deemed an acceptable form of discipline. This appears to leave the door open for the physical and humiliating punishment of children by their parents. In administering punishment, parents or guardian of the child should ask if the punishment is in conformity with the Charter, as stipulated in Art 11(5). The crux is that domestic punishment administered in a manner inconsistent with the child's dignity is prohibited.

### **5.7 Prohibition of Harmful Social and Cultural Practices - Article 24(3) CRC; Article 21 ACRWC**

CRC approaches harmful social and cultural practices from the perspective of their impact on the right to health.<sup>97</sup>

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<sup>92</sup> Article 32(2) CRC

<sup>93</sup> Article 32(1) CRC.

<sup>94</sup> Van Bueren note 6 p.45.

<sup>95</sup> Article 19(1) CRC

<sup>96</sup> Article 16(1) ACRWC

<sup>97</sup> Article 24 (3) CRC.

ACRWC deals with them from a broader perspective which includes health but also discrimination, dignity and development.<sup>98</sup> Article 21 provides that state parties should take all measures to abolish harmful social and cultural practices as prejudicial to the child's health and also discriminating to the child on the ground of sex or other status. It cannot be gainsaid that some African cultural practices militate against the protection of children from harmful cultural practices. A frequently cited example of such practice is female genital mutilation (FGM).<sup>99</sup> The ACRWC also explicitly sets eighteen as the minimum age for marriage.<sup>100</sup> In reality child marriage and betrothal is prevalent in African traditional setting despite eighteen years age stipulation in the ACRWC. At the Grand Bay,<sup>101</sup> all African States were urged to work assiduously towards the elimination of discrimination against women and abolition of cultural practices which dehumanises or demean women and children.<sup>102</sup> Sadly, this is yet to be reflected in reality in the lives of children in Africa.

### 5.8 Prohibition of Discrimination -Article 2 CRC; Articles 3 and 26 ACRWC

Discrimination is a particular form of differentiation.<sup>103</sup> It is differentiation on illegitimate grounds, based on attributes or characteristics which have potential to impair the fundamental dignity of persons as human being or to affect them seriously in a comparable manner.<sup>104</sup> It occurs when law or conduct for no good reasons treats some people as inferior or incapable or less deserving of respect than others.<sup>105</sup> The principles of equality and non-discrimination are embedded throughout the human rights framework and prescribe that all rights must be 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The principle of non-discrimination in education is an immediate obligation, and it plays a key role in empowering marginalised groups such as women and girls, and helps to combat wider discrimination within societies. Verheyde has also pointed out that the principle of equality implies that special attention should be given to specific groups which are particularly vulnerable to discrimination in education and which consequently require special policies.<sup>106</sup> This was also upheld by the Committee of Experts of the ACRWC in its decision on the complaints brought before it by the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent against the government of Kenya in 2011. The Committee's recommendation was that the Government of Kenya should adopt a short-, medium- and long-term plan, including legislation, administrative and other measures to ensure the fulfilment of the right to education of these children. The key principle of non-discrimination mandates equal rights for all.

Article 3 ACRWC imposes a duty on the State Parties to ensure that every child within its jurisdiction enjoys all the rights set forth in the African Child Charter without discrimination of any kind irrespective of the child's parents or legal guardian's race, colour, sex, language, religion, political or other opinion, nationality, social origin, fortune, birth or other status. The article does not only protect the child from discrimination, but by extension, protects the child's parents too. For example, a child of an unmarried mother can inherit from the late father's estate, as no child should be subjected to any disability or depravity as a result of circumstances of his or her birth.<sup>107</sup> According to Van Bueren, '[...] the most enduring form of unequal treatment is discrimination between marital and non-marital children'<sup>108</sup> Art 2 CRC, includes non-discrimination on ground of disability, this is not in the African Child Charter.<sup>109</sup> Of particular concern is in Africa is discrimination against the girl child, children with disabilities, street children and children of minority groups. Bearing in mind that it is a common practice in Africa for the handicaps to be discriminated against as a result of their disabilities, article 13 ACRWC specifically protects the right to protection for children with disability.

<sup>98</sup> Article 21(1)(a) ACRWC.

<sup>99</sup> Sloth-Neilsen, J. (2007), 'Surveying the research landscape to promote children's legal rights', 7 African Human Rights Law Journal at 347.

<sup>100</sup> Article 21(2) ACRWC.

<sup>101</sup> 1<sup>st</sup> OAU Ministerial Conference on Human Rights, April 1999.

<sup>102</sup> "Grand Bay Declaration and Plan of Action" OAU DOC CONF/HRA/DECL(1) para. 6.

<sup>103</sup> Currie, Ian & De Waal, J. (2006) The Bill of Rights Handbook, 5<sup>th</sup> ed, Juta

<sup>104</sup> ibid

<sup>105</sup> ibid

<sup>106</sup> Verheyde, M., (2006) A Commentary on the United Nations, (the Right of the Child, Article 28: The Right to Education, Leiden: Martinus Nijhoff Publishers,.

<sup>107</sup> S.42(2) 1999 Constitution of Nigeria

<sup>108</sup> Van Bueren, G, The International Law on the rights of the Child note 6 p.4.

<sup>109</sup> Art 2 CRC

Gender equality has been a focal point at several international summits and conferences since the 1990s.<sup>110</sup> Committee of Experts of the ACRWC in its decision on the complaints brought before it by the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent against the government of Kenya in 2011.<sup>111</sup> The Committee's recommendation was that the Government of Kenya should adopt a short-, medium- and long-term plan, including legislation, administrative and other measures to ensure the fulfilment of the right to education of these children.<sup>112</sup>

### 5.9 Setting Minimum age for Military Service

The ACRWC provides that children shall not take a direct part in hostilities and no child shall be recruited for military service.<sup>113</sup> On the other hand, CRC sets age of recruitment into their respective domestic armed forces fifteen years.<sup>114</sup> This is lower than the ACRWC provision. ACRWC forbids the use of children as soldiers.<sup>115</sup> It is a common place now that children due to the rudimentary technique are manipulated more easily than adults. Since the last ten years children have actively been involved in war as children soldiers. Up till the past seven years some children in Liberia, Sierra Leone did not know peace other than war and violence. Such children in their childhood have been manipulated to take part in repetitive murder as a result of which several were killed or tortured.<sup>116</sup> As African children are at the risk of being used as soldiers prohibiting children from military service is a welcome development.

### 6.0 Duties and Responsibilities of the Child - Article 31 ACRWC

Art 31 ACRWC assigns duties to the child with respect to certain entities. CRC does not have similar a provision on the duties and responsibilities of the child. The ACRWC gives express recognition to the idea that children too have responsibilities depending on their evolving capacities.<sup>117</sup> These are responsibilities towards family and society to work for the cohesion of the family, to respect parents, superiors and elders and to preserve African cultural values. There are two qualifications to this article: the duties of the child are subject to his or her age or ability and are subject 'to such limitations as may be contained in the present Charter.' This article challenges the traditional view in international human rights law that it is states which are primarily responsible as duty bearers and reflects the African concept that the family is the basic unit of society.

This is an innovation in the ACRWC which follows its 'mother' charter, the ACHPR which has a similar provision in Article 27 of the ACHPR. Article 31 of the ACRWC enumerates the duties of the child to the family, community, the nation and to the region. The duties of the child are subject to his/her age and ability.<sup>118</sup> This is a reflection of the African culture because children participate in certain chores in accordance with their ages. For example, a child between the ages of five to seven can be sent on errands to deliver messages within the community. An eight year old girl is required to assist in looking after the younger siblings and cleaning the house. A boy of similar age oversees small livestock and assists in nurturing agricultural farms in the compound.

<sup>110</sup>The 1990 World Conference on Education for All (Jomtien), Article 3(3) of the World Declaration on Education for All; the 1995 World Conference on Women (Platform for Action, Beijing (UN Doc. A/CONF.177/20/Rev.1,1996), paras 263 and 279); the 1990 World Summit for Children (Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990, para 10); and the 2000 World Education Forum (Dakar) (Articles 7(ii) and (v) and 8(vi) of the Dakar Framework for Action.

<sup>111</sup> 002/09 IHRDA and Open Society Justice Initiative on behalf of children of Nubian descent v. Kenya. 22 March 2011.

A complaint was brought before the Committee of Expert of the African Charter on the Rights and Welfare of the Child alleging violation of Article 3 of the ACRWC that the children of Nubian descent were treated differently from other children in Kenya. It was also alleged that the children of Nubian descent had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not composed of children of Nubian descent, which is a violation of Article 11(3) ACRWC. They claimed that there is de facto inequality in their access to available educational services and resources.

<sup>112</sup> ibid

<sup>113</sup> Article 22(2) ACRWC

<sup>114</sup> Article 38(2) CRC.

<sup>115</sup> Article 22 ACRWC

<sup>116</sup> Bisset, C. (1990) 'UN International Treaty on Children's Rights', Vol11 No 3, Infant Mental Health Journal, p. 216.

<sup>117</sup> Article 31 ACRWC

<sup>118</sup> ibid

A teenage boy assumes more responsibilities assisting on the farm and the teenage girl performs duties relevant to the preparation of food and other household chores. This clearly shows that this responsibility of the child in accordance with his or her age protects the child against harmful or hazardous work. The child also has the duty to work towards the cohesion of the family. This is a reinforcement of the extended family structure in a traditional setting. The family includes not only parents and siblings but the extended family such as aunts, uncles and grandparents. The child is under duty to uphold family unity which undertakes the task of bringing up the child so the child must maintain the kinship system. The child's duty to work for the cohesion of the family is merely a moral duty. The child is further under 'duty to respect' his parents, superiors and elders at all times.<sup>119</sup> The phrase 'duty to respect ... at all times' generated debate and argument, for example Van Buren cautioned that the responsibility to respect parents and elders at all times is 'too unquestioning and general'.<sup>120</sup> In a situation where family members are abusing or exploiting children, to maintain that children are obliged to respect the abuser is a dangerous precedent.<sup>121</sup> Ncube along the same vein points out that the duty to respect parents could easily be relied upon to curtail children's rights to freedom of expression, privacy and participation in decision making.<sup>122</sup> Chirwa also remarks that this may undermine the child's right to participate in decision making in matters affecting the child in particular.<sup>123</sup> On the other hand, Sloth Nelson and Mezmur, both see this provision from a different point of view.<sup>124</sup> They point out that the duty to respect parents, elders and superiors, is akin to positive traditions that the African Children's Charter identifies as constituting an asset in the upbringing of African children. They elaborate further that it does not entail docility or unquestioning subservience.<sup>125</sup> That the opposite of duty to respect is a license to disrespect and seen this way drives home the point that the intention of the drafters was not to silence children but rather to celebrate the positive aspect of the African child-rearing practices in nurturing a respectful society. Associating with Sloth Nelson and Mezmur it is submitted that the ACRWC will not contain provisions which will contradict the protection of the rights of the child. Therefore, the inclusion of duties for the child in the ACRWC is a step in the right direction. The child is also under a duty to serve his or her national community. Children's involvement in the community as a duty could take different forms such as community self-help projects whereby the youth build health centers or community halls in their communities. Article 31 expands the ACRWC from not just a catalogue of only rights of the child, but to also include duties required from the child.

### 7. Committee Articles 42-45 CRC, Articles 32-45 ACRWC

The rights and duties created by the two treaties are enforced through the monitoring bodies, the committee for the CRC<sup>126</sup> and committee of experts for the ACRWC (CERWC).<sup>127</sup> Their functions are similar, except that the CERWC in addition, accepts communications from individuals.<sup>128</sup> The CERWC had only received two communications, and had made a decision on one of these two-Kenya: Nubian children in Kenya v Kenya.<sup>129</sup>

The CRC Committee, like the ICESCR Committee, publishes its interpretation of the content of its provisions in the form of General Comments on thematic issues. General Comments carry considerable weight and serve an important function of defining and clarifying interpretation of provisions or other related topics in the instrument in order to assist and promote further the implementation of the Convention. General Comments, though not legally binding, serve as important jurisprudential functions to the meaning of rights and duties under the CRC. It is important to consult the General Comment when assessing the State party's obligation in respect of a particular right because it elaborates the specific right in question.

<sup>119</sup> *ibid*

<sup>120</sup> Van Buren, Gnote 6, 76.

<sup>121</sup> *ibid*

<sup>122</sup> Ncube, (1997), 'Recognition and monitoring children's rights in Africa. Challenges and Prospects' in: E. Verhellen (ed.) *Children's Rights*, (Belgium, Children's Rights Centre, University of Ghent), 612.

<sup>123</sup> Chirwa, D., (2002) 'The Merits and Demerits of the ACRWC', *10*: (2), *International Journal of Children's Rights*, 157-177.

<sup>124</sup> Sloth Nelson and B.D Mezmur, 'A Dutiful Child, the Implication of Article 3 of the African Children Charter', *Journal of African Law*, **52**: (2), 177.

<sup>125</sup> *ibid*

<sup>126</sup> Article 42 CRC

<sup>127</sup> Article 32 ACRWC

<sup>128</sup> Article 44(1) ACRWC.

<sup>129</sup> 002/Com/002/09 IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya,

Since 2001, the CRC Committee has issued seven General Comments which cover various topics including the aims of education, adolescent health, early childhood, and HIV/AIDS. To date, the Committee of Experts on the Rights and Welfare of the Child (CERWC) has issued 2 General comments. The first one deals with article 30 of the Charter and focuses on “children of incarcerated imprisoned parents and primary caregivers”. It was adopted in November 2013, and aimed at ensuring that non-custodial sentences are always considered first for pregnant women and mothers of young children, and the establishment of alternatives to their detention. General Comment N° 2 is on the right to a name and nationality recognised by article 6 of the Charter. Notwithstanding its heading (Name and nationality), Article 6 of the African Charter on the Rights and Welfare of the Child recognizes three interlinked rights namely: the right to a name (Art 6 (1)), the right to birth registration (Art 6(2)) and the right to a nationality (Art 6 (3)). It also provides for state obligations with regard to the implementation of the right to a nationality (Art 6(4)). The purpose of this General Comment is to give the meaning and scope of these rights and explain the corresponding obligations of the State parties to the Charter for their implementation.

### **Conclusion**

It has been shown that the two child’s instruments both share the key principles of non-discrimination, the best interests of the child, children’s participation and the survival and development of the child. It might be rightly argued that the ACRWC is a duplication of most of the rights already in the CRC.<sup>130</sup> Although this might be correct, it must be noted that duplication of these rights that are in the CRC and now in the ACRWC is not a problem but a benefit, as it brings additional attention to important issues such as right to health, education and identity. So duplication here has its potential benefit to the rights of children in Africa, as it makes available additional enforcement tools to enforce children’s rights. These aspects should not inhibit or prevent another child’s rights instrument. The duplication is to stress the need for state parties to make available additional measures of enforcement for effective implementation of the treaty.

The ACRWC is more explicit about certain issues relevant in Africa which are not in the CRC. For example, factors disadvantaging the girl-child are considered. As children are used as child-soldiers, it went beyond the 15 year age limit for military recruitment stipulated in the CRC.<sup>131</sup> In particular, ACRWC challenges traditional African views that conflict with the rights of the child such as attitudes concerning child marriage, parental rights and obligations towards their children and children born out of marriage. ACRWC also gives express recognition to the conception that children have responsibilities in the community depending on their evolving capacities. However, ACRWC is not yet very well known within the continent amongst children, civil society, the media or governments. It has yet to be ratified by 7 out of 54 AU Member States (Central Africa Republic, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Federal Republic of Somalia, Democratic Republic of São Tomé and Príncipe, Republic of South Sudan and Tunisia).<sup>132</sup> Whereas, the CRC, has been ratified by all African countries,<sup>133</sup> whereas, CRC has been ratified by all African States except the newly created state of South Sudan.<sup>134</sup> The two instruments should be used side by side to work towards the promotion and protection of children’s rights in Africa. There may be instances where one will provide more protection to children than another. The two instruments allow for provisions in other international laws or State Parties national laws which are ‘more conducive’ to the realisation of the rights of the child to take precedence.<sup>135</sup> In other words, if there is a situation where the ACRWC, the CRC or indeed a national legal system provides a higher level of protection for children then the higher level should be relied upon. On balance, both the CRC and the ACRWC has had remarkable impact on the lives of millions of children worldwide, both recognise children as rights holders with a voice and a contribution to make to the wider community. Both aim to realise the children’s survival, development, protection and participation rights. Since the ratification of both treaties, it is evident that African states have become increasingly child-friendly.

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<sup>130</sup> Right to Education: Art 11(3)(e) ACRWC is similar to Art 28 (1)(e) CRC

<sup>131</sup> Article 38 (3) CRC & Article 22(2) ACRWC.

<sup>132</sup> [http://www.africanchildinfo.net/index.php?option=com\\_k2&view=item&id=6915](http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915)

<sup>133</sup> 20 January 2015 - The United Nations today applauded Somalia’s ratification of the Convention on the Rights of the Child (CRC). Available: [http://www.africanchildinfo.net/index.php?option=com\\_k2&view=item&id=6915#.VMfuXdIvnYo](http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvnYo) accessed 27 January 2015.

<sup>134</sup> *ibid*

<sup>135</sup> See Article 41 of the CRC and Article 1(2) ACRWC)

Many countries have reduced infant mortality rates, reduced numbers of underweight children, increased child immunisation services and expanded access to improved sanitation facilities and safe drinking water sources. Most of them also increased budgetary allocation to health and education.<sup>136</sup> In sum, these two instruments codify global commitments shared almost universally by most countries, that all children everywhere have; the right to survive and develop, to be protected from violence, abuse and exploitation, to have their views respected and to have actions concerning them be taken in their best interests. In order to ensure that African children across the region enjoy the two children's rights 'remedies', it is crucial that States Parties ensure that these rights enjoy sufficient cultural support in the communities within which the children live. In conclusion, the ACRWC is a catalogue of children's rights, not only founded upon CRC, but also reflective of and informed by African cultural values and heritage. This debunks the perception of children's rights as practices and ideologies perceived or described as non-African favour.

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