

REGIONAL DEVELOPMENTS

MAKING PROGRESS: THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD AND THE RIGHTS OF CHILDREN WITH DISABILITIES

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1 Introduction

The rights of children on the African continent are enshrined within the African Charter on the Rights and Welfare of the Child (ACRWC). This Charter has been ratified by 46 States¹ on the continent and, as a result, many states parties to the ACRWC have harmonised their legislative and policy framework in a bid to domesticate the provisions of the Charter as well as other relevant international and regional treaties.² The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is established as the body to promote the ratification of the ACRWC and monitor the domestication of this treaty by states parties.³

This subsection provides a brief overview of the ACRWC as the main instrument underpinning the normative framework on the rights of children with disabilities in Africa⁴ and reports on recent developments in the work of the African Children's Committee.

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1 According to the list of ratified states parties on the website of the African Committee of Experts on the Rights and Welfare of the Child. However, the author is aware that this list might be outdated as Swaziland – who is reported not have ratified the ACRWC has subsequently ratified. See <http://AfricanChildrensCommittee.org/wp-content/uploads/2011/03/French-and-English-AfricanChildrensCommittee-Updated-Status-of-the-ACRWC.pdf> (accessed 30 August 2013).

2 For example, Lesotho passed its Children's Protection and Welfare Act on 8 June 2011; on 30 March 2011 Zanzibar's Revolutionary Council passed its Children's Bill into an Act; the Liberian Children's Law was adopted on 4 February 2012, amongst others.

3 Art 32.

4 The normative framework for addressing the rights of children with disabilities in Africa consists of multiple intersecting treaty provisions, including art 7 of the United Nations (UN) Convention on the Rights of Persons with Disabilities and art 23 of the UN Convention on the Rights of the Child (CRC). However, this section is confined to the ACRWC.

2 African Charter on the Rights and Welfare of the Child

2.1 The substantive provisions

The scope of application of the ACRWC is inclusive of all children and the rights contained within this treaty apply equally to all children. However, special recognition is given to children with disabilities in article 13.

Article 13(1) provides that ‘every child who is physically or mentally disabled’ has the right to special measures of protection in keeping with his or her physical and moral needs. This entrenches a broad protective framework to children with disabilities in society and is linked to promoting their independence and participation in communities.

Article 13(2) contains more detailed provisions than the broad framework in article 13(1).⁵ An important element in this sub-article is that it goes beyond an obligation on states parties only towards a disabled child, but also places obligations on states parties towards *care-givers* of children with disabilities. This has been correctly argued to provide a higher level of protection for disabled children by African states that have ratified the ACRWC.⁶ What article 13(2) is silent on are key important socio-economic obligations that should have been given express recognition, specifically the rights to education and health care. Needless to say, the provisions of articles 11⁷ and 14⁸ would equally apply to children with disabilities. However, the specificity required in both education and health care access for children with disabilities is lost within such a broad framework. Article 13(2) further speaks of training and preparation for employment, which could suggest that children with disabilities should only be ‘trained’ with the goal of future economic activity, as opposed to the provision of education from a rights-based perspective.

Article 13(3) relates to accessibility and the duties of states parties in this respect. Even though such special provisions are welcomed, the sub-article could arguably be limiting when it states ‘... and other places to

5 Art 13(2) reads as follows: ‘States parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development’.

6 See M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 90.

7 Art 11 contains the education provisions of the ACRWC.

8 Art 14 contains the health provisions of the ACRWC.

which the disabled may legitimately want to have access to'. There is no definition of what is meant by 'legitimately'.

Both sub-articles 13(2) and 13(3) are limited in their application in that the obligations placed on states parties are subject to available resources. Article 13(3) is formulated a little more strongly in that it requires progressive realisation. It therefore leaves an open-ended obligation on states parties to comply with the provisions of article 13, but at the same time is not prescriptive in the necessary achievements to be reached by states parties. Even though treaties cannot provide prescriptions of necessary achievements, it is left within the mandate of the relevant treaty body to provide guidance in this regard.⁹

2.2 The mandate of the African Children's Committee

The mandate of the African Children's Committee is contained in part three of the ACRWC.¹⁰ This mandate can be summarised as promoting and protecting the rights within the ACRWC; monitoring the implementation by states parties; interpreting the provisions of the ACRWC; and performing any further tasks entrusted by the Heads of State and Government of the African Union. These are all 'standard' functions of a treaty body and can be found within multiple treaties in which monitoring bodies of this nature are established.¹¹ The African Children's Committee has developed guidelines to give effect to its mandate, which include guidelines to conduct investigations.

The African Children's Committee is also mandated with receiving communications relating to a violation of the provisions of the ACRWC. The Committee has developed guidelines for the consideration of communications and at the time of writing, has finalised one communication in the matter of *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*.¹² It also has one pending communication that relates to the situation of children in the conflict

9 An interpretation by the African Children's Committee of art 13 of the ACRWC is recommended, including the prescriptive achievements that are necessary to implement arts 13(2) and 13(3).

10 Art 42.

11 For example see art 30 of the African Charter on Human and Peoples' Rights where the African Commission on Human and Peoples' Rights is established or arts 43, 44 and 45 of the Convention on the Rights of the Child that establish and codify the mandate of the UN Committee on the Rights of the Child.

12 Decision: No 002/Com/002/2009. A copy of this judgment can be downloaded here: <http://www.acerwc.org/wp-content/uploads/2011/09/002-09-IHRDA-OSJI-Nubian-children-v-Kenya-Eng.pdf> (accessed 29 August 2013). The facts and merits of this case will not be discussed in this article. For a further analysis of this decision see: E Durojaye & E 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* 564.

region of northern Uganda. The Committee is still in the process of investigating this matter.

The African Children's Committee has encountered a number of structural stumbling blocks in exercising its mandate, such as a lack of sufficient time for Committee meetings, especially now that the time has come for states parties who have ratified to submit country reports.¹³ The Committee has also failed to intensify its efforts or adopt new ways and strategies to ensure that states parties to the ACRWC submit country reports on time.¹⁴ Despite these limitations, the Committee has made some inroads in recognising and promoting the rights of children with disabilities on the African continent.

3 Recent activities of the African Children's Committee in relation to children with disabilities

During its 52nd Ordinary Session in 1990, the Organisation of African Unity Council of Ministers adopted a resolution to declare the 16th of June the Day of the African Child, to be commemorated every year.¹⁵ It has been correctly argued that this 'is an optimal date for the Committee to popularise the ACRWC, and is a means to ensure that its objectives are translated into reality'.¹⁶ The African Children's Committee, during its 17th ordinary session, adopted the theme for the 2012 Day of the African Child to be '[t]he rights of children with disabilities: The duty to protect, respect, promote and fulfil'.¹⁷

Upon adoption of a theme, the African Children's Committee develops a concept note that addresses the problem – in this instance the promotion and protection of the rights of children with disabilities – and

13 See J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336 351.

14 See J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 *African Human Rights Law Journal* 534 541.

15 Council of Ministers, 52nd Ordinary Session, 'Resolution on African Decade for Child Survival, Protection and Development' CM/Res.1290 (LII). See: http://www.au.int/en/sites/default/files/COUNCIL_EN_3_8_JULY_1990_COUNCIL_MINISTERS_FIFTY_SECOND_ORDINARY_SESSION.pdf (accessed 29 August 2013). The significance of the date of 16 June is that it recalls and commemorates the 1976 uprisings in Soweto, when a protest by school children in South Africa against apartheid-inspired education resulted in the public killing of the unarmed young protesters by police officials.

16 See A Lloyd 'Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: Recent developments' (2003) 3 *African Human Rights Law Journal* 329 337.

17 See L Wakefield & UM Assim 'Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child: Recent developments' (2011) 11 *African Human Rights Law Journal* 699 714.

gives guidance to states parties in respect of both the lead-up to the Day of the African Child and subsequent activities. States parties are expected to report to the African Children's Committee on its celebrations on the theme and, importantly, on measures in place to further realise the rights mentioned in the theme. These measures are crucial to ensure that such commemorative days are not just once-off events with very little impact, but rather are sustainable in order to ensure that the relevant rights contained within the ACRWC are realised in a systematic manner.

In relation to the Day of the African Child 2012 theme on children with disabilities, the African Children's Committee identified six areas of concern, which would be in line with the *Call for Accelerated Action*¹⁸ on children's welfare on the continent. These six areas were the links between poverty and disability; social attitudes, stigma and discrimination; access to education; violence against children with disabilities; the importance of statistics and data collection; and the right to be heard and to participate.¹⁹

The Committee also proposed the following four activities to be undertaken by states parties in addressing these areas of concern:

- (a) Compile and adopt national plans of action to protect, respect, promote and fulfil the rights of children with disabilities;
- (b) Conduct and review national legislation and policy frameworks to align it with the normative human rights framework at both a regional and international level;
- (c) Strengthen all areas of service provision to accommodate and include children with disabilities; and
- (d) Introduce or reinforce accessible complaints mechanisms for children and families with disabilities.²⁰

These activities go beyond celebratory or lamenting events that are normally associated with days of this nature. The then chairperson of the Committee, MA Kabore, reiterated this during her opening remarks at its 19th ordinary session when she said that '... such activities could be envisaged in terms of concrete and urgent measures in favour of children with disabilities'.²¹ They require more investment and should be

18 The Call for Accelerated Action on the Implementation of the Plan of Action towards an Africa Fit for Children was adopted by the Ministers of the African Union Member States in 2007 in Cairo, Egypt. See <http://www.carmma.org/resource/call-accelerated-action-implementation-plan-action-towards-africa-fit-children> (accessed 30 August 2013) for an explanation on this process.

19 African Children's Committee *Concept Note on the commemoration of the Day of the African Child on 16 June 2012 under the theme: The rights of children with disabilities: The duty to protect, respect, promote and fulfill* paras 21-38.

20 African Children's Committee (n 19 above) paras 39-46.

21 See African Union *19th Session of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee)*, 26-30 March 2012, Addis Ababa, Ethiopia, para 13. The 19th session report is available for download at: <http://www.AfricanChildrensCommittee.org/wp-content/uploads/2011/03/English-African-Childrens-Committee-Session-19-Report4.pdf> (accessed 30 August 2013).

commended to go a long way in ensuring that the rights of children with disabilities are realised by states parties to the ACRWC.

Monitoring the activities in line with the Day of the African Child concept note is just as important as stipulating what the activities should be. The African Children's Committee therefore incorporated a reporting guideline to states parties when they made the concept note available. It was expected that states parties report to the Committee on the implementation of the activities undertaken in respect of the theme for the Day of the African Child and the concept note. It also goes without saying that these activities cannot be reported on based solely on one day's celebrations.

During the 20th session of the African Children's Committee the UNICEF liaison office to the African Union presented a report on how certain states parties to the ACRWC celebrated the Day of the African Child based on this theme.²² The extent to which states parties gave recognition to the rights of children with disabilities was notable. While one-day celebrations are not necessarily the most effective methods to systematically address challenges, it is worthwhile to acknowledge that if these celebrations caused states parties to give thought to the plight of children with disabilities, then the concept note adopted by the African Children's Committee reached half of its intended objectives. The other half would be reached once states parties report on the implementation of the activities.

The activities proposed in the Day of the African Child concept note serve as a strong basis for implementing the provisions of the ACRWC. Therefore the African Children's Committee should use this as basis when interrogating the country reports by states parties to the ACRWC. This would go a long way in domesticating the provisions of the ACRWC as it pertains to the special recognition envisaged by the ACRWC in relation to children with disabilities.

22 A report on the 20th session of the African Children's Committee is not yet available on the African Children's Committee's website. However, the author was present at this session.