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The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account

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Abstract

This article examines the cultural-based critiques of the international human rights paradigm generally and children's rights in particular, with specific reference to Africa. In this regard, the paper attempts to identify gaps in the analyses of the African Charter on the Rights and Welfare of the Child. Towards that end, the paper proceeds in three parts. In the first section, it situates the discussion within the general framework of children's rights at international law. In the next section, it turns to an examination of the culture-based critiques of the idea of universal rights. Finally, in the fourth and fifth sections, it analyses the documents and literature that focus on the rights and welfare of the child. In the concluding section, the author raises several important questions regarding the propriety of this special category of human rights in the African context.

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I. Introduction

The preamble to the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')¹ makes two important statements regarding the instrument's conception of the rights and welfare of the child. Firstly, it identifies the Charter's foundation as the principles of the international law on the rights and welfare of the child as contained in the declarations, conventions and other instruments of the Organisation of African Unity and the United Nations.² Significantly, the Charter specifically mentions the Convention on the Rights of the Child ('the Convention' or 'the CRC'),³ and the Declaration on the Rights and Welfare of the African Child ('the African Children's Declaration').⁴ Secondly, the Charter charges that the concept of the rights and welfare of the child should be inspired and characterised by the virtues of African cultural heritage, historical background and the values of the African civilisation. In other words, the Charter requires that the rights and welfare of the child, which are derived from universal sources, must be alive to the reality of African children.

Given the Charter's attempts to act as a bridge between international law and local observation, it ought to be the pre-eminent authority on children's rights in Africa. However, analysis on the rights and welfare of the child that is based on the Charter is still very limited. In this article, I survey existing analysis on the international law on the rights of the child and analyse the cultural-based critiques of the international human rights paradigm generally and children's rights in particular with the explicit purpose of identifying gaps in the analysis towards which further Charter-based contribution may be made. Thus, in the following section of the article, I present an introduction to the general structure of children's rights at international law. This is followed, in section 3, by an examination of the culture-based critiques of the idea of universal rights. Sections 4 and 5 complement the above by offering an analysis of documents and literature that focus on the rights and welfare of the child.

II. The structural basis of children's rights at international law

Efforts to make provision for a catalogue of children's rights or entitlements at the international level may be traced back to 1924 when the fifth Assembly of the League of Nations adopted the Declaration of the Rights of the Child ('the 1924 Declaration' or 'the Declaration').⁵ The 1924 Declaration, which was also known as the Declaration of Geneva, proclaimed that 'mankind owes to the child the best it has to give'; a message that was subsequently to underline the 1959 Declaration on the Rights of the Child ('the

¹ African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

² African Children's Charter, preamble para 8.

³ Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 ILM (1990) 1340.

⁴ Declaration on the Rights and Welfare of the African Child AHG/St. 4 (XVI) Rev. 1 1979. Text also available at <www.chr.upac.za/hr_docs/african/docs/ahsg/ahsg36.doc> (accessed 12 April 2009).

⁵ Declaration of the Rights of the Child League of Nations Official Journal (1924); Records of the Fifth Assembly. Supplement no. 23. See generally D Hodgson 'The historical development and 'internationalisation' of the children's rights movement' (1992) AJFL p 25.

1959 Declaration')⁶; the 1989 Convention on the Rights of the Child ('the Convention' or 'the CRC').⁷ as well as the African Children's Charter. In particular, the 1924 Declaration set out five principles aimed at fulfilling the rights of children. The first principle provided that '[t]he child must be given the means requisite for its normal development, both materially and spiritually.' The second provided that '[t]he child that is hungry must be fed; the child that is sick must be nursed...' The third principle espoused an element of what has come to be commonly as the 'children first principle'. It declared that '[t]he child must be the first to receive relief in times of distress.' Principles four stated that the child must be protected from all forms of exploitation whilst the fifth principle called on states to inculcate in children a spirit of service towards fellow man. The 1924 Declaration, however, was never intended to create binding obligations on states and corresponding legal rights for children. Although it was termed a Declaration of the *Rights of the Child*, the instrument emphasised the duties that men and women had in ensuring that mankind gave children the best it had got to give. In other words, children were regarded as recipients of welfare rather than holders of specific rights.

Despite this shortcoming, the 1924 Declaration is important in the development of the current children's rights framework in several ways. Firstly, it debunks the notion that the international rights of the child are a recent development in international human rights law. The League of Nations initiative took place well before efforts to codify the universal rights of all people. The Declaration also provides the groundwork for the proposition that the welfare of children could best be protected by the protection of their rights;⁸ a proposition that has been borne out by the CRC and the African Children's Charter. Finally, the Declaration, by espousing a mixture political, social and economic aspirations; renders credence to the principle that asserts the indivisibility of rights along civil and political, on the one hand; and economic, social and cultural on the other.

A further important step in the protection of the rights and welfare of the child was taken when the General Assembly of the United Nations adopted the 1959 Declaration. The Declaration is a longer document consisting of a preamble and ten principles. The preamble to the Declaration, which makes a reference to the United Nations Charter and the Universal Declaration of Human Rights, calls upon governments to implement its provisions through 'legislative and other measures progressively taken.' The preamble reaffirms the 1924 Declaration's pledge that 'mankind owes to the child the best it has to give' and goes on to place unequivocal duties on local authorities and voluntary organisations to work towards the observance of the rights of children. Despite the focus on the rights of children and the corresponding duties on states, some of the 1959 Declaration's principles seem inconsistent with the idea of establishing legal rights. For example, principle 6 promotes what may now be considered an inappropriate view of the respective roles of fathers and mothers in a child's life. The principle states, among other things, that 'a child of tender

⁶ 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).

⁷ Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 ILM 1448 and (1990) 29 ILM 1340.

⁸ G van Bueren *The International Law on the Rights of the Child* (Dordrecht, Boston, & London, Martinus Nijhoff Publishers, 1995) 8.

years shall not, save in exceptional circumstances be separated from his mother.’ This view would not pass muster in the current international human rights framework as it promotes a stereotypical view of mothers that hinges on discrimination. Similarly, the declaration in principle 6 that a child needs ‘love and understanding’; and that children should grow in an atmosphere of ‘affection and of moral and material security’ would now be considered too vague to raise any legal obligations.

However, apart from these shortcomings, the 1959 Declaration represents ‘the first serious attempt to describe in a reasonably detailed manner’⁹ a catalogue of the rights of the child. In accordance with the Declaration, a child is entitled to a name and nationality,¹⁰ to adequate nutrition, housing, recreation and medical services.¹¹ It also calls upon states to make special provision for the needs of physically, mentally, and socially handicapped children;¹² as well as those children lacking family support.¹³ The Declaration also guarantees the child the right to education, the right to play and recreation,¹⁴ and the right to be protected from neglect¹⁵ and hazardous employment.¹⁶ More importantly, the 1959 Declaration contained a general non-discrimination clause¹⁷ and was the first international instrument to enshrine the principle that children are entitled to ‘special protection’ and that such protection must be implemented by reference to ‘the best interests of the child’ which ‘shall be a paramount consideration.’¹⁸

Although the 1959 Declaration was a non-binding resolution of the General Assembly, its statement on the rights and welfare of the child set the foundation for subsequent development of the corpus of child law at the international level. It marked a break with the prior conception of children as beneficiaries of charity and developed the child as a subject of international law with the ability to enjoy the benefits of specific rights and freedoms. Indeed, in 1979, twenty years after adopting the Declaration, the General Assembly noted that:

[T]he principles of the Declaration have played a significant part in the promotion of the rights of children in the entire world as well as in shaping various forms of international cooperation in this sphere.¹⁹

Thus, it is not surprising that the 1959 Declaration’s principles found their way into the next international statement on the rights and welfare of the child: the Convention on the Rights of the Child. The first draft of the Convention that was submitted by Poland to the Commission on Human Rights in 1978 in many respects resembled the 1959 Declaration. This draft was adopted by the Commission’s open-ended Working Group on the Draft Convention on the Rights of the Child in 1979. After a decade of discussion and refinement, the Working Group adopted its final report on 21 January 1989 and

⁹ Jane Fortin *Children’s Rights and the Developing Law* (2nd edn London, LexisNexis, 2003) 35.

¹⁰ 1959 Declaration, principle 3.

¹¹ 1959 Declaration, principle 4.

¹² 1959 Declaration, principle 5.

¹³ 1959 Declaration, principle 6.

¹⁴ 1959 Declaration, principle 7.

¹⁵ 1959 Declaration, principle 9.

¹⁶ As above.

¹⁷ 1959 Declaration, principle 2.

¹⁸ As above.

¹⁹ UN GAOR, 33rd Sess., UN Doc. A/33/45.

forwarded the report to the Commission on Human Rights for consideration and transmission to the General Assembly. The Convention was adopted unanimously by the General Assembly on 20 November 1989 and quickly came into force on 2 September 1990.

The Convention which applies to ‘every human being below the age of eighteen years’,²⁰ contains 54 articles, 40 of which makes provision for substantive rights ranging from civil and political to economic, social and cultural rights. It includes typical civil and political rights such as protection from discrimination,²¹ right to life,²² right to name and nationality,²³ freedom of expression,²⁴ religion,²⁵ association and assembly,²⁶ and the right to privacy.²⁷ Amongst the economic, social and cultural rights are the rights to health,²⁸ social security,²⁹ education,³⁰ and the right to play.³¹ Additionally, the CRC has been further augmented by the adoption of two optional protocols: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict³² and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.³³ In a nutshell, the CRC is a very comprehensive treaty that makes provision for almost every aspect of a child’s life. It may rightly be described as forming the core of the international law on the rights of the child.³⁴

Given the extensive scope of the Convention, it is useful for explanatory and analytical purposes to classify the rights into categories.³⁵ In this regard, Thomas Hammaberg has suggested that the Convention may be said to be concerned with the four ‘P’s:³⁶ the participation of children in decisions affecting them; the protection of children from all forms of discrimination; the prevention of harm to children; and the provision of assistance for their basic needs. All these ‘P’s’ are equally important and thus implementation efforts cannot be skewed in favour of one aspect when efforts in

²⁰ Unless the age of majority is reached earlier. See CRC, art. 1.

²¹ CRC, art. 2.

²² CRC, art. 6.

²³ CRC, art. 7.

²⁴ CRC, art. 13.

²⁵ CRC, art. 14.

²⁶ CRC, art. 15.

²⁷ CRC, art. 16.

²⁸ CRC, art. 24.

²⁹ CRC, art. 26.

³⁰ CRC, art. 29.

³¹ CRC, art. 31.

³² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002. The text is also available at <<http://www.unhchr.ch/html/menu2/6/protocolchild.htm>> (accessed on 22 April 2009).

³³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* January 18, 2002. The text is also available at <<http://www.unhchr.ch/html/menu2/dopchild.htm>> (accessed on 22 April 2009).

³⁴ Jane Fortin describes it as ‘the touchstone for children’s rights throughout the world.’ See Jane Fortin (n 9) 49.

³⁵ Jane Fortin (n 9) 38.

³⁶ Thomas Hammaberg ‘The UN Convention on the Rights of the Child-and how to make it work’ (1990) 12 HRQ 97. See also G van Bueren (n 8) 15.

the other areas are lagging behind.³⁷ The Committee on the Rights of the Child, which is tasked with monitoring the implementation of the CRC by states parties has also emphasised on the interrelated nature of its provisions. Nevertheless, the Committee has elevated non-discrimination,³⁸ the child's best interests,³⁹ survival and development⁴⁰ and principle on participation into general principles.⁴¹ Consequently, any consideration of actions, policies or interventions relating to children must be gauged with reference to these four cross-cutting principles.⁴²

Since it was adopted by the General Assembly in November of 1989, the CRC has taken credit for several firsts. It was the longest and most comprehensive list of human rights created for a specific group. It entered into force in record time as the quickest ratified instrument of all human rights treaties; coming into force barely nine months after its adoption. It quickly became the most ratified human rights treaty in the world; with ratifications by all the world's nations save for East Timor, Somalia and the United States of America.⁴³

However, the enthusiasm which greeted the adoption of the CRC must be tempered with the flurry of reservations, declarations and the accompanying objections that greeted these record ratifications. No less than 70 states parties have entered reservations or declarations, some of which attempt to subject the Convention under the various religious, cultural or traditional observations current in the concerned jurisdictions. Consequently, whilst the ratification of the Convention en masse indicates a basic acceptance of the premise that the welfare of children may be best achieved by the promotion and protection of their rights; there is yet no universal consensus on the form that such protection should take. This struggle between universal ideas and the relevance of context are not peculiar to children's rights but permeate throughout human rights discourse generally.

III. Universal rights and the struggle for context

In 1948, the international community adopted by consensus, the Universal Declaration of Human Rights ('the UDHR' or 'the Declaration')⁴⁴ Almost sixty years down the road, it is still the pre-eminent document in the growing corpus of human rights instruments.⁴⁵ The Declaration proclaims the universality of human rights by

³⁷ G van Bueren (n 8) 15.

³⁸ CRC, art. 2.

³⁹ CRC, art. 3.

⁴⁰ CRC, art. 6

⁴¹ See Office of the High Commissioner for Human Rights, Fact Sheet No. 10 (Rev 1) 'The rights of the child' available at <<http://www.unhcr.ch/html/menu6/2/fs10.htm> (accessed 22 December 2006).

⁴² T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *Afr Hum Rts L J* 221 at 228-9.

⁴³ As of 26 September 2006, the CRC had 192 states parties. See <<http://www.ohchr.org/english/countries/ratification/11.htm#N40>> (accessed on 22 April 2009).

⁴⁴ Universal Declaration of Human Rights, adopted 10 December 1948, G.A.Res 217A, UN GAOR, 3rd sess., at 71, UN Doc A/810 (1948).

⁴⁵ J Donnelly 'The Universal Declaration model of human rights: A liberal defense' (2001) available at <<http://www.du.edu/humanrights/workingpapers/papers/12-donnelly>> (accessed on 22 April 2009) noting that the global human rights regime is rooted in the Universal Declaration. See also

proclaiming that it is ‘a common standard of achievement for *all peoples and all nations*.’⁴⁶ Consequently, since the prescriptions of the Declaration apply to every human being regardless of who or where they are, human rights are often commonly spoken of as universal rights.⁴⁷ As Donnelly puts it, human rights are ‘general rights that arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to be anything other than be born a human being.’⁴⁸ Such rights are, therefore, an inherent part of one’s humanity and the claim of universal rights is that *all* human beings ought to be treated in the ways prescribed by the UDHR *everywhere*.⁴⁹ Howard, who is in many respects Donnelly’s ideological and philosophical counterpart, proffers the following definition:

Human rights are rights that all human beings are entitled to, merely by virtue of being human. Such rights do not have to be earned, nor are they dependent on any particular social status.⁵⁰

This conception of human rights as entitlements that belong to the individual is explicitly liberal.⁵¹ It originated out of the specific historic context of western Europe. Although the foundations of human rights thought may be traced to earlier thinkers and writers, the concept was given a particularly clear and forceful articulation in the writings of 18th century thinker, John Locke through his *Treatise on government*.⁵² Thus, taking their cue from their liberal origins, universalists maintain that every person has comprehensive and equal rights, as an individual living within human society. Whilst universalists do not deny that people from different cultures or backgrounds may be different, they insist that individual sameness, or similarity, among human beings should prevail over cultural difference when it comes to human rights.⁵³ Those taking a relativist position on the question of human rights reject the above notions of human rights as naïve, lacking empirical validity, ahistorical and worst of all culturally imperialistic.⁵⁴ The relativists begin by asserting the empirical fact that historically, different societies have had different or no notions of rights. They also claim

M Glen Johnson & J Symmides *The Universal Declaration of Human Rights: A History of its Creation and Implementation, 1948-1998* (Paris, UNESCO Publishing 1998); G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague, Boston, Martinus Nijhoff Publishers 1995).

⁴⁶ UDHR, preamble.

⁴⁷ See generally J Donnelly *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University 1989) ch. 1 and JW Nickel *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley, University of California Press 1987).

⁴⁸ J Donnelly ‘Human rights and human dignity: An analytical critique of non-western conceptions of human rights’ (1982) 76 *American Political Science Review* p 303 at p 306.

⁴⁹ J Donnelly (n 45) at 1-3.

⁵⁰ R Howard ‘Universal human rights’ (2001) available at <<http://www.chrf.ca/english/programmes-eng/files/ihrt/22nd-session/universal-hr.pdf>> (accessed on 22 December 2006).

⁵¹ Ibid at 1.

⁵² See generally OM Ejidike ‘Human rights in the cultural traditions and social practice of the Igbo of south-eastern Nigeria’ (1999) 43 *JAL* 71.

⁵³ LS Bell, AJ Nathan & I Peleg ‘Introduction: Culture and human rights’ in LS Bell, AJ Nathan & I Peleg (eds) *Negotiating Culture and Human Rights* (Columbia University Press, New York 2001) 1 at 5.

⁵⁴ Ibid.

that individual rights are not God-given or self-evident as the universalists claim. Rather, they are a historical construct which developed in Europe in reaction to the social, political and economic development of those communities. Thus, argue the relativists, individual human rights are not universal but rather, particularistic western values masquerading as universal concepts.

The debate between universalists and relativists highlights the complex and often arduous task of translating legal and ethical concepts of rights between two different cultures or normative systems. A plethora of anthropological literature illustrates a great many of the dilemmas that arise from encounters between different value systems.⁵⁵ However, despite the initial clamour against those challenging the liberal doctrine of the universality of individual human rights, increasing awareness has emerged slowly amongst scholars as to the prevalence of significant cultural variations in the protection of human rights.⁵⁶ Many scholars have questioned the strict presumptions upon which human rights are based⁵⁷ and have suggested that a great deal of flexibility must be incorporated when formulating conceptions of human rights across different cultures.⁵⁸ In this regard, Obemeyer observes:⁵⁹

It is increasingly recognised that while absolute universals cannot be found, it is possible, and indeed desirable, to seek common denominators across cultures, which in turn can be used to develop contextually relevant notions of [human] rights.

The debate between universalists and relativists concerning the appropriateness of a western-inspired ideology for non-western societies has not escaped the notice of African and Africanist scholars. Amongst this group, a rich diversity of opinion exists. The position of some western-trained African jurists is often uncritical of the universalist argument and is itself entrenched within liberal thought. Shivji has gone so far to describe this strain of human rights discourse as being 'less sophisticated than that of African social scientists.'⁶⁰ As an example, Asante's forceful argument on the applicability of human rights to African communities is reflective of this scholarly position. He emphatically argues:⁶¹

I reject the notion that human rights concepts are peculiarly or even essentially bourgeois or western, and without relevance to Africans. Such notions confuse the articulation of the theoretical foundations of human rights with the ultimate objective of any philosophy of human rights. Human rights quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic

⁵⁵ M Herskovitz 'Statement on human rights' (1947) 49 *Amer. Anthropol.* p 539.

⁵⁶ See A Pollis 'Cultural relativism revisited: Through a state prism' (1996) 18 *HRQ* 316 at 317.

⁵⁷ See M Obemeyer 'A cross-cultural perspective on reproductive rights' (1995) 17 *HRQ* 366 at 368.

⁵⁸ See generally Alison Dundes Renteln *International Human Rights: Universalism Versus Relativism* (Newbury Park, California, London, Sage Publications 1990).

⁵⁹ M Obemeyer (n 57) 368.

⁶⁰ Issa G Shivji *The Concept of Human Rights in Africa* (Dakar, Codesria 1989) at 11.

⁶¹ Asante quoted in H Hannum 'The Butare colloquium on human rights and economic development in Francophone Africa: A summary and analysis' (1979) 1 *Universal Human Rights* 1 at 15 (see fn 67).

worth of the individual. This is *an eternal and universal phenomenon* and it is also true to Nigerians and Malays as to Englishmen and Americans.

Those who argue against this universalist critique of human rights in Africa advance a cultural specific alternative. They observe that human rights as conceived in the west are rejected in Africa precisely because their philosophical basis is not only different but indeed opposite. It is opined that whereas the liberal construct of human rights is premised on an autonomous and rational individual, the African worldview knows not of such individualism. Pollis affirms this contention when she asserts:⁶²

Whatever the diversity amongst third world countries in their traditional belief systems, individuals still perceive themselves in terms of their group identity. Who and what an individual is has been conceptualised in terms of the kinship system, the clan, the tribe, the village, whatever the specific cultural manifestations of the underlying prevailing worldview.

Consequently, any theory of human rights must take into account this reality if it is to be of any use to Africans. In affirming Pollis' reminder, it is sufficient to observe that a considerable number of African scholars argue against what Ejidike terms 'cultural-monopolist' derivations of the origins of human rights.⁶³ He instead advocates a cultural-universalist conception which he considers not only possible but also very necessary. He argues thus:⁶⁴

To arrogate the concept [of human rights] to some groups, cultures, and civilisations to the exclusion of others would be deleterious to the momentum toward universal consensus on human rights in at least two ways. It would harden or ossify divisive tendencies and provide ammunition for apologist justification of violations.

Ibhawoh subscribes to this view but for a different reason. He suggests that one reality that has strengthened the need for the universalisation of human rights is the trend toward rapid globalisation in almost every sphere of human endeavour. He observes that:⁶⁵

The spread of the western model of the state to Africa and other parts of the developing world has given rise to the need for constitutional and other legal guarantees of human rights. Thus, the modern concept of human rights, admittedly a product of the west, is becoming equally relevant in other parts of the world.

⁶² A Pollis 'Liberal, socialist and third world perspectives of human rights' in P Schwab & A Pollis (eds) *Toward a Human Rights Framework* (New York, Praeger 1982) 1ff.

⁶³ OM Ejidike(n52) 71.

⁶⁴ Ibid.

⁶⁵ B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 HRQ 839.

Whilst acknowledging the relevance of universal norms, Ibhawoh nevertheless cautions against universalistic expositions of human rights in the construction of their protection. Instead, he argues for approaches which take into account and are enriched by the 'African cultural experience.'⁶⁶ Aidoo attributes the absence of this Africanness to the fact that 'original research in the area of human rights in Africa is scanty.'⁶⁷ He decries the seeming preoccupation of scholars with human rights discourse at the formal level at the expense of considering civil society 'where cultural traditions and customs impact negatively on specific rights.'⁶⁸ Aidoo, therefore, emphasises the need for urgent research on such themes as the 'cultural foundation of human rights' amongst others, which in his view have not been sufficiently addressed by African scholars.

In view of the above observations, it is vitally important that the literature and scholarship on children's rights in Africa must seek to align itself with the realities of African children so that a firm 'cultural foundation' is established for this category of human rights. However, one aspect which almost all of these scholars omit to focus their attention are the source documents. It is critically important that not only scholarship has proper cultural foundations but also the core instruments protecting the rights of the child.

IV. Documents affecting the rights and welfare of the African child

As noted earlier in this discussion, international efforts to prescribe a catalogue of children's rights may be traced back to the 1924 Declaration which was later followed by the 1959 Declaration. However, at the time when these documents promulgated, the majority of African states were still under colonial rule.⁶⁹ The principles in these documents were arguably not intended to benefit children who found themselves under colonial rule despite the universalistic tones in which they were couched.

Despite this gloomy background, when African states adopted the Declaration on the Rights and Welfare of the African Child ('the African Children's Declaration')⁷⁰ in 1979 at the sixteenth ordinary session of the Assembly of Heads of Government of the Organisation of African Unity ('the OAU') in Liberia, Monrovia; they explicitly recognised the 1959 UN Declaration by declaring that member states of the OAU 'should undertake or continue...efforts to renew the current legal codes and provisions relating to the rights of children, particularly by taking into account the 1959 UN Declaration.' Thus, quite clearly the OAU subscribed to the ideals that the 1959 UN Declaration enunciated. At the same time, the African Children's Declaration gave political force to an otherwise particularistic account of children's rights which did not have an African cultural foundation.

⁶⁶ Ibid.

⁶⁷ A Aidoo 'Africa: Democracy without human rights?' (1993) 15 HRQ 703 at 713.

⁶⁸ B Ibhawoh (n 65) 840.

⁶⁹ See generally L Muthoga 'Analysis of international instruments for the protection of the rights of the child' in Community Law Centre (ed) *International Conference on the Rights of the Child: Papers and reports of a conference convened by the Community Law Centre* (Cape Town, Community Law Centre 1992) 123.

⁷⁰ Declaration on the Rights and Welfare of the African Child AHG/St. 4 (XVI) Rev. 1 1979. Text also available at <www.chr.upac.za/hr_docs/african/docs/ahsg/ahsg36.doc> (accessed 12 April 2009).

Further to that, the African Children's Declaration took an unequivocal cognisance and gave support to the processes in the UN General Assembly with respect to the rights of the child. In particular, the Declaration mentioned UN General Assembly resolution 1/31/169 which proclaimed 1979 as the International Year of the Child ('the IYC').⁷¹ In this regard, the African Children's Declaration called on all OAU member states to form permanent commissions or machineries bestowed with the necessary legal powers to assist in implementing the IYC.⁷²

Further still, the African Children's Declaration grounded the conception and implementation of children's rights within an African socio-political context by declaring that African children are inheritors and keepers of African cultural heritage and consequently called on member states to ensure that:

...efforts should be made to preserve and develop African arts, language and culture and to stimulate the interest and appreciation of African children in the cultural heritage of their own countries and of Africa as a whole.⁷³

In other words, no conception of children's rights should rob African children of their legacy, inheritance and inheritance as children of the continent. At the same time, the Declaration makes it clear that the recognition of cultural values should not assume primacy over the protection of children's rights. Rather, the two paradigms should complement each other and help achieve the adequate protection of African children.⁷⁴

However, despite this strong acceptance of children's rights by the OAU, the issue did not feature as emphatically in the subsequent statement on human rights by the organisation. The African Charter on Human and Peoples' Rights ('the African Human Rights Charter' or 'the African Charter')⁷⁵ which was adopted by the OAU in 1981 did not provide extensively for children's rights. In the words of Viljoen, 'children are only referred to on one occasion, as an afterthought, in the context of women's rights' in article 18(3) where the African Human Rights Charter enjoins states parties to 'ensure...the protection of the woman and child as stipulated in international declarations and conventions.'

A debate ensued regarding whether by virtue of this provision, states parties to the African Human Rights Charter became legally bound by the provisions of the 1959 UN Declaration and subsequent instruments that dealt with women's or children's rights⁷⁶. Whilst some authors sought to give a generous interpretation to the article, it is difficult to see how states could become bound by these declarations or conventions without formally submitting to the prescribed ratification process of the concerned instruments. Indeed the Vienna Convention on the Law of Treaties ('the Vienna

⁷¹ African Children's Declaration, preamble.

⁷² African Children's Declaration, para 1.

⁷³ African Children's Declaration, para 10.

⁷⁴ African Children's Charter, para 2.

⁷⁵ African Charter on Human and Peoples' Rights, adopted June 27, 1981 (entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁷⁶ F Viljoen 'Supra-national human rights instruments for the protection of children in Africa : the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *The Comparative and International Law Journal of Southern Africa* p 199 at p 205.

Convention')⁷⁷ which is considered the definitive statement on the law of treaties would not regard the situation envisaged under article 18(3) of the African Charter as evincing an intention to become legally bound by subsequent instruments.⁷⁸ At best the provision could be considered as an expression of a political commitment to support the processes within the UN aimed towards securing children's rights as opposed to an automatic ratification mechanism. This interpretation is confirmed by the fact that all of the 52 African countries that are bound by the CRC had to ratify the treaty in accordance with its provisions despite their ratification of the African Charter.⁷⁹

However, despite accepting the provisions of the CRC *en masse*, African states still sought to draft provisions of an instrument on the rights of the child which reflected African concerns. Hence the drafting of the African children's Charter by a working group of African experts on the rights and welfare of the child.

According to Muthoga, the idea to adopt an instrument on the rights of the African child 'originated from a desire to address certain peculiarly African problems' which had not been addressed by the CRC.⁸⁰ Among other concerns; the peculiarities of the African situation omitted from the Convention were identified as the situation of children living under apartheid; disadvantages facing the African girl child; the African conception of the community's responsibilities and duties; the role of the extended family in the upbringing of children; the use of children as soldiers; and problems of internal displacement arising from civil wars and internal insurrections.⁸¹

Similarly, Wako attributes the drafting of the Charter to the value of regional arrangements per se as a moving force for positive change and in this case, as a tool for the enhanced protection of African children. In this regard, he mentions resolutions of the UN General Assembly and concludes that 'each region, with its unique culture, traditions and history, is best placed to handle and resolve its human rights situation.'⁸² In a nutshell, the appropriateness of the CRC to the African child was weighed and found somewhat wanting. The intention thus was to supplement or plug in the holes presented by the global instrument.

Viljoen, however, attributes the African initiative to frustration with the UN process during the drafting of the CRC. He correctly observes that African nations were grossly underrepresented during the drafting process. He notes:

African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft the final proposal. This is the lowest percentage of all continents, contrasting sharply with west European (61% of the continental potential) and even Latin American (29%) participation over a similar period.⁸³

⁷⁷ Vienna Convention on the Law of Treaties, adopted 22 May 1969 (entered into force 27 January 1980) 1155 UNTS 331.

⁷⁸ See Vienna Convention, arts 11-16.

⁷⁹ See CRC, arts 47 & 48.

⁸⁰ L Muthoga (n 69) 124.

⁸¹ F Viljoen (n 76) 206

⁸² SA Wako 'Towards an African Charter on the Rights of the Child', paper delivered at the Workshop on the Draft Convention on the Rights of the Child, Nairobi, 9-11 May 1988 at p (Paper on file with author).

⁸³ F Viljoen (n 76) 200.

Consequently, it was difficult to get on board in a forceful way issues that reflected the African cultural context. In other words, potentially divisive and emotive issues were omitted in the search for consensus between states from diverse backgrounds.⁸⁴ Thus, although the CRC addressed every aspect of children's lives, specific provisions on aspects peculiar to Africa fell victim to the overriding aim reaching a compromise and the African Children's Charter was intended to fill that void in terms of African concerns. The Charter incorporates the universalist outlook of the CRC but at the same time clothes its conceptions within the 'African cultural context.' It is, therefore, a document with a cultural-universalist outlook and a perfect start point for the consideration and elucidation of children's rights in Africa.

Another useful document for analysing the rights and welfare of the child is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Women's Protocol' or 'the Protocol').⁸⁵ The Women's Protocol, which contains an extensive compendium of rights for women defines 'woman' as 'persons of female gender, including girls.'⁸⁶ Consequently, the Protocol provides another source of protection for African girl-children. However, the majority of the literature dealing with the rights and welfare of the African child is mostly based on the CRC and the African Children's Charter is merely mentioned by the way.

V. Literature on the rights and welfare of the African child

The CRC is the principal normative framework relied on in most analyses relating to the rights of the child in Africa. Thus, most of the discussions in the secondary literature examine specific issues regarding children's rights in Africa or within particular domestic jurisdictions in light of the standards propounded by the CRC. In these analyses, the African Children's Charter does not feature prominently, if at all. For example, in Alston's work relating to the best interests of the child and how the concept may be analysed, interpreted and implemented within various cultural contexts, out of the contributors dealing with the concept from an African perspective, only one makes reference to the African Children's Charter.⁸⁷ Similarly, in Ncube's laudable work on the interaction between law, culture, tradition and children's rights, only Ncube's analysis⁸⁸ is based on the African Children's Charter whilst the rest of the contributors adopt the CRC as the benchmark.

The large volume of literature analysing the rights of children in Africa in terms of the CRC is necessary and perhaps inevitable for a number of reasons. Firstly, all African states, save for Somalia, have ratified the Convention. It is thus important to develop scholarship which critically investigates the implementation as well as the

⁸⁴ Ibid.

⁸⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000 (entered into force 25 November 2005) CAB/LEG/66.6.

⁸⁶ Women's Protocol, art 1(k).

⁸⁷ See B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' in P Alston (ed) *Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford, Oxford University Press 1994) 80 at 83.

⁸⁸ W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Dartmouth, Aldgate 1998) 11.

implications of the Convention. Secondly, African states were slow in ratifying the African Children's Charter after its adoption by the African Union (formerly the Organisation of African Union) on 11 July 1990 at Addis Ababa, Ethiopia. Thus, whilst commentators were marvelling at the speed and volume at which the Convention had been ratified by African states, the African Children's Charter could lay claim to no such fame. It remained in the background, not influencing the discourse on children's rights in Africa as it ought to have done.

Ironically, the emphasis on the CRC makes it very difficult to avoid universalistic expositions of children's rights and, therefore, poses one of the key obstacles to developing an appropriately distinctive African discourse on children's rights. Consequently, investigations into how the virtues of African cultural heritage, historical background and the values of African civilisation shape the contours of protection for African children are hard to come by since these principles did not inspire the conception of children's rights in the CRC.

However, this state of affairs notwithstanding, some scholars have made contributions based on the African Children's Charter itself. This motley collection of literature may be better described by its paucity than its depth of analysis. However, in a manner not unlike the contributions based on the CRC, most of the literature based on the African Children's Charter assumes the cultural legitimacy of children's rights within African communities. As a result, the majority of the works are either abstract textual examinations of the relevant instruments or analyses of particular harmful practices which are inconsistent with the said instruments.

Thus, Gose presents a comparative analysis of the African Children's Charter with the CRC which concentrates on the differences between the wording of the Charter and the CRC.⁸⁹ He painstakingly highlights the textual differences between the two documents and often comments on the implications that the differences may have in the interpretation of the Charter. His meticulousness is demonstrated when he observes that '...article 27 of the Charter contains flaws in relation to its numbering. The Charter's provision is numbered as 27(1) while there is no other subsection in the article.' This level of thoroughness is reflected in the entire work. However, he does not address the question of the Charter's or the CRC's relationship to the socio-political context of the African child.

Another example of work that avoids engagement with the lived reality of African children is the contribution by Lloyd.⁹⁰ In her article, she explicitly sets out to present a 'theoretical analysis' of children's rights in Africa and although her analysis proposes to discuss 'the reality of children's rights in Africa'; that reality is limited to the text of the African Children Charter and other documents within the African human rights system. Like Gose, she presents a wide-ranging critique of the substantive provisions of the Charter and makes comparisons between the African Children's Charter and the CRC. This discussion is then rounded off by an examination of the monitoring and enforcement mechanisms envisaged by the Charter. However, the absence of context-based analysis or material leads her to conclude that '[b]asically, before the adoption of

⁸⁹ See generally Michael 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* (Cape Town, Community Law Centre, 2002).

⁹⁰ Amanda Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) *Afr Hum Rts L J* 11.

the African Children's Charter, children had no voice, no specific rights or protection';⁹¹ a proposition which does not accurately describe the situation of children before the adoption of the Charter. She, however, correctly observes that as far as the African Children's Charter is concerned, '[t]here is a lack of awareness..., and notable lack of academic debate.'⁹²

Similarly, Chirwa 'critically discuss[es] the merits and demerits of the African Children's Charter.'⁹³ He analyses some concepts and themes which are central to the African Children's Charter such as obligations of states parties, non-discrimination, best interests principle, the child's survival and development and others. Like Gose, Chirwa uses the CRC as the comparator for his analysis and points out the shortcomings or improvements that the Charter has over the CRC. He, however, omits to engage critically with the context of the rights and welfare of the African child.

Thus, a significant part of the discourse on children's rights in Africa has assumed that children's rights are a legitimate enterprise within African societies. Such an approach not only erroneously expects international norms respecting children's rights to override inconsistent cultural norms but also stifles the development of a conceptual framework for resolving the inevitable conflict between African traditional values and children's rights.

Some contributions though, attempt to avoid an abstract rendering of the Charter's provisions and provide some background or context to their adoption or operation. For example Viljoen's contribution, though generally presenting a textual analysis of the African Children's Charter, adverts to some cultural justifications for the adoption of the Charter.⁹⁴ He also attempts, albeit cursorily, to engage with the issues that make it necessary to have an African document on the rights of the child. The article, although providing a suitable context to the promulgation of and necessity for the African Children's Charter, attempts to engage with too many issues and as a result does not deal with them in any sufficient depth.

Thompson also combines a textual analysis with an examination, albeit very brief, of the implications of the African Children's Charter on African family law.⁹⁵ Her analysis, unlike those discussed above, does not focus on weighing the African document against the CRC but proceeds to examine the provisions of the Charter *sui generis* thereby affirming the African Children's Charter's position as a self-standing document.⁹⁶ This analysis is followed by an examination of the position of African family law in the context of the protections prescribed by the African Children's Charter. Her analysis, however, does not seek to investigate and resolve the profound questions associated with children's rights and family relationships. She merely raises questions whose answers are left unstated thereby implying the need for further grounded research. Regrettably though, she calls for a normative break with cultural traditionalism in the protection of children's rights and points to the African Children's

⁹¹ Ibid.

⁹² Ibid.

⁹³ DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 Intl J of Children's Rts 157ff.

⁹⁴ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to Child Law in South Africa* (Landsdowne, Juta, 2000) 214.

⁹⁵ Bankole Thompson 'Africa's charter on children's rights: A normative break with cultural traditionalism, (1992) 41 ICLQ 432.

⁹⁶ M Gose (n 89) 12-15.

Charter as evidence of such break.⁹⁷ What is needed now are not normative breaks with tradition but an affirmation of traditionalism in the whole enterprise of children's rights and the African Children's Charter, far from affirming such break, calls for a prominent place for African values and civilisation in the conception of children's rights.⁹⁸

An additional recent resource that begins to clarify children's rights in Africa by reference to the lived reality of African children is Ncube's laudable collection of essays⁹⁹ which highlights practices and notions which are inconsistent with the African Children's Charter and the CRC. One of Ncube's contributions in the volume which is based on the African Children's Charter calls for 'African cultural fingerprinting' in the conception and implementation of children's rights in Africa.¹⁰⁰ He emphasises the importance of local cultural context in giving substantive rights their meaning.¹⁰¹ He, therefore, calls for the need for research directed at 'understanding the intersections and interfaces between children's rights as conceived in the relevant human rights instruments and the cultural and social context of Africa.'¹⁰² The essays that follow his contribution attempt to address this critical need for contextualisation. However, the studies offer microanalyses of particular rights, contexts or domestic situations with the result that a sustained analytical framework is absent. There are, therefore, questions that still need to be investigated.

VI. Emerging questions

In this concluding section, I raise some of the questions that could stimulate research that is based on the African Children's Charter. Recognising that the majority of the literature assumes the cultural legitimacy of children's rights in Africa, there remain important questions regarding the appropriateness of this category of human rights in the African context. How has the debate regarding the universality or relativity of human rights shaped the conception of children's rights? Is there a need for the African Children's Charter? And if so, does it guarantee better or more efficacious protection for African children?

In this regard, one must then consider in what ways the African Children's Charter makes provision that is ideally suited to the African cultural context. Do the core concepts in the Charter bear or encourage African cultural fingerprinting? In what respects do they encourage the development of a distinctively African discourse on children's rights?

Obviously, a consideration of the core principles raises questions as to their implementation. How should this be achieved at the formal level? How about at the informal level? Is it possible to sustain the cultural context of the African Children's Charter at this stage? What tools, agencies or strategies ought to be relied on during this process?

In examining these questions, I argue that researchers must adopt both socio-legal as well as international law methods to present an understanding of the African

⁹⁷ B Thompson (n 95) 433.

⁹⁸ African Children's Charter, preamble.

⁹⁹ W Ncube (n 88).

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* 26.

Children's Charter that is not only situated within current debates in human rights but also reflective of the impact of context in the pursuit of universal rights.