

**A Critical Analysis of the Proposed 4th Optional Protocol to the CRC
and Its Potential Impact on Secondary Education in Sub-Saharan
Africa**



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Declaration Statement

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Dedication

This thesis is dedicated to my beloved wife and son, whose love, patience, and unwavering support have been my anchor throughout this journey. Your sacrifices and encouragement gave me the strength to persevere during the most challenging moments. It wasn't easy, but together we made it this far.

And to all children whose right to secondary education remains unfulfilled may this work contribute, in some meaningful way, to the advancement of justice, equity, and opportunity for every child until there is free universal secondary education for all.

Executive Summary

This study aims to critically analyze the potential impact of having the proposed 4th Optional Protocol to the CRC in the context of five (5) selected countries in Southern Africa that were among the first to ratify the CRC, namely Zimbabwe (1990), Mauritius (1990), Lesotho (1992), Botswana (1995) and South Africa (1995). The thesis reflects on the feasibility of adopting OP4 to the CRC and its potential impact on secondary education rights. As such, the study seeks to critically assess whether the benefits of the proposed OP outweigh its risks and how the selected Southern African countries can effectively implement it within their existing legal and policy frameworks, if it's adopted.

It is important to note that the decision of the HRC to pursue OP4 on the education rights of children can complement the SDG Agenda 2030, providing a significant opportunity to strengthen socio-legal frameworks to promote accessible, free secondary education for all children. Nonetheless, the potential benefits must be weighed against potential risks such as normative gaps associated with ratification, financial constraints, political will, implementation capacity, and the adequacy of the finally agreed-upon content of the OP.

The research study employed legal and doctrinal analysis to proffer answers to the question: To what extent does the proposed 4th Optional Protocol to the CRC trigger benefits and risks to the implementation of secondary education rights of children in the context of selected Southern African Countries? The sub-questions focus on international and regional education rights obligations creating the impetus for OP4, key secondary education challenges faced by the selected Southern African countries, the main rights and obligations related to secondary education outlined in the HRC Resolution on OP4, and would the proposed OP4 enhance or not produce additional positive progress towards the realization of the right to secondary education in selected Southern African countries.

The study is therefore structured in five chapters as follows:

Chapter 1: Introduction-It introduces the problem statement, objectives, research questions, methodology and a description about some of the legal framework of child rights in relation to secondary education.

Chapter 2: International and Regional Standards on Education Rights of Children in relation to Secondary Education. This Chapter examines international human rights standards regarding education rights of children with respect to secondary education. It also discusses SDG 4 in relation to secondary education. More so, the Chapter assesses Africa regional child rights norms and SADC sub-regional standards related to secondary education.

Chapter 3: The Reality of Education Rights of Children in the Context of Secondary Education in Selected Southern African Countries. The chapter provides an analysis of the legal mandate, policy requirements and the practice of secondary education rights of children in selected Southern African countries.

Chapter 4: Quest for an Expanded International Legal Mandate on Education Rights: Towards OP4 and Its Potential Implications for Secondary Education of Children in Selected Southern African Countries. This Chapter presents the HRC Resolution 56/5 (2024) proposing the development of OP4. It then assesses the benefits and risks of the proposed OP4 to the CRC with the view to consider its feasibility and potential effectiveness in promoting education rights in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe.

Chapter 5: Findings, Recommendations, and Conclusion. This chapter presents key findings, recommendations, and conclusions of the research study.

Keywords: Children's Rights, Secondary Education, Education Rights, 4th Optional Protocol to the CRC, Southern Africa, International Human Rights Law, Sustainable Development Goal 4, Human Rights Council Resolution 56/24,

Overview of the Main Findings

The study seeks to provide answers to research questions. As such, research findings are presented using research sub-questions as follows:

The existing international and regional education rights obligations creating the impetus for OP4

A review of the international and regional human rights instruments in Chapter 2 revealed the following:

- The CRC explicitly recognizes secondary education as a fundamental right for every child, and Article 28(1)(b) mandates State Parties to progressively make it available and accessible, with the introduction of free education and bursaries as examples of appropriate measures, on a need basis. In what is seen to be a weak provision on international cooperation, Article 28(3) of the CRC only obligates States to promote and encourage international cooperation, with no firm extraterritorial obligations included. There are some overarching articles of the CRC that provide State obligations on other aspects of children's rights that can hamper availability and accessibility of secondary education such as Article 2, Article 32(1), Article 24(1), Article 27(1-3), and Article 4. It is argued that the CRC language regarding secondary education is not strong and there is no explicit obligation for free secondary education.
- The ICESCR does not mention children explicitly, but under Article 13(2)(b), guarantees the right to secondary education for every person, including children, mandating States to make secondary education progressively available and accessible free to all. It has strong language for a progressive move towards free secondary education. Article 2(1) alludes to the principle of progressive realization of ESC rights and like Article 4 of the CRC, it recognizes international cooperation as essential for realization of ESC rights, especially in low-income countries.
- SDG 4 sets explicit targets for the completion of free primary and secondary education by all children by 2030, providing a global political consensus, including governments' unanimous assessment that the financing for these goals is achievable by 2030. However, countries are lagging in realizing their SDG targets, the SDG framework tends to avoid the human rights language of obligations, the framework lacks an indicator on the availability of free education, and it's only limited to 2030.
- The ACRWC provides for the right to education for every child, and in a rather weak language mandates States to make secondary education progressively free and accessible to all. It is argued that the ACRWC reflects the African regional consensus on State obligations to ensure progressive realization of the right to secondary education.
- The SADC Protocol is a legally binding sub-regional instrument that recognizes basic education as a fundamental right, mandates compulsory secondary education and regional cooperation, but it is silent on free secondary education. It is argued that the language of the Protocol does not provide for strong obligations of Member States.

The key secondary education challenges faced by the selected Southern African countries that can be addressed by the OP4

Chapter 3 analyses the implementation of education rights in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe resulting in the following socio-legal challenges most of which can be potentially addressed through OP4:

- The Constitution of Botswana and that of Mauritius does not explicitly guarantee the right to secondary education. The Constitution of Lesotho has weak implementation as mechanisms for guaranteeing free, accessible secondary education are not specified. For South Africa the Constitution does not guarantee free secondary education. The Constitution of Zimbabwe also has weak implementation.
- It is argued that the absence of the right to secondary education and lack of explicit mention of compulsory secondary education in some Constitutions and legislations can result in policy gaps and inconsistencies in implementation hampering the availability and accessibility of secondary education. In addition, notable gaps in some policy requirements can perpetuate disparities in availability and accessibility of secondary education.

- There are several systemic barriers to accessing secondary education in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe. It is argued that the CRC Committee, the ACERWC and CESCR observations imply that most barriers to access secondary education are associated with direct and indirect costs of education as well as limited government funding towards secondary education.
- It is argued that non-ratification of some treaties and non-reporting to some treaty bodies by Botswana, Lesotho and Mauritius weakens State commitment to the full realization of secondary education rights, limiting accountability and alignment with international secondary education rights standards.
- Despite reasonable progress, countries studied are lagging towards full realization of secondary education both under the CRC and the SDG 4 goal confirming existence of barriers towards secondary education.
- One can argue that, while OP4 can potentially contribute significantly towards addressing most socio-legal barriers to secondary education, it might not reasonably address systemic challenges such as corporal punishment and adolescent pregnancies.

The main rights and obligations related to secondary education outlined in the HRC Resolution on OP4

- It suffices to say the Resolution's language affirms the need for a legally binding mandate on making public secondary education available free to all children. The evidence available confirms that existing international human rights standards and voluntary commitments have proven inadequate in addressing systemic barriers to secondary education.

Whether OP4 enhances or does not add value to the realization of the right to education in the context of selected Southern African countries

Chapter 4 examines the possible impact of the proposed OP4 and reveals the following:

- A binding protocol could strengthen accountability and elevate free public secondary education for all to an enforceable and justiciable right, particularly in Botswana and Mauritius.
- One can argue that, if adopted, OP4 has the potential to validate and internationalize existing good practices thereby improving commitment towards the realization of secondary education particularly in South Africa, Lesotho and Zimbabwe, with robust laws and policies.
- The binding nature of the protocol would require States to address systemic barriers to secondary education such as indirect costs, underfunding of secondary education and inadequate infrastructure which are critical factors in countries like Lesotho, Botswana, and Zimbabwe.
- The language of the resolution unlike that of the CRC Article 28(3) tends to impose a strong obligation to provide development cooperation to advance the right to secondary education, particularly in countries like Zimbabwe and Lesotho that somewhat require international support.
- There is arguably a concern that without guaranteed international support a binding protocol could create legal obligations that are unfeasible. Expanding treaty obligations through OP4 can exert normative pressure beyond existing commitments for those countries with limited capacity to implement the obligations, such as Botswana.
- There remains a risk of somewhat overloading States with multiple overlapping obligations for countries like Zimbabwe and Lesotho, with limited administrative capacity.
- It is common for some governments to postpone domestic socio-legal reforms awaiting international consensus on OP4 during a lengthy drafting and ratification process.
- It can therefore be argued that whereas OP4 can expand secondary education rights, caution must be taken to consider the varied contexts of countries and other significant players/institutions for the full realization of free secondary education for all children. Resource constraints and institutional capacity might need to be dealt with forthwith to set the correct tone for OP4.

List of Abbreviations and Acronyms

ACERWC – African Committee of Experts on the Rights and Welfare of the Child
ACRWC – African Charter on the Rights and Welfare of the Child
BEAM – Basic Education Assistance Module
CESCR – Committee on Economic, Social and Cultural Rights
CRC – United Nations Convention on the Rights of the Child
CRC Committee – Committee on the Rights of the Child
CRIN- Child Rights Information Network
ESP – Education Sector Plan
ESCR- Economic, Social and Cultural Rights
FOB – Free on Board (used in trade/shipping)
GC- General Comment
GDP – Gross Domestic Product
GEM – Global Education Monitoring (Report Team)
HRC – Human Rights Council
HRW- Human Rights Watch
ICESCR – International Covenant on Economic, Social and Cultural Rights
JC – Junior Certificate
LGCSE – Lesotho General Certificate of Secondary Education
NGO – Non-Governmental Organization
OC – Ombudsperson for Children
OHCHR- United Nations Office of the High Commissioner for Human Rights
OP – Optional Protocol
OP4 -Proposed 4th Optional Protocol to the CRC
OPAC – Optional Protocol on the Involvement of Children in Armed Conflict
OPIC – Optional Protocol on a Communications Procedure
OPSC – Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
OVC – Orphans and Vulnerable Children
RISDP – Regional Indicative Strategic Development Plan
SADC – Southern African Development Community
SDG – Sustainable Development Goal
SDG 4 – Sustainable Development Goal 4: Quality Education
UIS – UNESCO Institute for Statistics
UN – United Nations
UNESCO – United Nations Educational, Scientific and Cultural Organization
UPR – Universal Periodic Review

Chapter 1: Introduction

1.0. Chapter Summary

This chapter defines the research problem. It further presents the aim of the research, research objectives, research questions and the research methodology. The Chapter also presents the children's rights legal framework guiding the research and the overall outline of the research study. Finally, the Chapter presents a conclusion outline.

1.1. Problem Statement

The right to education, including secondary education, is an established feature of international human rights law.¹ In 1948 the Universal Declaration of Human Rights (UDHR) in Article 26 set the standard for the recognition of the right to education, particularly aimed at the "full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms."² Ever since 1948 many countries have made efforts to ratify at least one international human rights treaty that guarantees the right to education, including secondary education, and incorporate it in domestic legislation.³ Article 28(1)(b) of the CRC⁴, Article 13(2)(b) of the ICESCR,⁵ and Article 11(3)(b) of the ACRWC⁶ recognizes the right of the child to secondary education together with the general obligations of State Parties to progressively realize this right within their means and that of international cooperation.⁷ States are required to make elementary education free and compulsory, with most extending this requirement to include up to 5 years of mandatory secondary education.⁸ Secondary education should be available and accessible to all, and the form of education on offer should be of an acceptable standard that is also adaptable to the needs of each individual learner.⁹

Sheppard notes that "it would benefit millions of children if quality, inclusive, ... free secondary education were to become an immediate obligation of States, rather than an aspect of the right to education that states may progressively realize," since it's a gateway to many other children's rights.¹⁰ Emphasizing the significance of education, the CRC Committee in General Comment (GC) 1 notes that States must take the necessary steps to formally incorporate the aims of education articulated in Article 29 into their

¹ Laura Lundy et al., "The Education Rights of Children," *International Human Rights* (Singapore, 2019), 260.

² UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, resolution 217 A (III) (December 10, 1948), Article 26

³ UNESCO *Right to Education Handbook* (2019), 17

⁴ UN General Assembly, *Convention on the Rights of the Child*, United Nations Treaty Series, vol. 1577, p. 3 (November 20, 1989) (CRC). Article 28(1)(b)

⁵ UN General Assembly, *International Covenant on Economic, Social, and Cultural Rights*, United Nations Treaty Series, vol. 993, p. 3, 16 December 1966 (ICESCR). Article 13(2)(b)

⁶ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, CAB/LEG/24.9/49 (1990), 11 July 1990 (ACRWC). Article 11(3)(b)

⁷ Wouter Vandenhoe, Gamze Erdem Türkelli, and Sara Lembrechts, *Children's Rights: A Commentary on the CRC and Its Protocols*, 1st ed., Elgar Commentaries Series (Cheltenham, 2019). Article 28 :05

⁸ Lundy et al., "The Education Rights of Children," 260

⁹ Ibid

¹⁰ Bede Sheppard, "It's Time to Expand the Right to Education," *Nordic Journal of Human Rights* 40, no. 1 (2022), 97

education policies and legislation at all levels.¹¹ The right to education should go beyond primary level to cover secondary education to accommodate the “common justifications of the right to education – rooted in the development of individual autonomy, human dignity and the multiplier effect in supporting other rights.”¹² At secondary education level life opportunities are often allocated and inequalities are widened,¹³ and this level tend to be “a filter for separating children into trajectories of skilled occupations with high remuneration or more routine poorly compensated work, with schools differentiated both in terms of quality and orientation.”¹⁴ Secondary education is part of an “empowerment right like no other human right” giving learners liberating power by making it possible for them to engage in critical thinking.¹⁵ However, whereas countries have made reasonable progress in providing free primary education, there is limited progress regarding provision of free secondary education in line with the progressive realization principle of international human rights law.¹⁶

UNESCO statistics reveal that the right to free and compulsory secondary education is still far from being universally realized by countries.¹⁷ The continued presence of school fees has been blamed for limiting the effective implementation of the right to secondary education with direct and indirect costs resulting in some children dropping out of school.¹⁸ In South Africa, for example, “88% of parents reported that back-to-school costs set them back financially, forcing them to compromise in other areas to afford these expenses.”¹⁹ Consequently, parents will often not feel compelled to send their children to school if the costs of education are unaffordable.²⁰ This is exacerbated by exorbitant school fees in private secondary education which often “excludes especially marginalized children.”²¹ Providing free secondary education has been seen to result in increased enrollment,²² and “a 24% increase in graduation rates in low and lower-middle-income countries”.²³ Beiter notes that there is need to reframe the right to education in international law since it is in a global crisis due to factors such as “privatization of education; the ignored extraterritoriality of states’ international human rights obligations; poverty and lack of resources; non-acceptance of ‘otherness’, inequality, and exclusion; and unsustainable lifestyles

¹¹ UN Committee on the Rights of the Child, General Comment 1 (2001), Article 29 (1), The aims of education, CRC/GC/2001/1, 17 April 2001. Para 17

¹² Tristan McCowan, *Submission to the Open-Ended Intergovernmental Working Group on an Optional Protocol to the CRC* (unpublished manuscript, 2025)

¹³ Ibid

¹⁴ Ibid

¹⁵ Klaus D. Beiter, *Submission on Proposed Optional Protocol to the CRC* (unpublished manuscript, 2025), 4

¹⁶ Kishore Singh, *Report of the UN Special Rapporteur on the Right to Education*, UN Doc. A/HRC/17/29 (April 18, 2011), para. 56

¹⁷ UNESCO and Right to Education Initiative, *Right to Education Handbook* (Paris: UNESCO, 2019), 100

¹⁸ Two Former UN Special Rapporteurs on the Right to Education, *Submission on the Proposed Optional Protocol to the CRC* (unpublished manuscript, 2025)

¹⁹ Barbara Biggs, “[Parents Struggle as Back-to-School Costs Soar: Survey Reveals Financial Stress and Sacrifices.](#)” *Moonstone Information Refinery*, January 18, 2024

²⁰ Katarina Tomaševski, *Report of the UN Special Rapporteur on the Right to Education*, UN Doc. E/CN.4/2002/60 (January 7, 2002), para 12

²¹ Beiter, *Submission on Proposed Optional Protocol to the CRC*, 6

²² Human Rights Watch (HRW), *Submission to the Working Group on the Optional Protocol to the Convention on the Rights of the Child* (2025)

²³ Ibid, 7

and societies.”²⁴ Recognizing the gaps in the existing international human rights law, Todres and others posit that “in the absence of a strong legal mandate, governments may not take the steps necessary to secure the education rights of all children, from pre-primary through secondary education.”²⁵

It is against this backdrop that child rights experts are increasingly advocating for an expansion of positive States obligations to ensure the realization of secondary education rights of all children.²⁶ Although the principal international children’s rights treaty, the Convention on the Rights of the Child (CRC) already recognizes a right to free and compulsory primary education, it has been criticized for failing to mandate free secondary education.²⁷ In response to public pressure through “a proposal advanced by Luxembourg, the Dominican Republic, and Sierra Leone, and co-sponsored by 46 other states”,²⁸ on July 10, 2024, the Human Rights Council (HRC) made a bold step to establish a working group of countries to consider and draft a new treaty explicitly recognizing every child’s right to free public secondary education, among other rights.²⁹ The proposed new treaty is expected to build upon the foundation laid by Article 28 and 29 of the CRC, recognizing that free primary education alone is insufficient to prepare children to thrive in today’s world,³⁰ and ultimately break the cycle of poverty for some children.³¹ Additionally, the HRC also requested that children be given the opportunity to express their views on the treaty’s substance and participate in the process making it the first time that children are consulted and given a voice in the drafting of a new international treaty.³²

Interestingly, child rights advocates seem to be positive about the proposed 4th Optional Protocol to the CRC (OP4) with some advocating for the HRC to move with speed to develop and adopt the new treaty.³³ Human Rights Watch (HRW),³⁴ some academics,³⁵ and former special rapporteurs³⁶ on the right to education, have since made submissions to the HRC in support of OP4 as a necessary legal mandate to improve commitment towards expanding State obligations on the right to education, particularly secondary education. This is “in conjunction with the range of initiatives underway globally to improve the quality and coverage of education throughout the life course.”³⁷ Whilst it is a fact that OP4 can assist State Parties to the CRC that have been struggling to progressively realize education rights of children

²⁴ Klaus D. Beiter, “[Why Neoliberal Ideology, Privatization, and Other Challenges Make a Reframing of the Right to Education in International Law Necessary](#),” *The International Journal of Human Rights* 27, no. 3 (March 16, 2023), 454

²⁵ Jonathan Todres and Charlotte S. Alexander, “Bringing the Right to Education into the 21st Century,” *Berkeley Journal of International Law* 42, no. 1 (2023): 68–69, 71

²⁶ Human Rights Watch, “[A Call to Expand the International Right to Education](#),” June 7, 2022

²⁷ Human Rights Watch, “[UN Rights Council Takes Big Step for Treaty on Free Education](#),” July 10, 2024,

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ *Ibid*

³¹ Todres and Alexander *supra* note 25, at 71

³² *Ibid*

³³ HRW *supra* note 22

³⁴ *Ibid*

³⁵ Beiter *supra* note 15, at 4; McCowan, *supra* note 12

³⁶ Two Former UN Special Rapporteurs, *supra* note 18

³⁷ McCowan, *supra* note 12

following the ratification of the CRC, the limited visibility of most Southern African countries³⁸ and their child rights experts³⁹ can raise questions on whether they are convinced about the justification and feasibility of adopting a new treaty on the education rights of children, especially secondary education. Some Southern African countries such as Botswana, Lesotho, Mauritius, South Africa and Zimbabwe have been amongst the first countries to ratify the CRC,⁴⁰ but they have made somewhat limited progress towards free secondary education for all children.⁴¹ This begs the question: How much more time does States require to fully make secondary education “available and accessible to every child including taking appropriate measures such as the introduction of free education” as mandated by the CRC Article 28(1)(b)?⁴² It appears as if there has been a reasonable amount of time already, but some States are still lagging behind regarding full realization of their obligations in relation to secondary education. Therefore, it is imperative to undertake a critical analysis of the potential benefits and risks of adopting OP4 focusing on secondary education in Southern Africa where already education systems are facing some systemic barriers to the realization of education rights for all children.⁴³

It is important to note that the decision of the HRC to pursue an Optional Protocol (OP) on education rights of children⁴⁴ can complement the SDG Agenda 2030⁴⁵ providing a significant opportunity to strengthen socio-legal frameworks to promote compulsory, free secondary education. Nonetheless, the potential benefits must be weighed against potential risks such as normative gaps associated with ratification, financial constraints, political will, implementation capacity and the adequacy of the finally agreed upon content of the OP. As such, this study critically analyzes the potential benefits and risks of drafting and adopting the OP4 with respect to secondary education in the context of five (5) selected countries in Southern Africa that were among the first to ratify the CRC namely Zimbabwe (1990), Mauritius (1990), Lesotho (1992), Botswana (1995) and South Africa (1995).

1.2. Aim of the research

To critically analyze the potential impact of the proposed 4th Optional Protocol to the CRC in relation to secondary education in the context of selected Southern African countries.

1.3. Research Objectives

1. To examine the existing international human rights standards creating the impetus for OP4.

³⁸HRW, supra note, 22

³⁹ Human Rights Watch, [Academics' Sign-On Letter Re: Right to Free Early Childhood Education and Free Secondary Education](#), June 5, 2024

⁴⁰ OHCHR, [Ratification Status for CRC – Convention on the Rights of the Child](#)

⁴¹ CRC Concluding Observations, Botswana (2019), Para 52; CRC Concluding Observations, Lesotho (2018), Para 53; CRC Concluding Observations, Mauritius (2023), Para 38; CRC Concluding Observations, South Africa (2024), Para 40; CRC Concluding Observations, Zimbabwe (2016), Para 68

⁴² CRC Article 28(1)(b)

⁴³ South African Department of Basic Education, [“SADC Member States Join Forces to Address Education and Training, Science, Technology and Innovation in the Region.”](#) June 20, 2018

⁴⁴ Ann Skelton., “Right to Education (Class Slides)” (Lecture, Leiden University, November 26, 2024).

⁴⁵ Jeffrey D. Sachs, Guillaume Lafortune, and Grayson Fuller, *The SDGs and the UN Summit of the Future: Sustainable Development Report 2024* (Dublin: Dublin University Press, 2024)

2. To interrogate the main provisions of OP4 in relation to secondary education and their implications for secondary education in the context of Southern Africa.
3. To investigate the existing secondary education challenges in the selected five Southern African countries and assess whether and how countries could benefit from OP4 to address these challenges.
4. To examine the legal, financial, and political benefits and risks associated with the adoption and implementation of OP4 in the context of secondary education rights in selected Southern African countries.

1.4. Research question

1.4.1. Main Research Question

The research study seeks to answer the following question:

To what extent does the proposed 4th Optional Protocol to the CRC trigger risks and benefits to the implementation of secondary education rights of children in the context of selected Southern African countries?

1.4.2. Sub-questions

1. How are the existing international and regional education rights obligations creating the impetus for OP4 in relation to secondary education?
2. What are the key secondary education challenges faced by the selected Southern African countries that can be addressed by OP4?
3. What are the main rights and obligations related to secondary education outlined in the HRC Resolution on OP4?
4. How would OP4 enhance or not produce additional positive progress towards the realization of the right to education in the context of selected Southern African countries?

1.5. Children's rights legal framework

The research study is guided by the following children's rights legal framework: The HRC Resolution on OP4; CRC Article 28 & 29 (Education Rights); Article 4(Implementation of Rights); Article 24 (Right to Health); Article 27 (Adequate Standard of Living); Article 32 (Exploitation); CRC OPs; ACRWC Article 11; ICESCR Article 13; ICESCR Article 2; CRC GC 1; CRC GC 5; CRC GC19; ICESCR GC 13; SADC Protocol on Education and Training(SADC Protocol); SDG 4 (on Education). As it is, the above-mentioned children's rights frameworks are analyzed with a view to identifying any gaps that can be filled in by OP4 and appreciating how they create the impetus for OP4. The HRC Resolution on OP4 is also examined for its adequacy to address existing gaps in implementing secondary education rights of children in the context of Southern African countries.

1.6. Methodology and Research Techniques

The study makes use of the qualitative research approach focusing on legal and doctrinal analysis⁴⁶ of the HRC Resolution on OP4, the CRC and its existing Protocols, ICESCR, SDG 4, the ACRWC, the SADC Protocol, and a comparative analysis of national socio-legal frameworks in relation to secondary education in selected Southern African countries. A desk review was therefore conducted focusing

⁴⁶ Martin Scheinin, "The Art and Science of Interpretation in Human Rights Law," in *Research Methods in Human Rights: A Handbook*, ed. Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (Cheltenham: Edward Elgar Publishing Ltd, 2017), 20

mainly on analysis of the treaties, General Comments, concluding observations and recommendations of treaty bodies to selected Southern African countries, national laws and policies, policy reports, UN documents and academic publications. Recordings of the UN Web TV on discussions related to OP4 were also used to understand different arguments from States regarding benefits and risks of OP4. Thematic analysis was then used to categorize findings to provide answers to the research question(s). Table 1 below presents the overall outline of the thesis.

Table 1: Thesis Outline

| Chapter | Chapter Contents | Summary Description |
|---|---|---|
| Chapter 1: Introduction | 1.0. Chapter Introduction 1.2. Problem statement 1.3. Aim and objectives 1.4. Research questions 1.5 Methodology 1.6.A description about the Child Rights Legal Framework. 1.7. Chapter Conclusion | It introduces the problem statement, objectives, research questions, methodology and a description about the Child Rights Legal Framework. |
| Chapter 2: International and Regional Standards on Education Rights of Children in relation to Secondary Education | 2.0. Chapter Introduction 2.1. The CRC and Education Rights of Children with Respect to Secondary Education 2.2. International Covenant on Economic, Social and Cultural Rights (ICESCR) 2.3. Analysis of Sustainable Development Goals (SDG4) in Relation to Secondary Education 2.4. Regional Legal Frameworks on Education Rights in Relation to Secondary Education 2.5. Sub-regional Legal Frameworks on Education Rights of Children in Relation to Secondary Education 2.6. Chapter Conclusion | This Chapter examines international human rights standards regarding education rights of children with respect to secondary education. It also discusses SDG 4 in relation to secondary education. More so, the Chapter assesses Africa regional and SADC sub-regional child rights standards related to secondary education. |
| Chapter 3: The Reality of Education Rights of Children in the Context of Secondary Education in Selected Southern African Countries | 3.0. Chapter Introduction 3.1. Implementation of Secondary Education Rights in Botswana 3.2 Implementation of Secondary Education Rights in Lesotho 3.3 Implementation of Secondary Education Rights in Mauritius | The chapter provides an analysis of the legal mandate, policy requirements and practice of secondary education rights of children in selected Southern African countries. |

| | | |
|--|---|--|
| | <p>3.4 Implementation of Secondary Education Rights in South Africa</p> <p>3.5 Implementation of Secondary Education Rights in Zimbabwe</p> <p>3.6. Chapter Conclusion</p> | |
| <p>Chapter 4: Quest for An Expanded International Legal Mandate on Education Rights: Towards an Optional Protocol to the CRC and Its Potential Implications for Secondary Education of Children in Selected Southern African Countries</p> | <p>4.0. Chapter Introduction</p> <p>4.1. The HRC Resolution</p> <p>4.2. Potential Benefits of a Binding International Legal Mandate on Education Rights in the Context of Secondary Education in Selected Southern African Countries</p> <p>4.3. Potential Risks and Challenges Associated with A Binding International Legal Mandate on Education Rights in the Context of Secondary Education in Selected Southern African Countries</p> <p>4.4. Chapter Conclusion</p> | <p>This chapter presents the HRC Resolution proposing the development of OP4. It then assesses the benefits and risks of OP4 with the view to consider its feasibility and effectiveness in promoting education rights in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe.</p> |
| <p>Chapter 5: Findings, Recommendations, and Conclusion</p> | <p>5.0. Chapter Introduction</p> <p>5.1. Findings</p> <p>5.2. Recommendations</p> <p>5.3. Conclusion</p> | <p>It presents key findings, recommendations, and conclusions of the research study.</p> |

1.7. Conclusion Outline

The proposed thesis reflects on the potential impact of adopting OP4 in relation to proposed secondary education rights and obligations in the HRC Resolution. As such, the study seeks to critically assess whether the potential benefits of OP4 outweigh its risks and how the selected Southern African countries can effectively implement it within their existing legal and policy frameworks, if it's adopted. Recommendations are made to governments and other critical players to balance legal obligations with practical implementation in promoting secondary education rights of children in line with OP4. The recommendations will also be aimed at supporting advocacy efforts to improve the drafting and implementation of secondary education rights.

Chapter 2: International and Regional Standards on Education Rights of Children in Relation to Secondary Education

2.0. Chapter Introduction

The HRC Resolution regarding OP4 calls upon States to “make public secondary education available free to all”.⁴⁷ This Chapter therefore examines international human rights standards and SDG 4 in relation to secondary education. It then assesses ACRWC and SADC sub-regional standards related to secondary education. In a sense, this chapter aims to partly answer the question on how the existing international and regional education rights obligations create the impetus for OP4 in relation to secondary education.

2.1. The CRC and Education Rights of Children with Respect to Secondary Education

The CRC, adopted in 1989, which is monitored by the CRC Committee, explicitly recognizes education as a fundamental right for every child and establishes key obligations for State Parties.⁴⁸ In fact, the CRC and its OPs provide a framework for States to respect, protect and fulfill children's right to secondary education.⁴⁹ By ratifying OPAC States demonstrate a commitment to preventing the recruitment of children into armed forces, thereby reducing some barriers to secondary education,⁵⁰ by ratifying OPSC countries commit to protecting children from exploitation that can disrupt their education,⁵¹ and ratifying OPIC⁵² is a recognition of the fact that “children have the right to appeal to an international mechanism specific to them, if violations (of their secondary education rights) cannot be addressed effectively at national level.”⁵³

Article 28(1)(b) of the CRC requires “States Parties to recognize the right of the child to education,” and progressively make secondary education “available and accessible to every child”, through taking “appropriate measures such as the introduction of free education and offering financial assistance in case of need.”⁵⁴ This is similar to the ICESCR Article 13(2)(a)⁵⁵, but it can be argued that the CRC language regarding secondary education is not strong and seem to restrict States to what is practical or can be easily realized. For both the CRC and the ICESCR secondary education, as an ESCR, is to be realized only progressively,⁵⁶ but it can be argued that the ICESCR has stronger language about the move towards free education. GC 13 suggests that the States must put in place plans of action to progressively ensure the maximum realization of secondary education.⁵⁷ It is noteworthy that both the

⁴⁷ UN Human Rights Council, *Resolution 56/5*, UN Doc. A/HRC/RES/56/5 (2024), para 1(b)(ii)

⁴⁸ Todres and Alexander, “21st Century,” 68–69

⁴⁹ Ibid

⁵⁰ OPAC, Preamble

⁵¹ OPSC, Preamble

⁵² OPIC. Article 5

⁵³ OPIC, “[Putting Children's Rights on Equal Footing with Human Rights: OP to the CRC on a Communications Procedure \(OPIC\)](#)”

⁵⁴ CRC Article 28(1)(b)

⁵⁵ Vandenhoe, et al, *Children's Rights*, Article 28: 04, p290

⁵⁶ Ibid

⁵⁷ CESCR GC13, para 52

CRC and the ICESCR are inspired by and replicates Article 26 of the UDHR that identifies education as a fundamental human right to be universally protected.⁵⁸

Vandenhole et al posit that availability; accessibility, with the three overlapping dimensions of non-discrimination, physical and economic accessibility; acceptability; and adaptability rights constitute the normative content of the right to education under the CRC.⁵⁹ In applying these elements, ‘the best interests of the student shall be a primary consideration’.⁶⁰ The three types of obligations applicable to the right to education are the obligation to respect, to protect and to fulfil.⁶¹ Similar to ICESCR, specifically as minimum core obligations, States are expected to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1) of the ICESCR; to adopt and implement a national educational strategy which includes provision for secondary education.⁶²

Retention and completion of secondary education is provided for in Article 28 (1)(e) where States are obliged to enforce “regular attendance at schools and the reduction of drop-out rates.”⁶³ A weak provision on international cooperation on the right to education can be found in Article 28(3) of the CRC,⁶⁴ where States are only under an obligation to promote and encourage international cooperation, with no firm extraterritorial obligations included.⁶⁵ International cooperation requires developed States to support developing countries in achieving accessible, quality, and progressively free secondary education.⁶⁶ The CRC Committee has urged states that provide development cooperation to design their programmes in line with the principles of education contained in the CRC.⁶⁷ Article 28(3) mirrors Article 4 of the CRC which provides that “...with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”⁶⁸ Accordingly, GC 19 notes that States parties should collaborate with other States’ efforts to mobilize the maximum available resources for children’s rights.⁶⁹

The CRC is quite unique in providing for a separate provision on the aims of education in Article 29(1).⁷⁰ These aims, set out in the five subparagraphs of article 29 (1) are all linked directly to the realization of the child’s human dignity and full development, taking into account the child’s special developmental

⁵⁸UDHR, Article 26.

⁵⁹ Vandenhole, et al., supra note 55, at 290

⁶⁰ CESCR GC13, para 7

⁶¹ supra note 59

⁶² CESCR GC13, Para 57

⁶³ CRC Article 28 (1)(e)

⁶⁴ Vandenhole, et al., supra note 55, at 298

⁶⁵ Wouter Vandenhole, ‘Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?’ (2009) 17 International Journal of Children’s Rights 23–63, 61

⁶⁶ CRC Article, 28(3)

⁶⁷ CRC Committee GC1, para 28

⁶⁸ CRC Article 4

⁶⁹ CRC Committee GC 19, para 37

⁷⁰ CRC Article 29(1)

needs and diverse evolving capacities.⁷¹ The CRC insists upon the need for education to be child-centered, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates.⁷² As it is, secondary education should empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.⁷³ Article 29(2) of the CRC is associated with accessibility of education by indirectly guaranteeing the freedom to establish and direct educational institutions.⁷⁴ The CRC Committee views implementation of Article 29(1) as an immediate obligation meaning “resource constraints cannot provide a justification for a State’s failure to take any, or enough, of the measures that are required.”⁷⁵ It can therefore be argued that Article 29 of the CRC provides for education, including secondary education, as a public good of such importance that its availability and accessibility should be guaranteed to all children.⁷⁶

2.1.1. Some Overarching Articles of the CRC Focusing on Secondary Education

According to Article 2 discrimination on any ground including gender, disability, or socioeconomic status, offends the human dignity of the child and is capable of undermining the capacity of the child to fully benefit from educational opportunities.⁷⁷ Article 23(3)(4) calls for inclusive education for children with disabilities, ensuring they have access to education suited to their needs.⁷⁸ Additionally, Article 32(1) obligates States to protect children against child labor, which can interfere with children's right to education.⁷⁹ Furthermore, Article 24(1) requires states to ensure child well-being, which supports school attendance, retention, and learning at the secondary level.⁸⁰ Health and nutrition (Article 24) are foundational for realizing education rights.⁸¹ Article 27(1)(2)(3) of the CRC recognizes every child’s right to an adequate standard of living,⁸² obligating States to support families in need through “... material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”⁸³ Material deprivation often impedes educational access, underscoring State duties to ensure equitable secondary education.⁸⁴

⁷¹ CRC Committee GC 1, para 1

⁷² CRC Committee GC 1, para 2

⁷³ Ibid

⁷⁴ Vandenhoe, Türkelli, and Lembrechts, *Children’s Rights*, Article 29.01, p299

⁷⁵ CRC Committee GC 1, para 28

⁷⁶ Beiter, *supra* note 15; Tristan, *supra* note 12

⁷⁷ CRC Committee GC1, para 10

⁷⁸ CRC Article 23(3)(4)

⁷⁹ CRC Article 32(1)

⁸⁰ CRC, Article 24(1)

⁸¹ Katarina Tomaševski, *Education Denied: Costs and Remedies* (London: Zed Books, 2003), 43

⁸² CRC Article 27(1)-(3)

⁸³ CRC Article 27(3)

⁸⁴ Malcolm Langford, Bruce Porter, Rebecca Brown, and Julieta Rossi, eds., *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria: Pretoria University Law Press, 2016), 272

Article 4 emphasizes the use of maximum resources available, including international cooperation, in implementing ESCR.⁸⁵ In a realistic acceptance that lack of resources can hinder the full implementation ESCR in some States, GC 5 emphasizes the principle of “progressive realization” of such rights.⁸⁶ States Parties are expected to demonstrate that they have made every effort to mobilize, allocate and spend sufficient financial and other resources⁸⁷. GC 19 notes that “the immediate and minimum core obligations imposed by children’s rights shall not be compromised by any retrogressive measures, even in times of economic crisis.”⁸⁸ In the event of resource shortages, “States parties with resources for international cooperation have an obligation to provide such cooperation with the aim of facilitating the implementation of children’s rights in the recipient State.”⁸⁹ It can therefore be argued that States have a positive obligation to mobilize internal and external resources to progressively make secondary education available and accessible.

2.2. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR, adopted in 1966, which is overseen by the Committee on Economic, Social and Political Rights (CESCR) is a core human rights treaty that, under Article 13, guarantees the right to education as a fundamental right of every person, including children.⁹⁰ It is worth noting that the ICESCR does not mention children explicitly in every provision, but its protections encompass them fully.⁹¹ The CESCR in its GC13 notes that “education is both a human right in itself and an indispensable means of realizing other human rights.”⁹²

Article 13(2)(b) of the ICESCR recognizes the right to secondary education as a clearly legally binding component of the right to education, obligating States to “make secondary education in its different forms generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”⁹³ Generally, this provision requires: availability (adequate infrastructure, trained teachers, materials.); accessibility (non-discrimination, physical and economic access); acceptability(culturally relevant and quality content); adaptability(responsive to the needs of diverse learners, especially marginalized children).⁹⁴ These are echoed in the 4As Framework developed by Katarina Tomaševski, former UN Special Rapporteur on the Right to Education, and endorsed by the CESCR Committee as the normative content on the right to education.⁹⁵ According to GC13 secondary education should be “available and accessible to every child; progressive introduction of free education is an obligation with immediate effect regarding non-discrimination and deliberate, concrete steps toward full realization; States must eliminate indirect costs (uniforms, exams, transport)

⁸⁵CRC Article 4

⁸⁶CRC Committee GC 5. Para 7

⁸⁷CRC Committee GC19. Para 28

⁸⁸CRC Committee GC19. Para 31

⁸⁹CRC Committee GC19. Para 35

⁹⁰ICESCR, Article 13

⁹¹Ibid

⁹²CESCR GC 13, para 1

⁹³ICESCR Article 13(2)(b)

⁹⁴CESCR GC 13, para 6

⁹⁵Tomaševski supra note 20, at 12-13.

that undermine economic accessibility; States parties are obliged to take deliberate, concrete and targeted steps towards the full realization of the right to education."⁹⁶

The ICESCR operates under the principle of progressive realization enshrined in Article 2(1).⁹⁷ GC13 notes that "progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 13."⁹⁸ While full implementation may take time, certain obligations are immediately binding, especially non-discrimination.⁹⁹ Failure to take steps toward realization or taking regressive measures is a violation of the right to education, unless fully justified.¹⁰⁰ The principle of non-retrogression demands that states not only protect past gains but also guard against decline in law, policy, and practice.¹⁰¹ Hence, States must act with child-sensitive immediacy, ensuring that policies not only exist but are implemented and resourced.¹⁰² As such, Article 2(1) of the ICESCR recognizes international assistance and cooperation as essential for realization of ESCR, especially in low-income countries.¹⁰³ Maximum available resources include both domestic and international resources.¹⁰⁴ However, the ICESCR may limit attention to child-specific needs unless interpreted alongside the CRC since it doesn't separate children and adult rights to education.¹⁰⁵ It can be argued that unless interpreted dynamically, the ICESCR gives States room to often invoke "progressive realization" to justify the limited resourcing of secondary education or impose costs that can disadvantage children.

2.3. Analysis of Sustainable Development Goals (SDG4) in Relation to Secondary Education

In 2015, the UN General Assembly unanimously approved 17 Sustainable Development Goals (SDGs) as '... a plan of action for people, planet and prosperity'.¹⁰⁶ SDG4 aims to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all" by 2030.¹⁰⁷ States agreed to "ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes,"¹⁰⁸ setting explicit targets for the completion of free secondary education by all children by 2030.¹⁰⁹ Although not legally binding, SDGs are evidence of a

⁹⁶ICESCR GC 13, para. 43

⁹⁷ICESCR Article 2(1)

⁹⁸ICESCR GC13. para 44

⁹⁹ICESCR Article 2(2)

¹⁰⁰ICESCR GC13, para 45

¹⁰¹Ibid

¹⁰²Ibid

¹⁰³ICESCR Article 2(1)

¹⁰⁴UNESCO *supra* note 17, at 138

¹⁰⁵ICESCR Article 13

¹⁰⁶Sheppard, "Expand the Right," 111

¹⁰⁷UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, October 21, 2015 (hereinafter UNGA Res 70/1), para. 25

¹⁰⁸Ibid

¹⁰⁹ Ibid

global political consensus, including governments' unanimous assessment that the financing for these goals is achievable by 2030.¹¹⁰ Research shows that the "CRC Committee has acknowledged the SDGs' standard of free secondary education, but stopped short of expressly pressing governments to meet that goal."¹¹¹ UNESCO concludes that even if countries manage to achieve their voluntarily set benchmarks, they still will fall short of the SDG 4 target pledges, even before taking the potential impact of COVID-19 into account.¹¹² Regrettably, the SDG framework tend to avoid the human rights language of obligations namely respect, protect and fulfill.¹¹³ It can be argued that the SDG framework lacks an indicator on the availability of free education,¹¹⁴ and compulsory, free secondary education has to be only progressively realized until 2030 without clarity on how to sustain gains beyond 2030.¹¹⁵ Furthermore, there is provision for voluntary participation in monitoring mechanisms with "no clear obligations for international organizations or States as members of international organizations".¹¹⁶

2.4. Regional Legal Frameworks on Education Rights in Relation to Secondary Education

2.4.1 The African Charter on the Rights and Welfare of the Child (ACRWC) and Education Rights of Children

The ACRWC, adopted in 1990, which is overseen by the African Committee of Experts on the Right and Welfare of the Child (ACERWC), is a regional instrument that upholds children's rights, including the right to education.¹¹⁷ Specifically, Article 11 of the ACRWC provides for the right to education for every child.¹¹⁸ It further articulates the aims of education as "the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential";¹¹⁹ the preservation and strengthening of positive African values,¹²⁰ among others. With regard to secondary education the ACRWC "encourage the development of secondary education in its different forms and to progressively make it free and accessible to all."¹²¹ The child's right to education must be implemented through State parties taking all appropriate measures with a 'view to achieving full realization of this right'.¹²² The ACRWC mandates States to "take measures to encourage regular attendance at schools and the

¹¹⁰Sheppard supra note, 106

¹¹¹Todres and Alexander, "21st Century," p84

¹¹²UNESCO, SDG 4 Data Digest 2021: National SDG 4 Benchmarks to Transform Education, (Paris: UNESCO Institute for Statistics, 2021), 46

¹¹³Beiter supra note 24, at 453

¹¹⁴Civil society organizations, academics, and education professionals, Global Indicator for Target 4.1: [Letter to the United Nations, March 4, 2016](#)

¹¹⁵Ibid

¹¹⁶Beiter supra note 116

¹¹⁷ACRWC

¹¹⁸ACRWC Article 11(1)

¹¹⁹ACRWC Article 11(2)(a)

¹²⁰ACRWC Article 11(2)(c)

¹²¹ACRWC Article 11(3)(b)

¹²²Julia Sloth-Nielsen, "The African Charter on the Rights and Welfare of the Child," in Child Law in South Africa, ed. Trynie Boezaart. Leiden University Scholarly Publications, 2017, 433.

reduction of drop-out rate.¹²³ Additionally, it prohibits child rights violations that limit access to secondary education such as child labor (Article 15),¹²⁴ all forms of violence in schools (Article 16),¹²⁵ lack of parental support (Article 20),¹²⁶ and harmful practices, including child marriage (Article 21).¹²⁷ The ACRWC inspires aspiration 6 of the Africa's Agenda for Children 2040 which states that every child should benefit fully from quality education.¹²⁸ It can be argued that while the ACRWC reflects the recognition of the right to secondary education and regional consensus on State obligations, the language on secondary education is not very strong giving States a lot of leeway towards its full realization.

2.6. Sub-regional Legal Frameworks on Education Rights of Children in Relation to Secondary Education

The Southern African Development Community (SADC) has established some legal instruments aimed at ensuring the right to education, particularly secondary education. The SADC Protocol on Education and Training (1997) is legally binding,¹²⁹ and in Article 5 on cooperation in basic education (primary and secondary levels) it mandates Member States "to improve and sustain the educational standards at... secondary levels;¹³⁰ provide universal basic education for at least nine years of schooling;¹³¹ provide socially disadvantaged groups special support in admission to basic education;¹³² co-operate in some specific areas."¹³³ Furthermore, SADC Regional Indicative Strategic Development Plan (RISDP) (2020-2030), which is not legally binding, requires States to ensure universal access to secondary education by 2030, emphasizing inclusive and equitable secondary education.¹³⁴ It can be argued that whereas the SADC Protocol and RISDP mandates universal secondary education and regional cooperation, they are silent on free secondary education.¹³⁵ Moreover, the language of the Protocol does not provide for strong obligations of Member States as most provisions are broadly worded and focus on policy alignment rather than strict legal obligations with direct enforceability in national courts.¹³⁶ Lack of adjudication mechanisms means that non-compliance is addressed primarily through peer review of

¹²³ACRWC Article 11(3)(d)

¹²⁴ACRWC Article 15

¹²⁵ACRWC Article 16

¹²⁶ACRWC Article 20

¹²⁷ACRWC Article 21

¹²⁸African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Agenda 2040: Africa's Agenda for Children – [Fostering an Africa Fit for Children](#), November 9, 2016

¹²⁹Southern African Development Community [Protocol on Education & Training 1997](#)(Hereinafter SADC Protocol)

¹³⁰SADC Protocol, Article 5(1)

¹³¹SADC Protocol, Article 5(3)

¹³²SADC Protocol, Article 5(4)

¹³³SADC Protocol, Article 5(6)

¹³⁴Southern African Development Community (SADC), *Regional Indicative Strategic Development Plan (RISDP) 2020–2030*, 45

¹³⁵Ibid

¹³⁶Ibid

Member States and dialogue as evidenced by the setting up of the technical committee on basic education under Article 13.¹³⁷

2.6. Chapter Conclusion

The CRC, ICESCR and ACRWC do not mandate States to make secondary education explicitly free. The SDG 4 framework requires States to provide free and compulsory secondary education, but it's only a time-bound soft law until 2030 and lacks an indicator on free secondary education. Finally, the SADC Protocol on Education and Training is silent on free secondary education. This can, therefore, stimulate debates on how to make free secondary education an "immediate obligation for States,"¹³⁸ given its significance in unlocking better opportunities for all children in the 21st century.

¹³⁷SADC Protocol in Article 13(1)(a); ¹³⁷ Southern African Development Community (SADC), "[Ministers of Education Meet to Review](#)," 2013; Southern African Development Community (SADC), "[Announcement for Joint Meeting of Ministers of Education and Training and Science Technology and Innovation](#),"

¹³⁸Tristan, supra note 12

Chapter 3: The Reality of Education Rights of Children in the Context of Secondary Education in Selected Southern African Countries

3.0. Introduction

States are expected to respect, protect and fulfill their obligations under international law often through domestication and incorporation of international law for enforceability and justiciability in domestic jurisdiction.¹³⁹ Hence, this chapter provides an analysis of the implementation of secondary education rights of children through examining the legal mandate, policy requirements and the practice of secondary education in selected Southern African countries. It aims to answer the question regarding the key secondary education challenges faced by the selected Southern African countries that can be addressed through OP4.

3.1. Implementation of Secondary Education Rights in Botswana

3.1.1. The Legal Mandate

The Constitution of Botswana does not explicitly guarantee the right to education.¹⁴⁰ There is a proposal to amend the Constitution to include section 7B(1) which reads, “every person shall have the right to education”, and “this right shall be progressively realized.”¹⁴¹ Currently the legal mandate with regard to secondary education is found in the Education Act.¹⁴² Although the Education Act does not mention the right to education, it mandates the Minister “to promote post-primary education...and the progressive development of schools”¹⁴³, and making regulations prescribing “compulsory attendance at schools in any area, and the manner in which compulsory attendance is to be ensured”.¹⁴⁴ The right to education for all children is explicitly provided for under the Children’s Act which asserts that: “Every child has a right to free basic education,”¹⁴⁵ and make education at all levels compulsory.¹⁴⁶ Admittedly, the court in Botswana tend to recognize and enforce educational rights through interpretations of statutory provisions and contractual obligations as in the case of *BONELA v Ledumang Senior Secondary School* where the High Court ordered the school to make arrangements for the child to write missed exams clarifying that no-one has a “right to limit any child’s right to education.”¹⁴⁷ However, one can argue that the absence of the right to free and compulsory secondary education from the Constitution has the potential to weaken its enforceability and limits prioritization of children’s rights to secondary education,¹⁴⁸ something that can be addressed by OP4 in Botswana.

¹³⁹UNESCO supra note 17, at 172

¹⁴⁰Constitution of the Republic of Botswana (1966, revised in 2016)

¹⁴¹Botswana Constitution (Amendment) Act, 2024, [Extraordinary Gazette](#), Bill No. B17; ConstitutionNet, “[Civil Society and Botswana’s Failed Constitutional Amendment Bill](#)”

¹⁴²Botswana Education Act (1967, revised 2003)

¹⁴³Ibid, Section 3(1)

¹⁴⁴Ibid, Section 29(2)(d)

¹⁴⁵Botswana Children’s Act (2009), Section 18(1)

¹⁴⁶Ibid, Section 18(2)

¹⁴⁷Botswana Network on Ethics, Law and HIV/AIDS (BONELA), “[Order Issued in the Ledumang Case](#),” March 31, 2021

¹⁴⁸CRC Committee GC 1. para 17

3.1.2. Policy Requirements

The Revised National Policy on Education (RNPE) (1994, updated 2021) expands access to junior secondary education which goes for three years and upper secondary school for two years.¹⁴⁹ Junior secondary school is legally compulsory in Botswana and progress to upper secondary education is optional depending on learners passing the Junior Certificate of Education.¹⁵⁰ The RNPE, among other things, aims to improve access, ensure equity and inclusiveness for all marginalized children like orphans, and those with disabilities.¹⁵¹ Additionally, the National Development Plan also provides the framework for ensuring access and quality in secondary education.¹⁵² Botswana has developed a National Implementation Plan (NIP) for SDG 4 aiming to enhance access and learning outcomes at all levels, including secondary education,¹⁵³ through focusing mainly on improving teacher quality, curriculum relevance, and infrastructure development, aligning its educational strategies with global objectives.¹⁵⁴ Vision 2036 also focuses on promoting quality, inclusive secondary education.¹⁵⁵ Furthermore, the Remote Area Development Programme (RADP) supports marginalized communities by improving availability of secondary schools in remote areas.¹⁵⁶ The Education and Training Sector Strategic Plan (ETSSP) 2015–2020 outlines strategic priorities such as expanding access to senior secondary education and addressing disparities.¹⁵⁷ In Botswana parents are charged a ‘co-payment’ for education, but the children of those in lower income groups receive free education.¹⁵⁸ In addition, free school meals are provided to all school pupils.¹⁵⁹ It can be argued that making only junior secondary education compulsory can limit progress to upper secondary education, and targeted exemptions from paying fees can make those involved feel humiliated to apply or might not be aware of the exemptions.¹⁶⁰

3.1.3. Secondary Education Rights in Practice

Botswana is party to the CRC since 1995 and the ACERWC since 2001.¹⁶¹ Botswana has consistently allocated substantial portions of its GDP to education with 6.8% in 1992 and 8.1% in 2020,¹⁶² but

¹⁴⁹Statistics Botswana, [Secondary Schools Stats Brief 2022](#), 1

¹⁵⁰Education Profiles, “[Botswana: Non-State Actors in Education](#)”

¹⁵¹Ibid

¹⁵²Botswana, National Development Plan 11 (2017–2023)

¹⁵³Botswana, National Implementation Plan for Sustainable Development Goal (SDG) 4 – Education 2030, 12

¹⁵⁴Ibid

¹⁵⁵Ibid

¹⁵⁶Botswana Youth Magazine, “Remote Area Development Programme: 10 Years of Affirmative Action and Employment Promotion”

¹⁵⁷Botswana, Education & Training Sector Strategic Plan (ETSSP 2015–2020), 7.

¹⁵⁸Ibid, p20

¹⁵⁹Ibid

¹⁶⁰Beiter, supra note 15, at 5

¹⁶¹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), “Member States: [Ratifications](#)”

¹⁶² World Bank, “Government Expenditure on Education, Total (% of GDP) – [Botswana](#)”

academic critics still note persistent underfunding of rural schools.¹⁶³ Nearly a quarter of Botswana's public spending goes to educate her children, significantly more than in comparator countries, for similar, or poorer results.¹⁶⁴ Consequently, gross secondary education enrollment ratios demonstrate marked expansion, from 57% in 1995¹⁶⁵ to 72% in 2022.¹⁶⁶ Despite high enrolment, dropout rates and rural-urban inequalities hinder realization of SDG 4.1 targets.¹⁶⁷ Some children from disadvantaged families drop out of secondary school to work as farm hands, many attend school without proper uniforms, and some walk long distances to reach to school, with limited access to educational materials like books and computers.¹⁶⁸ While Botswana's legal and policy frameworks show commitment to children's right to secondary education, gaps in implementation, inclusivity, and enforcement hinder full realization of these rights for all children.¹⁶⁹

The CRC Committee raises concerns “about low completion rates (for all education levels), the large number of children who are out of school and the introduction of fees for secondary school in 2006.”¹⁷⁰ Considering the SDG 4 targets,¹⁷¹ the Committee recommends Botswana to “guarantee the right to free quality education for all girls and boys, including of foreign nationality, and effectively reduce regional disparities in access to education”;¹⁷² improve efforts to keep pregnant girls and adolescent mothers in the mainstream school system.¹⁷³ In the same vein, ACERWC concluding observations notes that contrary to the Botswana Children's Act and policy proclamations secondary education particularly upper secondary education “is not free in the State Party which is limiting the accessibility to secondary schools and increasing the vulnerability of children from poor households and marginalized minority ethnic groups to drop out of schools.”¹⁷⁴ Therefore, the Committee recommends the State Party to “work towards making secondary education free and accessible...”¹⁷⁵ The ACERWC notes additional challenges such as high school dropout, long distance to access education, and low attendance, transition and completion rates.¹⁷⁶ It therefore recommends that the State should allocate adequate resources to the education sector; build more schools; increase the attendance, transition and completion rates in schools; enhance the provision of school feeding programmes; address root causes of school dropout; address discrimination against pregnant girls and teenage mothers; and explicitly

¹⁶³ Veronica Margaret Makwinja, Rethinking Education in [Botswana](#): A Need to Overhaul the Botswana Education System, *Journal of International Education Research*, Volume 13, Number 2, 2017

¹⁶⁴ Ibid

¹⁶⁵ World Bank, “School Enrollment, Secondary (% Gross) – [Botswana](#)”

¹⁶⁶ Ministry of Basic Education, Education [Statistical Report](#) 2023,

¹⁶⁷ Concluding Observations, Botswana (2023).

¹⁶⁸ Ibid; Veronica M. Makwinja and Oabona N. Nthoi, “Finding Solutions for Addressing Poor Performance in the Botswana Education Systems and Lessons Learnt From COVID-19,” *IAFOR Journal of Education* 10, no. 2 (2022), 6

¹⁶⁹ Broken Chalk, “[Educational Challenges in Botswana](#),”

¹⁷⁰ CRC Concluding Observations, Botswana (2019), para 52

¹⁷¹ Ibid, para 53

¹⁷² Ibid, para 53(a)

¹⁷³ Ibid

¹⁷⁴ ACERWC Concluding Observations, Botswana (2023), para 43

¹⁷⁵ Ibid, para 43

¹⁷⁶ Ibid, para 44

prohibit corporal punishment.¹⁷⁷ In a sense Botswana has significant barriers to enrollment, completion, and equity,¹⁷⁸ calling for more effort to make secondary education available and accessible free to all children in line with OP4. However, it can be argued that corporal punishment and teen pregnancy issues might not be addressed by OP4.

On a related note, as a signatory to the SADC Protocol, which promotes equitable access to secondary education,¹⁷⁹ Botswana has actively implemented the SADC Protocol by aligning national education policies with regional standards, enhancing secondary education access, and promoting inclusive education practices.¹⁸⁰ However, implementation has been slow, with resource allocation challenges hindering full compliance.¹⁸¹ Botswana has not yet ratified the ICESCR and the UN Special Rapporteur on Minority Issues expressed disappointment at Botswana's failure to sign the ICESCR and its OP,¹⁸² to which the government of Botswana indicated that they are "not oblivious to the importance of treaties, but had no plans to ratify the ICESCR and its OP" until they are in a position to implement it.¹⁸³ To this end, it can be argued that Botswana's limited implementation of SADC Protocol and non-ratification of the ICESCR weakens its alignment with international education rights standards.

3.2. Implementation of Secondary Education Rights in Lesotho

3.2.1. The Legal Mandate

Section 28(c) of Lesotho's Constitution provide for secondary education stating that it "is made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education."¹⁸⁴ The Constitution adopted the ICESCR¹⁸⁵ language to affirm Lesotho's duty to progressively ensure free, accessible secondary education.¹⁸⁶ In addition, the Education Act mandates the Minister to "... make provision for free education at all other levels of learning;¹⁸⁷ make education services provided by the Ministry available within reasonable distance from every habitation;¹⁸⁸ decentralize educational services..."¹⁸⁹ The Children's Protection and Welfare Act in Section 11 provides for the right to education for all children without discrimination.¹⁹⁰ It also provides for access to secondary education by indicating that it is the duty of government to ensure "that all forms

¹⁷⁷Ibid, para 44-46

¹⁷⁸UNICEF, Botswana Country Office Report 2023, 2

¹⁷⁹ SADC Protocol

¹⁸⁰ Southern African Development Community (SADC), Report on the Review of the Twenty Years of Implementation of the International Conference on Population and Development (ICPD) Programme of Action (PoA) in the Southern Africa Development Community (SADC) Region, [SADC Ministers' Conference on the 20th Anniversary of the ICPD-PoA](#), July 2013, 52–55

¹⁸¹Ibid

¹⁸²YourBotswana, "[Botswana under UN Pressure to Sign Cultural Rights Treaty](#)," September 15, 2019

¹⁸³Ibid

¹⁸⁴Lesotho's Constitution of 1993 with Amendments through 2011, sec. 28(c)

¹⁸⁵ICESCR Article 13(2)(b)

¹⁸⁶Supra note 182

¹⁸⁷Lesotho Education Act (2010), Section 4 (1)(b)

¹⁸⁸Ibid, Section 4 (1)(c)

¹⁸⁹Ibid, Section 4 (1)(d)

¹⁹⁰Lesotho Children's Protection and Welfare Act (2011). Section 11(1), (2), (4),(5)

of secondary education are accessible... and that school discipline is consistent with a child's rights and dignity."¹⁹¹ However, while Lesotho has comprehensive legal frameworks supporting children's rights in line with the CRC,¹⁹² secondary education is still not compulsory in law, and mechanisms for guaranteeing free, accessible secondary education are not specified as efforts to expand free secondary education remain constrained by budget and infrastructure limitations.¹⁹³ OP4 might assist on guaranteeing free secondary education, but might not assist on compulsory education.

3.2.2. Policy Requirements

As outlined in the Education Sector Plan(ESP), secondary education in Lesotho "is a five-year school system with the first three (Junior Secondary) years of schooling leading to the attainment of Junior Certificate (JC) and the last two (Senior Secondary) years of schooling leading to the attainment of Lesotho General Certificate of Secondary Education (LGCSE)."¹⁹⁴The ESP aims at improving access, quality, and equity in education, emphasizing the need for infrastructure development to support these aims.¹⁹⁵ Lesotho has bursary schemes to cushion Orphans and Vulnerable Children (OVCs) against the cost of tuition and education related materials.¹⁹⁶ The Ministry of Social Development implements a "Child Grant Program" in some community Councils according to their poverty level.¹⁹⁷ A follow-up survey of this program shows that the bulk of the money is used by the parents towards education.¹⁹⁸ However, it can therefore be argued that user fees in secondary education can be counterproductive since it results in parents using the same money from social protection programs to pay school fees.¹⁹⁹ Bursary schemes can also be seen as a form of discrimination.²⁰⁰

3.2.3. Secondary Education Rights in Practice

Lesotho is party to the CRC since 1992 and the ACRWC since 1999.²⁰¹ Lesotho's education budget as a percentage of GDP has fluctuated significantly, averaging 8.23% from 1993 (8,6%) to 2023 (6.7%).²⁰² Gross enrollment ratios show gradual improvement from 24% in 1992²⁰³ to 60% in 2017.²⁰⁴ The Lesotho SDG Voluntary Review Report notes that secondary education has shown the least progress, with net enrolment rate for both boys and girls low but much more adverse in the case of boys, and STEM

¹⁹¹Ibid, Section 22(k)

¹⁹²CRC Committee. Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Combined Second to Fourth Periodic Reports of States Parties Due in 2007: [Lesotho, 2017](#).

¹⁹³Global Partnership for Education. "Where We Work: [Lesotho](#)."

¹⁹⁴Lesotho Ministry of Education and Training, [Education Sector Plan \(ESP\) 2016–2026](#), 2016, 49

¹⁹⁵Ibid

¹⁹⁶World Bank, [Lesotho Education Public Expenditure Review](#), 2019, 36

¹⁹⁷Supra note, 192 at 46

¹⁹⁸Ibid

¹⁹⁹Two Special Rapporteurs supra note 18,

²⁰⁰Beiter supra note 15, at 5

²⁰¹Supra note 40

²⁰²World Bank, "School Enrollment, Secondary ([% of Government Expenditure on Education](#)) – Lesotho," 2016

²⁰³World Bank, "[School Enrollment, Secondary \(% Gross\) – Lesotho](#)," 2016

²⁰⁴Ibid

subjects reflect a low uptake in the girl student population.²⁰⁵ It is further noted that net enrolments in the upper secondary was significantly lower than in lower secondary education.²⁰⁶ SADC Regional Report in relation to the SADC Protocol, to which Lesotho is a signatory, highlights need for stronger policy enforcement to align with regional education goals in light of challenges such as inadequate funding and teacher shortages slowing down progress.²⁰⁷ It is important to note that despite ratifying the ICESCR in 1992,²⁰⁸ Lesotho has not yet reported²⁰⁹ to the ICESCR Committee hindering effective monitoring and accountability.

The CRC Committee raises concerns about persistent high school fees for secondary education;²¹⁰ low enrolment rates;²¹¹ poor school infrastructure, overcrowding, lack of certified teachers and the long distances students must travel to attend school;²¹² disparities between urban and rural areas;²¹³ expulsion of pregnant teenagers and adolescent mothers;²¹⁴ limited access for children with disabilities.²¹⁵ It therefore recommends Lesotho to address the hidden costs of education, in particular in rural areas, and provide sufficient budget funding to the education sector;²¹⁶ increase children's enrolment in and access to secondary school.²¹⁷ The CRC Committee further recommends Lesotho to improve school infrastructure, increase the number of certified teachers and provide transportation to schools;²¹⁸ address the high number of dropouts among girls;²¹⁹ keep pregnant girls and adolescent mothers in school;²²⁰ support inclusive education for children with disabilities.²²¹ On a similar note, ACERWC in their concluding observations notes the decline in completion rates²²² and high student absenteeism due to financial barriers and a shortage of inclusive secondary schools, among other factors.²²³ It then recommends enhancing accessibility, and providing financial support;²²⁴ ensuring an

²⁰⁵Lesotho, Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development, 2022, 10

²⁰⁶ Ibid

²⁰⁷ Ibid

²⁰⁸ ICESCR Article 13

²⁰⁹ Child Rights Information Network(CRIN), Lesotho: [Children's Rights in UN Treaty-Body Reports](#)

²¹⁰ CRC Concluding Observations, Lesotho (2018), para 53(a)

²¹¹Ibid, para 53(b)

²¹²Ibid, para 53(c)

²¹³Ibid, para 53(d)

²¹⁴Ibid, para 53(e)

²¹⁵Ibid, para 53(f)

²¹⁶Ibid, para 54(b)

²¹⁷Ibid

²¹⁸Ibid, para 54(d)

²¹⁹Ibid, para 54(f)

²²⁰Ibid

²²¹Ibid, para 54(g)

²²²ACRWC Concluding Observations, Lesotho (2023), para 33

²²³Ibid

²²⁴Ibid, para 33(a)

equitable distribution of inclusive secondary schools;²²⁵ investing in school infrastructure improvement;²²⁶ addressing student absenteeism;²²⁷ establishing financial support mechanisms;²²⁸ collaborating with CSOs, international organizations, and other stakeholders for support.²²⁹ Some scholars have concluded that Lesotho's post-colonial curriculum reforms aimed at social justice have faced challenges in implementation,²³⁰ as disparities persist, particularly affecting marginalized communities' access to quality secondary education.²³¹ It can be argued that both the CRC Committee and the ACERWC are concerned about financial barriers to secondary education in Lesotho something that can be potentially addressed by OP4.

3.3. Implementation of Secondary Education Rights in Mauritius

3.3.1. The Legal Mandate

The Constitution of Mauritius does not explicitly grant the right to secondary education, but it recognizes “freedom to establish schools”.²³² Mauritius' Education Act mandates compulsory secondary education until a child attains 16 years,²³³ and it's a punishable offence to “refuse or neglect to cause the child to attend school”, without reasonable justification.²³⁴ It has a 11-year schooling framework (5 years of secondary education).²³⁵ The Education Act regulates school fees.²³⁶ Additionally, the Private Secondary School Authority (PSSA) was set up as a regulatory body by the Private Secondary School Authority (PSSA) 1976 Act for managing financial resources and maintaining norms and standards.²³⁷ The office of Ombudsperson for Children (OC) was established under the Ombudsperson for Children's Act²³⁸ to ensure that the rights, needs and interests of children are given full attention, promote the rights and best interests of children, and promote compliance with the CRC.²³⁹ However, it can be argued that while these legal measures reflect the government's commitment secondary education,²⁴⁰ secondary education is legally not free, and the legislation of Mauritius does not genuinely reflect a child

²²⁵Ibid, para 33(b)

²²⁶Ibid, para 33(c)

²²⁷Ibid, para 33(g)

²²⁸Ibid, para 33(i)

²²⁹Ibid, para 33(j)

²³⁰R. I. Mokotso and N. Silo, “Curriculum Reform for Social Justice: A Policy Historiography of Transformation in Lesotho, Zimbabwe, and South Africa,” *Research in Educational Policy and Management* 5, no. 1 (2023): 156

²³¹ Ibid, P158

²³²Constitution of Mauritius (1968), Article 3(1)(b)

²³³Mauritius Education Act (1957, amended 2016), Section 37(2)

²³⁴Ibid, Section 37(3)

²³⁵UNESCO, Contribution of UNESCO to the Universal Periodic Review (17th Session, 21 October–1 November 2013): [Mauritius](#)

²³⁶Supra note 231, at Article 39(g)

²³⁷Ibid

²³⁸Ibid

²³⁹Ibid

²⁴⁰Supra note 233

rights oriented approach as it tend to avoid the human rights language of State obligations, issues that can be addressed through OP4.

3.3.2. Policy Requirements

The Education and Human Resources Strategic Plan (EHRSP) 2008-2020, the Programme-Based Budget Estimates 2011 and Indicative Estimates 2012 & 2013 emphasize the commitment of the Ministry of Education and Human Resources to provide learning opportunities to all children and sustain equitable access to quality secondary education.²⁴¹ The EHRSP in particular aims to “improve completion rate at upper secondary level.”²⁴² The Nine-Year Continuous Basic Education Reform introduced in 2015 ensures automatic progression up to Grade 9.²⁴³ The National Policy and Strategy on Inclusive Education responds to both the specific and emerging educational needs of all children with special educational needs with focus on children with disabilities.²⁴⁴ In fact, the Mauritian government’s education reforms between 2008 and 2014 emphasize the implementation of learner-centered teaching and the introduction of vocational subjects at the secondary level with the view to reduce dropout rates and promote educational inclusion by catering for diverse student needs.²⁴⁵ Mauritius has invested in digital infrastructure, ensuring that all secondary schools are equipped with high-speed internet connectivity.²⁴⁶ Furthermore, Mauritius developed a robust Education Management Information System (EMIS) aimed at improving data management and supporting the monitoring of SDG 4 targets.²⁴⁷ The provision of scholarships for low-income students,²⁴⁸ and a book loan scheme have helped to improve accessibility to secondary schools.²⁴⁹ Since 2005, the government of Mauritius has provided free transport to all students.²⁵⁰ In the 2018 response to the UPR recommendation from Azerbaijan, Mauritius indicates that “education is free up to the tertiary level whilst...secondary education is compulsory by law for all children up to the age of 16, including children with disabilities.”²⁵¹ It can be argued that while in policy proclamations secondary education is said to be free, it can be difficult to enforce and demand accountability without constitutional or legislative provisions.

²⁴¹Ibid

²⁴²Government of Mauritius, [Education and Human Resources Strategy Plan](#): 2020, issued in 2009

²⁴³Supra note 233

²⁴⁴Ibid

²⁴⁵Government of Mauritius, [Education Reforms in Action](#) 2008–2014

²⁴⁶UNESCO Institute for Information Technologies in Education (IITE), “[Mauritius EMIS Support and Monitoring of Education 2030 Agenda](#),” UNESCO IITE, February 20, 2019

²⁴⁷Ibid

²⁴⁸Ibid

²⁴⁹Praveen Mohadeb, [Student Loans Schemes in Mauritius: Experience, Analysis and Scenarios](#) (Paris: International Institute for Educational Planning, UNESCO, 2006), 7

²⁵⁰Government of Mauritius, The Development of Education: National Report of Mauritius 2008, “[Measures Taken to Alleviate the Financial Burden of Families of School Going Children](#),” 16

²⁵¹Child Rights Information Network, Mauritius: [Government Submits Progress Report on UPR Recommendations](#)

3.3.3. Secondary Education Rights in Practice

Mauritius is party to the CRC since 1990, and ICESCR since 1973.²⁵² Mauritius has maintained strong financial commitment to education, with allocation gradually increasing from 3.1% in 1990 to 4.4% in 2020 and 4.6% in 2023 of the GDP.²⁵³ Secondary education enrollment shows remarkable progress, with gross enrollment ratios increasing from 53% in 1990²⁵⁴ to 90% in 2020.²⁵⁵ In terms of educational outcomes in relation to SDG 4, the country boasts of a high secondary education completion rate of 89.89% as of 2022, with female students achieving a higher rate of 92.80% compared to 87.13% for males.²⁵⁶ As an upper-middle-income country, Mauritius has made significant progress in implementing SDG 4.²⁵⁷ Tandrayen-Ragoobur and Kasenally in their research observes limited alignment to the SADC Protocol particularly evidenced by gender disparities in subject choice at the secondary level, with girls remaining underrepresented in STEM fields despite overall gender parity in enrollment.²⁵⁸ On a related issue, Mauritius has not been reporting under the ACRWC since its ratification in 1992, hampering the assessment of its progress under the ACRWC with regard to secondary education rights.²⁵⁹

The CRC Committee observes disparity in the application of the compulsory education policy, out of school children, and expulsion of pregnant adolescents resulting in it recommending application of the policy on compulsory education without discrimination,²⁶⁰ strengthening the enrolment and retention of all children in secondary school for the duration of compulsory education,²⁶¹ and keeping pregnant adolescent girls and adolescent mothers in mainstream schools.²⁶² On a similar note, the CESCR expresses concerns about the high rates of absenteeism,²⁶³ insufficiency of educational materials in the Creole language,²⁶⁴ and limited provision of inclusive education for students with disabilities.²⁶⁵ The CESCR recommends Mauritius to address high rate of absenteeism,²⁶⁶ improve access to educational materials in the Creole language,²⁶⁷ further extend the provision of inclusive secondary education for

²⁵²ICESCR Concluding Observations, Mauritius (2019), para 57

²⁵³World Bank, "[Government Expenditure on Education, Total \(% of GDP\) – Mauritius](#)," 2025

²⁵⁴World Bank, "[School Enrollment, Secondary \(% Gross\) – Mauritius](#)," 2025

²⁵⁵*Ibid*; Ministry of Education and Human Resources, Annual Digest of Education Statistics, 2020.

²⁵⁶ADEA (Association for the Development of Education in Africa). "[Mauritius Country Profile](#)." *Knowledge Hub*

²⁵⁷Education International. "Mauricio: Entre el Progreso Económico y los Desafíos Educativos." Education International

²⁵⁸Tandrayen-Ragoobur, V., & Gokulsing, D. (2021). *Gender gap in STEM education and career choices: what matters?* Journal of Applied Research in Higher Education, 14(3), 1021–1040, p14

²⁵⁹RODRA (Research on Open Distance Education and eLearning). "[Mauritius](#)."

²⁶⁰CRC Concluding Observations, Mauritius (2023), para 38(a)

²⁶¹*Ibid*, para 38(b)

²⁶²*Ibid*, para 38(c)

²⁶³ICESCR Concluding Observations, Mauritius (2019), para 57(a)

²⁶⁴*Ibid*, para 57(b)

²⁶⁵*Ibid*, para 57(d)

²⁶⁶*Ibid*, para 58(a)

²⁶⁷*Ibid*, para 58(b)

students.²⁶⁸ It can be argued that while both the CRC Committee and the CESCR are concerned about accessibility of secondary education, they are silent on school fees as a barrier to secondary education suggesting that in practice secondary education could be free in Mauritius.

3.4. Implementation of Secondary Education Rights in South Africa

3.4.1. The Legal Mandate

In South Africa, Section 29 of the Constitution guarantees everyone the right to a basic education²⁶⁹ “which the state, through reasonable measures, must make progressively available and accessible”.²⁷⁰ Section 3(1) of South African Schools Act mandates compulsory education up to Grade 9, typically completed by age 15,²⁷¹ and it’s an offence to prevent a learner “from attending a school.”²⁷² School fees is charged at some public schools,²⁷³ and the Minister determines schools that may not charge school fees.²⁷⁴ A learner may not “be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid school fees”.²⁷⁵ It is instructive to note that domestic courts in South Africa have adjudicated significant cases on the right to education,²⁷⁶ such as the case of *Moko v Acting Principal of Malusi Secondary School* where the Constitutional Court declared the conduct of the Acting Principal who denied a grade 12 learner an opportunity to sit for an examination due to missed extra lessons, “to be a violation of the right to education in section 29(1) of the Constitution.”²⁷⁷ It can be argued that secondary education in South Africa is compulsory up to junior secondary, but it’s not entirely free,²⁷⁸ calling for the potential intervention of OP4.

3.4.2. Policy Requirements

The National Development Plan 2030 sets the target of universal completion of Grade 12 at 80% demonstrating commitment to improve accessibility to secondary education.²⁷⁹ White Paper 6 also provides for inclusive education that is accessible to all children with disabilities.²⁸⁰ The implementation

²⁶⁸Ibid, para 58(d)

²⁶⁹Constitution of the Republic of South Africa, 1996, Section 29(1)(a)

²⁷⁰Ibid, Section 29(1)(b)

²⁷¹The South African Schools Act (1996). Section 3(1)

²⁷²Ibid, Section 3(a)(b)

²⁷³Ibid, Section 39(1)

²⁷⁴Ibid, Section 39(7)

²⁷⁵Ibid, Section 5(3)(a)

²⁷⁶Manisuli Ssenyonjo, “The Influence of the ICESCR in Africa,” *Netherlands International Law Review* 64 (2017): 280–281

²⁷⁷*Moko v Acting Principal of Malusi Secondary School and Others* ([CCT 297/20](#)) [2020] ZACC 30 (28 December 2020)

²⁷⁸Human Rights Watch, “[Submission by Human Rights Watch to the Committee on Economic, Social and Cultural Rights on South Africa](#),” Human Rights Watch, August 30, 2018

²⁷⁹Republic of South Africa, National Development Plan 2030: [Our Future—Make It Work](#) (Pretoria: National Planning Commission, 2012), 276

²⁸⁰South Africa Department of Education, Education White Paper 6: [Special Needs Education—Building an Inclusive Education and Training System](#) (Pretoria: Department of Education, 2001), 30

of “no-fee schools” and fee exemption policies were introduced by the Department of Education through the Amended National Norms and Standards for School Funding.²⁸¹ HRW notes that in 2018 “around 80 percent of schools across the country benefited from a “no-fee” policy, and approximately 60 percent of the school population accessed “no-fee schools.”²⁸² South Africa's legal and policy frameworks demonstrate a strong commitment to upholding children's rights to secondary education in line with the CRC.²⁸³ However, it can be argued that the continuing categorization of schools from no fees to fees, may result in some unexpected fees for parents.²⁸⁴

3.4.3. Secondary Education Rights in Practice

As a party to the CRC since 1995, ACRWC since 2000,²⁸⁵ and ICESCR since 2015, South Africa has maintained commitment to education rights as demonstrated by substantial education spending, averaging 5.28% of the GDP with 5% in 1995 and 6.1% in 2023.²⁸⁶ More so, secondary education enrollment shows significant expansion, with gross enrollment ratios increasing from 90% in 1994 to 108% (including those who repeat classes/delay enrolment) in 2022.²⁸⁷ SDG 4 review reveals progress indicating that completion rates for upper secondary education increased from 45.8% in 2015 to 50.9% in 2024.²⁸⁸ However, some scholars critique the ambiguity in South Africa's pursuit of SDG 4, noting that systemic inequalities and resource disparities hinder the achievement of inclusive and equitable quality education.²⁸⁹ Amnesty International reports that South Africa has one of the most unequal education systems globally, with a wide gap between the top-performing and underperforming schools.²⁹⁰ South Africa participates in regional education initiatives associated with the SADC Protocol,²⁹¹ as part of regional cooperation.²⁹² Like many other SADC Member States, South Africa faces criticism for not fully aligning its secondary education curriculum with SADC's harmonization goals, particularly regarding vocational training components.²⁹³

²⁸¹Yusuf Sayed and Shireen Motala, “Equity and ‘No Fee’ Schools in South Africa: Challenges and Prospects,” *Social Policy & Administration* 46, no. 6 (2012): 676–682

²⁸²Supra note 276

²⁸³Kilkelly, Ursula, and Ton Liefwaard. “Legal Implementation of the UNCRC: Lessons to Be Learned from the Constitutional Experience of South Africa.” *De Jure Law Journal* 52 (2019), 536

²⁸⁴Beiter supra note 15, at 2

²⁸⁵African Committee of Experts on the Rights and Welfare of the Child (ACERWC), “Overview of the Reporting Process,” ACERWC

²⁸⁶World Bank, [“Government Expenditure on Education, Total \(% of GDP\) – South Africa”](#)

²⁸⁷World Bank, [“School Enrollment, Secondary \(% Gross\) – South Africa”](#); Republic of South Africa Department of Basic Education, *Education Statistics in South Africa 2022* (Pretoria: DBE, 2022)

²⁸⁸UNESCO Institute for Statistics, South Africa – SDG 4 [Country Profile](#) (Montreal: UNESCO, 2025), 3

²⁸⁹S.M. Maistry, “SDG4 and the Ambiguity of Sustainable Development: The Case of Poor Schools in South Africa,” *Sustainability* 14, no. 21 (2022): 1–2

²⁹⁰Amnesty International, Broken and Unequal: [The State of Education in South Africa](#) (AFR 53/1705/2020)

²⁹¹Parliamentary Monitoring Group (PMG), “Portfolio Committee on Basic Education: [Progress Report on Rural School Infrastructure](#),” March 6, 2018

²⁹²Department of Basic Education, [“SADC Members’ Meeting](#), June 2018”

²⁹³Southern African Development Community (SADC), [“Education & Skills Development](#),” SADC

The CRC Committee raises concerns about the limited access to quality and inclusive education,²⁹⁴ the high dropout rates at the end of the compulsory school phase,²⁹⁵ the low quality of education, particularly in “no-fee schools”, and voluntary donations which contribute to school dropout.²⁹⁶ The Committee recommends ensuring access to and complete free, equitable and quality secondary education for all children;²⁹⁷ strengthening inclusive education of children with disabilities;²⁹⁸ reducing school dropouts;²⁹⁹ strengthening the quality of education, particularly in “no-fee schools”, and abolishing donations.³⁰⁰ Similarly, the CESCR is concerned about poor public school infrastructure and high dropout rates;³⁰¹ the practice of charging fees in the form of voluntary contributions in no-fee schools, the discriminatory effects of fee exemptions in fee-paying schools, and poor regulation of private secondary education.³⁰² The CESCR therefore recommends improvement in school infrastructure,³⁰³ reduction of the school dropout rate,³⁰⁴ review of the requirements for fee exemption in fee paying schools,³⁰⁵ ensuring that no-fee schools stop charging parents fees,³⁰⁶ improve regulatory framework for private schools,³⁰⁷ and inclusive education for children with disabilities and migrant children.³⁰⁸ Adding on, the ACERWC raises concerns about pervasive underspending on education and lack of prioritization of school infrastructure,³⁰⁹ and challenges faced by children with disabilities to access secondary education.³¹⁰ The ACERWC recommends South Africa to equip schools with relevant infrastructures,³¹¹ and continue its efforts in ensuring inclusive education for children with disabilities.³¹² It can therefore be argued that free secondary education might address most of the barriers to secondary education except inadequate infrastructure, privatization of schools and quality education.

²⁹⁴CRC Concluding Observations, South Africa (2024), para 40(a)

²⁹⁵Ibid, para 40(b)

²⁹⁶Ibid, para 40(c)

²⁹⁷Ibid, para 41(a)

²⁹⁸Ibid, para 41(b)

²⁹⁹Ibid, para 41(c)

³⁰⁰Ibid, para 41(d)

³⁰¹ICESCR Concluding Observations, South Africa (2018), Para 70

³⁰²Ibid, para 71(d)

³⁰³Ibid, para 71(a)

³⁰⁴Ibid, para 71(b)

³⁰⁵Ibid, para 71(c)

³⁰⁶Ibid

³⁰⁷Ibid, para 71(d)

³⁰⁸Ibid

³⁰⁹ACRWC Concluding Observations, South Africa (2023), para 36

³¹⁰Ibid, para 37

³¹¹Ibid, para 36

³¹²Ibid, para 37(a)

3.5. Implementation of Secondary Education Rights in Zimbabwe

3.5.1. The Legal Mandate

Zimbabwe's Constitution, guarantees the right to "a basic State-funded education",³¹³ "which the State, through reasonable legislative and other measures, must make progressively available and accessible."³¹⁴ It further articulates that "every child...has the right to education..."³¹⁵ with the State taking "all practical measures to promote free and compulsory education for children,"³¹⁶ and girls having the same opportunities as boys.³¹⁷ The Education Act reinforces this guarantee by stipulating that "every child in Zimbabwe shall have the right to school education"³¹⁸ without any discrimination,³¹⁹ and includes secondary schooling within the definition of basic education.³²⁰ HRW comments that the amended Education Act reasserts the constitutional protection that students should not pay fees, or levies, from preschool up to Form 4, the end of lower secondary education, and stipulates that no learner shall be excluded from school for non-payment of school fees.³²¹ Whereas primary education is explicitly compulsory, secondary education is not indicated as compulsory in the Education Act.³²² The Children's Act provides for the establishment of a Child Welfare Fund³²³ which "may be applied to promoting education among children..."³²⁴ It can therefore be argued that the right to secondary education is legally explicit, and secondary education should be free and compulsory in Zimbabwe.

3.5.2. Policy Requirements

The Zimbabwe Education Sector Strategic Plan (ESSP) seeks to improve equity, gender parity, and learning outcomes.³²⁵ Secondary education consists of four years of lower secondary education and two years of upper secondary education.³²⁶ The importance of the right to education in Zimbabwe is

³¹³Constitution of Zimbabwe Amendment (No 20),2013. Section 75(1)(a)

³¹⁴Ibid, Section 75(1)(b)

³¹⁵Ibid, Section 81(f)

³¹⁶Ibid, Section 27(1)(a)

³¹⁷Ibid, Section 27(2)

³¹⁸Education Act of Zimbabwe (1987, amended 2020), Section 4(1)

³¹⁹Ibid, Section 4(2)(a)(b)

³²⁰Ibid, Section 2

³²¹ Human Rights Watch, "[Zimbabwe Removes Barriers to Education: New Law Is Good News for Children's Rights.](#)" Human Rights Watch, March 18, 2020

³²² Ibid. Section 5

³²³Zimbabwe Children's Act (Chapter 5:06), Section 75H

³²⁴Ibid, Section 75J(d).

³²⁵Zimbabwe Education Sector Strategic Plan (ESSP) 2021–2025.

https://planipolis.iiep.unesco.org/sites/default/files/ressources/zimbabwe_essp_2021-2025.pdf. P12

³²⁶D. Mazambani and N. T. Tapfumaneyi, "Zimbabwe's Educational Curriculum Reforms from 2015 to 2024: Human Rights Implications to Learners, Educators, Parents and Guardians," African Human Rights Yearbook 8 (2024): 437–57, 445

evidenced by its prioritization in the National Development Strategy 1 (NDS1),³²⁷ which gives the Ministry of Education the mandate to provide quality, equitable and inclusive education,³²⁸ prioritizing infrastructure, regular and reliable provision of school feeding and nutrition as well as enhancing the capacity of teachers.³²⁹ Some secondary schools have multi-disability resource centers to cater for learners with differing special needs.³³⁰ The Basic Assistance Education Module (BEAM) was introduced to pay tuition fees for “indigent learners”, but the government has been struggling to provide funds to schools accommodating learners covered by BEAM.³³¹ It can be argued that limiting secondary education financial support for indigent learners to tuition fees might jeopardize their access to education if their parents do not afford other related costs, like school levies.

3.5.3. Secondary Education Rights in Practice

Zimbabwe ratified the CRC (1990),³³² ICESCR (1991) and ACRWC (1995). Zimbabwe's education budget as percentage of GDP has fluctuated dramatically, from a peak of 12.5% in 1990 to a low of 1.5% during the economic crisis in 2010, settling at 2.1% by 2018.³³³ Gross secondary education enrollment ratios slowly increased from 44% in 1990 to 40% at the crisis nadir (2003-2010), rebounding to 52% by 2013 (no data for 2020).³³⁴ According to the UNESCO, the lower secondary completion rate (modelled data) rose from 67.7 in 2013 to 74.1 in 2024.³³⁵ NDS 1 notes that high dropout rates, especially among girls and rural students, hinders progress toward SDG 4.1.³³⁶ The 2020 SADC education report noted Zimbabwe's curriculum reforms but highlighted inadequate teacher training for the new competency-based approach.³³⁷ This confirms the State Party report to the ACERWC which indicates that availability of secondary education is often affected by the economic crisis, leading to infrastructure decay and teacher attrition.³³⁸

The CRC Committee notes persistent high dropout rate for girls;³³⁹ the low quality of education as a result of inadequate budget allocations to support educational programmes and infrastructure;³⁴⁰ difficulties faced by some children in accessing secondary education, in particular those living in poverty

³²⁷ Republic of Zimbabwe, National Development Strategy 1, 16 November 2020: “[Towards a Prosperous & Empowered Upper Middle-Income Society by 2030](#),” January 2021–December 2025, 154

³²⁸ Ibid

³²⁹ Ibid

³³⁰ Ibid

³³¹ Supra note 325

³³² CRC Concluding Observations, Zimbabwe (2016), Para 68

³³³ World Bank, “Government Expenditure on Education, Total (% of GDP) – Zimbabwe,”

³³⁴ World Bank. “[School Enrollment, Secondary \(% Gross\) – Zimbabwe](#).”; Zimbabwe Ministry of Primary and Secondary Education, Statistical Education Report (2020)

³³⁵ UNESCO Institute for Statistics, Zimbabwe – [SDG 4 Country Profile](#), 2025, 3

³³⁶ Zimbabwe, National Development Strategy 1 (NDS1) (2021), 148–49

³³⁷ Supra note 180

³³⁸ Zimbabwe, [Initial Report of the Government of the Republic of Zimbabwe under the African Charter on the Rights and Welfare of the Child](#) (2013), 51–54

³³⁹ CRC Concluding Observations, Zimbabwe (2016), para 68(b)

³⁴⁰ Ibid, para 68(c)

and those in remote and rural areas, including walking long distances to school.³⁴¹ It therefore recommends the removal of barriers to girls' education,³⁴² adequate budgetary allocation to improve the quality of education,³⁴³ and providing a safe educational environment, free from discrimination and violence.³⁴⁴ In addition, submission of HRW to the CESCR notes that despite a constitutional requirement to promote "free and compulsory basic education for children,"³⁴⁵ the Zimbabwean government does not "provide a truly free public education to all children".³⁴⁶ In a response to the list of issues from the CESCR, on measures to prevent school dropouts and to encourage enrolment of children in schools, among other factors, the government of Zimbabwe cited "collaboration with Education Partners on the payment of fees and levies for vulnerable children,"³⁴⁷ demonstrating the significance of international support. The ACERWC highlights concern over "sending children home for unpaid fees, rising school dropouts due to teen pregnancies, inability to access education due to lack of birth certificates, and disparities between urban and rural schools."³⁴⁸ It recommends Zimbabwe to uphold its commitment to allocate up to 20% of its public expenditure towards education, thereby increasing budget for BEAM funds;³⁴⁹ ensure that children with disabilities have access to inclusive education;³⁵⁰ develop measures to reduce school dropouts, expand school feeding programs to all regions, remove various fees and indirect costs on education, and extend the BEAM program to include learning materials, uniforms, and stationery".³⁵¹ It can be argued that the challenge of user fees and low government investment in secondary education, in Zimbabwe, can be potentially addressed through OP4.

3.6. Chapter Conclusion

Botswana, Lesotho, Mauritius, South Africa and Zimbabwe are at different levels of implementing secondary education rights as reflected in international, regional and sub-regional human rights instruments. With at least three decades of implementing the CRC, it appears as if it's still a long journey towards full realization of secondary education in these countries. One can argue that, while OP4 can potentially contribute significantly towards addressing most of the identified socio-legal barriers to secondary education, it might not reasonably address systemic challenges such as corporal punishment and adolescent pregnancies that are often triggered by harmful socio-cultural practices.

³⁴¹Ibid, para 68(d)

³⁴²Ibid, para 69(b)

³⁴³Ibid, para 69(c)

³⁴⁴Ibid, para 69(d)

³⁴⁵Constitution of Zimbabwe, Section 27(1).

³⁴⁶Human Rights Watch, [Submission to the United Nations Committee on Economic, Social and Cultural Rights: List of Issues of Zimbabwe](#), 73rd Pre-Sessional Working Group, August 2023

³⁴⁷CESCR, Replies of Zimbabwe to the list of issues in relation to its second periodic report, E/C.12/ZWE/RQ/2 (Sept. 25, 2025), para. 83

³⁴⁸ACRWC Concluding Observations, Zimbabwe (2024), Para 41

³⁴⁹Ibid, para 41(i)

³⁵⁰Ibid, para 41(ii)

³⁵¹Ibid, para 41(iv)

Chapter 4: Quest for An Expanded International Legal Mandate on Education Rights: Towards an Optional Protocol to the CRC and Its Implications for Secondary Education of Children in Selected Southern African Countries

4.0. Chapter Introduction

Secondary education challenges unearthed in Chapter 3 are a cause for concern in the 21st Century considering the global recognition of secondary education for all children as having a “multiplier effect to other rights”.³⁵² This chapter, therefore, presents the HRC Resolution 56/5 (2024) (HRC Resolution) proposing the development of OP4. It then assesses the benefits and risks of OP4 with the view to consider its feasibility and potential effectiveness in promoting secondary education rights in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe.

4.1 The HRC Resolution 56/5 (2024)

4.1.1. The Purpose of HRC Resolution

As alluded to in Chapter 1, the HRC Resolution signals a potentially transformative shift in international child rights law.³⁵³ Adopted on 10 July 2024, the Resolution establishes “an open-ended intergovernmental working group with the mandate of exploring the possibility of, elaborating and submitting to the HRC a draft OP to the CRC.”³⁵⁴ The proposed OP4 to the CRC, among other things, aims to explicitly articulate the right to secondary education. In fact, in relation to secondary education Paragraph 1 of the Resolution outlines the proposed content of the OP4 as follows:³⁵⁵

- (i) Recognize secondary education as fundamental to the right to education for all children;³⁵⁶.
- (ii) Require States to make public secondary education available free to all;³⁵⁷.
- (iii) Reinforce international cooperation as an essential tool, on matters relating to education;³⁵⁸.
- (iv) Streamline reporting mechanisms by integrating them into CRC periodic reports eliminating the need for an initial or other separate reports.”³⁵⁹.

The aforesaid provisions seek to address some barriers to secondary education highlighted by Special Procedure mandate holders, such as the burden of indirect costs (including transportation and uniforms), the costs of digital devices and internet connections, and lunches for those unable to pay.³⁶⁰ However, it can be argued that the proposed content of OP4 fall short of mandating compulsory public secondary education and fees regulation for private secondary education, which are critical aspects of

³⁵²McCowan, *supra* note 12

³⁵³United Nations Human Rights Council, Resolution 56/5: Open-ended Intergovernmental Working Group on an Optional Protocol to the Convention on the Rights of the Child on the Rights to Early Childhood Education, Free Pre-primary Education and Free Secondary Education, A/HRC/RES/56/5 (10 July 2024)

³⁵⁴*Ibid*

³⁵⁵*Ibid*

³⁵⁶*Ibid*, para 1(b)(ii)

³⁵⁷*Ibid*, para 1(b)(ii)

³⁵⁸*Ibid*, para 1(c)

³⁵⁹*Ibid*, para 1(d)

³⁶⁰*Ibid*, preamble Para 8

the right to secondary education.³⁶¹ Additionally, the envisaged obligations would be more helpful if free and compulsory education are enunciated “as clear immediate obligations”, reflecting the temporary nature of childhood, and changing world order regarding the value of secondary education.³⁶²

OP4 aims to clarify and expand upon existing obligations in Article 28(1)(b) of the CRC, which requires States to progressively make secondary education available and accessible to all children, and “take appropriate measures such as the introduction of free education and offering financial assistance in case of need.”³⁶³ As alluded to in Chapter 2, this language lacks the binding force of an obligation to provide free secondary education.³⁶⁴ Some scholars note that the weak legal phrasing of Article 28(1)(b) has allowed for interpretive leeway, resulting in inconsistent implementation globally. Hence, OP4 seeks to close this normative gap by explicitly requiring States to provide free public secondary education.³⁶⁵

The HRC is concerned that a significant number of countries have made only “slow progress in raising...secondary education completion rates, in particular with regard to children from low-income families and in marginalized or vulnerable situations.”³⁶⁶ This is in spite of several international instruments encompassing the human right of everyone to education,³⁶⁷ such as ICESCR, HRC resolutions on the right to education, the most recent of which is resolution 53/7 of 12 July 2023,³⁶⁸ the near-universal ratification of the CRC in which States parties agreed with a view to achieving the right of the child to secondary education progressively,³⁶⁹ and the 2030 Agenda for Sustainable Development and the SDGs contained therein, in particular SDG 4.³⁷⁰ However, as the Resolution notes, global progress in secondary education remains uneven,³⁷¹ since “...250 million children, adolescents and young people do not attend school, predominately at the secondary school level... and lack of infrastructure at... secondary levels remain important obstacles to access to education in many countries, and that girls are still more likely to remain excluded from education.”³⁷² It can be argued that despite existence of international child rights norms and standards, globally there has been systemic barriers to full realization of the right to secondary education for all children.

The significance of secondary education is emphasized. The Resolution recognizes the urgent need for binding commitments on free secondary education, noting “the Youth Declaration on Transforming Education, in which young people demanded that decision makers eradicate all legal, financial and systemic barriers preventing all learners from gaining access to and fully participating in education.”³⁷³ Additionally, it affirms “the need to ensure equal access to educational opportunities and reduce

³⁶¹ Beiter *supra* note 15, at 4-6

³⁶² *Ibid*

³⁶³ CRC Article 28(1)(b); 29

³⁶⁴ Todres and Alexander, “21st Century,” 69-70

³⁶⁵ *Ibid*

³⁶⁶ HRC Resolution, Preamble para 5

³⁶⁷ *Ibid*, Preamble para 1

³⁶⁸ *Ibid*, Preamble para 2

³⁶⁹ *Ibid*, Preamble para 3

³⁷⁰ *Ibid*, Preamble para 4

³⁷¹ *Ibid*

³⁷² *Ibid*, Preamble para 7

³⁷³ *Ibid*, Preamble para 9

inequalities of outcome, including by eliminating discriminatory laws, policies and practices.”³⁷⁴ It further recognizes “the long-term benefits of education, including on digital skills and literacy, in promoting economic growth, development, social stability and individual empowerment, and urging States to explore the innovative financial mechanisms, international partnerships and effective policy measures to ensure that every child receives a quality education without financial barriers, especially children in marginalized or vulnerable situations.”³⁷⁵ More so, the HRC urges the international community to collaborate with States “to ensure inclusive and equitable quality education for all”.³⁷⁶ It can be argued that secondary education has to be an immediate obligation for States since it’s a public good essential for human dignity of children at the present and the future.

In a sense, the Resolution’s language affirms the need for a legally binding mandate on education rights with respect to secondary education.³⁷⁷ The available evidence confirms that existing international human rights law and voluntary commitments have proven inadequate in addressing systemic barriers to secondary education.³⁷⁸ As the Resolution acknowledges, progress in realizing secondary education has been slow in many countries.³⁷⁹ Child rights advocates, have long pushed for a binding guarantee of free secondary education.³⁸⁰ Their reports underscore that exclusion from secondary school disproportionately affects girls, children with disabilities, those from low income households, and those in conflict zones.³⁸¹ As such, legal codification can be a means of making rights enforceable.³⁸² Langford argues that OPs serve as crucial tools to clarify and strengthen State obligations, especially for ESCR.³⁸³ It is argued that OP4 has the potential to provide legal enforceability, promoting accountability at both national and international levels.

It is noteworthy that the Resolution seeks to make international cooperation more operational considering the fact that it is essential for low and middle income countries to meet their secondary education obligations.³⁸⁴ In alignment with Article 12 of the CRC and the evolving recognition of children as rights-holders with agency, the Resolution mandates child participation in the drafting process by indicating the need to “...give children the opportunity to express their views... including through child-friendly information... and act upon them...”³⁸⁵ To manage the tension between parental rights and child rights, Para 8 of the Resolution urges “consultations with parents, legal guardians and educators.”³⁸⁶ The HRC’s Resolution lays the groundwork for the possibility of expanding secondary education rights under the CRC framework. According to the Resolution a binding international mandate is not only justified but essential. In support of the Resolution, Beiter argues that “educational situation (including

³⁷⁴Ibid, Preamble para 10

³⁷⁵Ibid, Preamble para 11

³⁷⁶Ibid, Preamble para 13

³⁷⁷Ibid

³⁷⁸Ibid

³⁷⁹Ibid

³⁸⁰ Human Rights Watch, [A Call to Expand the International Right to Education](#), June 7, 2022

³⁸¹Ibid

³⁸²Vandenhoele supra note 65, at 61-62

³⁸³Malcolm et al supra note 84, at 272

³⁸⁴HRC Resolution, Preamble para 13

³⁸⁵Ibid, para 5

³⁸⁶Ibid, para 8

secondary education) can be significantly improved by further developing the international right to education, inter alia by adopting an Option Protocol to the CRC.”³⁸⁷ It is therefore important to examine how secondary education in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe can benefit from a legally binding protocol under the CRC.

4.2. Potential Benefits of a Binding International Legal Mandate on Education Rights in the Context of Secondary Education in Selected Southern African Countries

4.2.1. Legal Clarity and Justiciability

A binding protocol would elevate free public secondary education to a legally enforceable and justiciable right.³⁸⁸ This is particularly relevant in Botswana and Mauritius, where the Constitution does not explicitly guarantee the right to education, particularly free and compulsory secondary education.³⁸⁹ In Botswana, courts have been reluctant to interpret ESCR like education rights expansively due to the absence of a constitutional mandate on the right to education.³⁹⁰ The right to education in Mauritius is not directly justiciable in courts, as it is framed as a directive principle rather than an enforceable right, limiting legal recourse for violations as in the case of *Matadeen and Others v. M.G.C. Pointu and Others*, where judges struggled with interpretation of the Constitution in relation to a violation of the right to education.³⁹¹ Assuming these two countries ratify OP4, it can strengthen legal redress mechanisms and accountability with respect to secondary education. It can be argued that the Protocol can make the right to secondary education “unconditional”.³⁹²

4.2.2 Fortification of National Commitments

It can be assumed that a binding protocol can reinforce existing national commitments on secondary education. As revealed in Chapter 3, countries like Lesotho, Zimbabwe and South Africa, that already have robust laws and policies, would benefit from reinforced obligations to implement and expand their initiatives to make secondary education free and compulsory until end of upper secondary level. In the case of South Africa, a binding protocol would reinforce South Africa’s constitutional guarantee on the right to a basic education,³⁹³ “which the state, through reasonable measures, must make progressively available and accessible”,³⁹⁴ prompting broader obligations for inclusive and equitable quality secondary education.³⁹⁵ For Lesotho, OP4 has the potential to strengthen budgetary commitments and socio-legal frameworks under the Education Act, and the Lesotho ESP objectives to improve access,

³⁸⁷Beiter supra note 15, at 7

³⁸⁸Ssenyonjo supra note 386, at 280-28; UNESCO Right to Education Handbook (2019), 275

³⁸⁹Constitution of Botswana; Constitution of Mauritius, Article 3(2); UNESCO supra note 233

³⁹⁰Bonolo Ramadi Dinokopila, “The Justiciability of Socio-Economic Rights in Botswana,” *Journal of African Law* 57, no. 1 (2013): 108–25, 118–19.

³⁹¹*Matadeen and Others v. M.G.C. Pointu and Others* (Mauritius) [1998] UKPC 9 (18 February 1998) para. 5.

³⁹²McCowan supra note 12

³⁹³Constitution of South Africa, Section 29(1)(a)

³⁹⁴*Ibid*, Section 29(1)(b)

³⁹⁵Ann Skelton, “The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law,” *De Jure: Education Law in a Democracy* 46, no. 1 (2013): 1–23, 22

quality, and equity in education, emphasizing the need for infrastructure development,³⁹⁶ particularly in rural schools that lack adequate facilities, including classrooms.³⁹⁷ For Zimbabwe, OP4 can reinforce implementation of the Constitutional and legislative guarantees on free and compulsory basic, State-funded education for all children.³⁹⁸ As such, one can argue that, if adopted, OP4 has the potential to validate and internationalize existing good practices thereby improving commitment towards making secondary education available and accessible free for all.

4.2.3. Tackling Systemic Inequality

Disparity in the availability and accessibility of secondary education has become the norm in some countries. As alluded to earlier on, the HRC Resolution acknowledges “slow progress in raising secondary education completion rates, in particular with regard to children from low-income families and in marginalized or vulnerable situations”.³⁹⁹ The binding nature of the protocol would require States to address root causes of inequalities in access to secondary education such as indirect costs, underfunding of secondary education and inadequate infrastructure, which are critical factors in countries like Lesotho,⁴⁰⁰ Botswana,⁴⁰¹ and Zimbabwe.⁴⁰² As indicated in Chapter 3, in Lesotho concerns persist regarding high school fees for secondary education,⁴⁰³ partly contributing to gross enrollment ratios gradually moving from 24% in 1992⁴⁰⁴ to 60% in 2017.⁴⁰⁵ In Botswana, the CRC Committee raises concerns regarding “the large number of children who are out of school and the introduction of fees for secondary school,”⁴⁰⁶ with gross enrollment ratios moving from 57% in 1995⁴⁰⁷ to 72% in 2022.⁴⁰⁸ For Zimbabwe, the CRC Committee notes persistent challenges such as the high dropout rate for girls,⁴⁰⁹ and difficulties faced by some children in accessing secondary schools,⁴¹⁰ in particular those living in poverty and those in remote and rural areas, with gross secondary education enrollment ratios slowly rising from 44% in 1990 to 40% to 52% by 2013 (no data for 2020).⁴¹¹ As such, it can be argued that while free public secondary education can directly address some systemic disparities in access to secondary education, OP4 drafting should provide for broad equity-driven reforms, target marginalized groups, and require state accountability to address systemic inequality in secondary education of all children, for it to be more relevant to countries like, Botswana, Lesotho and Zimbabwe.

³⁹⁶Lesotho Education Sector Plan 2016 – 2026, 22

³⁹⁷Ibid, p51; UNESCO Institute for Statistics (2023); World Bank, supra note 200

³⁹⁸Human Rights Watch supra note 320

³⁹⁹HRC Resolution, Para 5

⁴⁰⁰CRC Concluding Observations, Lesotho (2018), Para 54

⁴⁰¹CRC Concluding Observations, Botswana (2019), Para 53

⁴⁰²CRC Concluding Observations, Zimbabwe (2016), Para 69

⁴⁰³CRC Concluding Observations, Lesotho (2018), Para 53(a)

⁴⁰⁴World Bank supra note 201

⁴⁰⁵Ibid

⁴⁰⁶CRC Concluding Observations, Botswana (2019), Para 52

⁴⁰⁷World Bank supra note 164

⁴⁰⁸Ministry of Basic Education, Education Statistical Report 2023

⁴⁰⁹CRC Concluding Observations, Zimbabwe (2016), Para 68(b)

⁴¹⁰Ibid, Para 68(d)

⁴¹¹World Bank supra note 161

4.2.4. Enhancing International Cooperation

Resource constraints tend to limit the progressive realization of secondary education rights.⁴¹² The Resolution aims at stronger operational mechanism for international cooperation by mentioning specific groups of duty bearers as the HRC urges “...development partners, international financial institutions and non-governmental organizations to support and cooperate with States...”⁴¹³. The language of the resolution unlike that of the CRC Article 28(3) is strong to impose an obligation to provide development cooperation to advance the right to education something that the CRC Committee for some reasons seem to be refraining from in some General Comments.⁴¹⁴ Data trends in Lesotho reveal that Lesotho's education budget as a percentage of GDP has fluctuated significantly, from 1993 (8,6%) to 2023 (6.7%).⁴¹⁵ In Zimbabwe, economic instability has weakened policy implementation and affected accessibility of education,⁴¹⁶ as evidenced by Zimbabwe's education budget as percentage of GDP which has fluctuated intensely, from a peak of 12.5% in 1990, settling at 2.1% by 2018.⁴¹⁷ Thus, one can argue that for countries like Zimbabwe and Lesotho that tend to require international support, a binding protocol with clear “extraterritorial State obligations”⁴¹⁸ can be useful to guarantee resource support for free public secondary education, particularly if it includes the positive obligation to “provide-fulfill”.⁴¹⁹

4.3. Potential Risks and Challenges Associated with A Binding International Legal Mandate on Education Rights in the Context of Secondary Education in Selected Southern African Countries

4.3.1. Resource Limitations Creating Implementation Gaps

As alluded to above, the implementation of any legal obligations is always dependent on resource availability.⁴²⁰ At the beginning, low- and middle-income countries might struggle implementing obligations on free public secondary education for all without adequate support.⁴²¹ Zimbabwe, for example, has suffered significant setbacks due to economic instability and any additional obligation is likely to be complied with if it comes with a resource package.⁴²² There is arguably concern that a binding protocol could create legal obligations that are unfeasible without guaranteed international support.⁴²³ While some scholars remain hopeful that the international community can support the

⁴¹²McCowan supra note 12

⁴¹³HRC Resolution. Preamble Para 13

⁴¹⁴Vandenhole supra note 65, at 44-45

⁴¹⁵World Bank, “School Enrollment, Secondary (% of Government Expenditure on Education) – Lesotho”

⁴¹⁶Zimbabwe UNICEF Country Office Annual Report 2023, p1

⁴¹⁷World Bank, “Government Expenditure on Education, Total (% of GDP) – Zimbabwe”

⁴¹⁸Beiter supra note 15, at 7

⁴¹⁹Vandenhole supra note 65, at 44-45

⁴²⁰McCowan supra note 12

⁴²¹ Ibid

⁴²²Todres and Alexander supra note 25, at 70; Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. II (New York: United Nations, 2007), 634.

⁴²³Todres and Alexander supra note 25, at 87-88

implementation of a legal mandate on the right to free secondary education in low-resource countries as demonstrated by the universal push for SDG 4 by States,⁴²⁴ this might need to be reconsidered in the wake of plans by different developed countries to cut development cooperation budget over the next years posing “additional challenges for the vast majority of developing countries that are eager to make progress on the Sustainable Development Goals.”⁴²⁵ Admittedly, resource limitations is not an acceptable excuse for falling short on the implementation of ESCR under the progressive realization and non-retrogressive measure principles,⁴²⁶ but somewhat low income countries like Zimbabwe and Lesotho still require external resource injection to make meaningful progress in realizing their obligations.⁴²⁷

Of course, there is a generalized assumption in international human rights law that “States are both willing and able to generate resources needed for education through general taxation.”⁴²⁸ Beiter notes that in countries where “high income disparities prevail, generally low personal and corporate tax rates will, therefore, prevent the realization,” of obligations.⁴²⁹ Innovative financing for education through the involvement of the private sector can only be supplementary since it’s “involuntary in nature, characterized by an ultimate absence of accountability of private actors” and a shift from the primary funding obligations of States.⁴³⁰ Ideally, since 1970 it was recognized that developed (donor) States should allocate 0.7% of their gross national income (GNP) to Official Development Assistance (ODA), of which 15-20% would go towards education.⁴³¹ Beiter further argues that “the funding gap towards the SDG 4 goals could be closed if Organization for Economic Co-operation and Development (OECD) members and middle-income countries” comply with their ODA obligations.⁴³² As it is, it can be argued that unless international cooperation is guaranteed in practice and low-income countries are supported to be innovative, OP4 obligation on free secondary education can have the risk of being seen as a ‘pie in the sky’ for States like Zimbabwe and Lesotho, already struggling to progressively make secondary education available and accessible to all.

4.3.2. Risk of Normative Overreach

There is always need to consider the normative limits of States when introducing international legal instruments to avoid insincere treaty commitments.⁴³³ Some scholars caution against expanding treaty obligations without considering state capacity.⁴³⁴ Langford argues that while OPs help clarify rights, they

⁴²⁴Ibid.

⁴²⁵[“European Countries Cut Development Cooperation Budgets.”](#) International Development Observer, December 6, 2024

⁴²⁶Todres and Alexander supra note 25, at 89

⁴²⁷Mary Burns, [“Sub-Saharan Africa’s Secondary Education Challenges,”](#) IIEP Learning Portal, March 12, 2020

⁴²⁸Katarina Tomaševski, *Free and Compulsory Education for All: The Gap between Promise and Performance* (Stockholm: Novum Grafiska, 2001), 21

⁴²⁹Beiter supra note 15, at 7

⁴³⁰Ibid

⁴³¹Ibid

⁴³²Ibid

⁴³³Wade M. Cole, “Mind the Gap: State Capacity and the Implementation of Human Rights Treaties,” *International Organization* 69, no. 2 (2015): 407–8

⁴³⁴Ibid

must be supported by tailored implementation frameworks.⁴³⁵ As discussed in Chapter 3, for Botswana, that has not ratified the ICESCR and its OP,⁴³⁶ OP4 may be perceived as normative pressure beyond existing commitments since in response to the non-ratification of the ICESCR it was indicated that the country can only ratify a treaty when it "...is in a position to implement the provisions..."⁴³⁷ To add on, Lesotho has not been reporting under the ICESCR ever since ratification in 1992.⁴³⁸ All this testifies the importance of bureaucratic efficacy of States, since to promote compliance with the OP4 governments have to invest in the administrative capacity to implement set obligations.⁴³⁹ It can be argued that this could possibly be some of the reasons behind delayed and non-ratification of some OPs like OPIC.⁴⁴⁰ In such a scenario, it can be argued that "child advocates and children themselves are left to rely on human rights treaty bodies and other relevant institutions (like UNESCO) to press governments to make progress on children's education rights,"⁴⁴¹ under existing international human rights frameworks. In the same fashion, it can be argued that, albeit not legally binding, a revised General Comment⁴⁴² with emphasis on immediate obligations to provide compulsory and free secondary education, can help to improve commitment of States.

4.3.3. Complications Associated with Overlap of Treaty Functions

The reporting process of any treaty is vital to human rights implementation such that an increase in treaties can result in reporting expectations on States. Although the HRC Resolution proposes integrated reporting within the CRC periodic framework to simplify reporting under OP4,⁴⁴³ there remains a risk of somewhat overloading States with multiple overlapping obligations. It is believed that the national process of reporting might involve setting up robust administrative units (including Management Information Systems) for data management as already done by Mauritius under SDGs.⁴⁴⁴ As noted in Chapter 3, for countries like Zimbabwe and Lesotho, that face administrative limitations, this could affect reporting quality and compliance which is already the case under the CRC and its existing Ops, which is marked by delayed reporting.⁴⁴⁵ Commenting on discussions associated with the exploration and drafting of the ICESCR OP adopted in 2009, it was observed that, some States expressed concern over the cost of an additional human rights procedure in light of the overstretched resources of the UN and a potential negative impact on the ability of the Committee to undertake its existing functions.⁴⁴⁶ It was also suggested that "other efforts might be more fruitful, such as improving respect for ESC rights in other existing procedures or placing international emphasis on improving strengthening national mechanisms."⁴⁴⁷ Whereas it can be argued that OPs have the potential to

⁴³⁵Langford, Malcolm. *The OP to the ICESCR: A Commentary*. Pretoria University Law Press, 2013, 368

⁴³⁶YourBotswana supra note 180

⁴³⁷ Ibid

⁴³⁸CRIN supra note 207

⁴³⁹Cole supra note 431, at 435

⁴⁴⁰ See Appendix 1

⁴⁴¹Todres and Alexander supra note 25, at 73

⁴⁴² Ibid

⁴⁴³HRC Resolution 56/5 (2024). Para 1(d)

⁴⁴⁴UNESCO supra note 244

⁴⁴⁵ See Appendix 1

⁴⁴⁶ Malcolm supra note 433, at 25

⁴⁴⁷Ibid

accelerate far-reaching changes in national law, policy, and practice,⁴⁴⁸ one can anticipate extra treaty monitoring workload to the CRC Committee,⁴⁴⁹ and States due to expanded obligations.

4.3.4. Lengthy Drafting and Ratification Process

Ordinarily, drafting and ratification of a binding protocol is a prolonged process⁴⁵⁰ of consultations, debates and multilateral consensus resulting in risks of potential legal stagnation, policy delays and deepened disparities in secondary education. It is common for some governments to postpone domestic socio-legal reforms awaiting international consensus on the best practices as GC1 encourages constant “review of existing approaches which are claimed to be incompatible with the Convention.”⁴⁵¹ Consequently, existing barriers to availability and accessibility of secondary education as highlighted in Chapter 3 might persist or worsen. In Botswana⁴⁵² and Mauritius⁴⁵³ where Constitutions does not explicitly guarantee the right to secondary education there is a risk of constitutional review delays to await the new language on right to secondary education. Already in Botswana there could be a missed opportunity for the most appropriate text to be inserted on the right to secondary education during ongoing discussions on Constitutional review alluded to in Chapter 3.⁴⁵⁴ The CRC Committee has since recommended, inter alia, Botswana to “guarantee the right to free quality education for all girls” and keep pregnant girls and adolescents girls in school.⁴⁵⁵ It recommends Lesotho to address the hidden costs of education, in particular in rural areas, and provide sufficient budget funding to the education sector.⁴⁵⁶ Mauritius has been recommended to apply the policy of compulsory education without discrimination.⁴⁵⁷ South Africa must ensure that all children, including marginalized groups have access to and complete free, equitable and quality secondary education.⁴⁵⁸ Zimbabwe has to ensure adequate budgetary allocation to improve the quality of education.⁴⁵⁹ One can therefore argue that political momentum in addressing the aforesaid barriers is likely to slow down whenever there are other related international processes going on, thereby limiting progress in implementation of existing secondary education related rights in Article 28 and 29 of the CRC.

Generally, countries take their time to ratify treaties as shown in Appendix 1 on the ratification status of the CRC and its OPs where Lesotho took three years to ratify OPSC, Mauritius nine years to ratify OPSC, and Zimbabwe ten years to ratify OPSC. All the five countries have not yet ratified OPIC, of course, this could be for many reasons, including avoidance of international quasi-judicial monitoring. As alluded to elsewhere, it can still be argued that an interim fast-tracked mechanism like “General

⁴⁴⁸Sheppard supra note 10, at 113

⁴⁴⁹Ibid

⁴⁵⁰Todres and Alexander supra note 25, at 73

⁴⁵¹CRC Committee GC 1 Para 25

⁴⁵²Constitution of Botswana

⁴⁵³Constitution Of Mauritius

⁴⁵⁴Botswana Constitution (Amendment) Act. B17

⁴⁵⁵CRC Concluding Observations, Botswana (2019), para 53(a)

⁴⁵⁶CRC Concluding Observations, Lesotho (2018), para 54(b)

⁴⁵⁷CRC Concluding Observations, Mauritius (2023), para 38(a)

⁴⁵⁸CRC Concluding Observations, South Africa (2024), para 41(a)

⁴⁵⁹CRC Concluding Observations, Zimbabwe (2016), para 69(c)

Comment by treaty committees,⁴⁶⁰ can be beneficial to push for progress in secondary education whilst the proposed OP4 processes advance.

4.4. Chapter Conclusion

OP4 presents a crucial opportunity to strengthen the legal architecture of secondary education rights. For Botswana, Lesotho, Mauritius, South Africa, and Zimbabwe, it offers a framework to consolidate progress, address barriers, and confirm their commitment to international norms on secondary education rights. However, risks related to feasibility, capacity, and political will might require solutions. Otherwise, the HRC Resolution lays a critical foundation for secondary education rights through legal clarity, and international cooperation.

⁴⁶⁰Beiter supra note 15, at 4

Chapter 5: Findings, Recommendations, and Conclusion

5.0. Chapter Introduction

As alluded to earlier on, the research study seeks to answer the question regarding to what extent does OP4 triggers benefits and risks to the implementation of secondary education rights of children in the context of selected Southern African Countries. As such, this chapter presents study findings using research sub-questions as themes. Since the research study engages with the HRC, CRC Committee, UN Member States, NGOs, children, and parents, in this Chapter, recommendations are therefore presented together with conclusion(s) for the research study.

5.1. Research Findings

5.1.1. The existing international and regional education rights obligations creating the impetus for OP4

A review of the international and regional human rights instruments in Chapter 2 revealed the following: The CRC explicitly recognizes secondary education as a fundamental right for every child, and Article 28(1)(b) mandates State Parties to progressively make it available and accessible, with the introduction of free education and bursaries as examples of appropriate measures, on a need basis.⁴⁶¹ Retention and completion of secondary education is provided for in Article 28(1)(e).⁴⁶² In what is seen to be a weak provision on international cooperation, Article 28(3) of the CRC⁴⁶³ only obligates States to promote and encourage international cooperation, with no firm extraterritorial obligations included.⁴⁶⁴ Additionally, the CRC Committee views implementation of Article 29(1) on aims of education as an immediate obligation, meaning ‘resource constraints cannot provide a justification for a State’s failure to take any, or enough, of the measures that are required’.⁴⁶⁵ There are some overarching articles of the CRC that provide for State obligations on other aspects of children’s rights that can hamper the availability and accessibility of secondary education, such as Article 2 on non-discrimination.⁴⁶⁶ Article 32(1) on child labor,⁴⁶⁷ Article 24(1) on the right to health and well-being,⁴⁶⁸ Article 27(1)(2)(3) on the right to an adequate standard of living,⁴⁶⁹ and Article 4⁴⁷⁰ on the implementation of ESCR.⁴⁷¹ It is argued that the CRC language regarding secondary education is not strong enough to push for full realization of the right to secondary education, as States have flexibility to decide what is feasible, and there is no obligation for free secondary education.

⁴⁶¹CRC Article 28(1)(b)

⁴⁶²CRC Article 28 (1)(e)

⁴⁶³Vandenhoele, Erdem Türkelli, and Lembrechts, *Children’s Rights: A Commentary on the CRC and Its Protocols, Second Edition*. Article 28.23 (P 298)

⁴⁶⁴Vandenhoele supra note 65, at 44-45

⁴⁶⁵CRC Committee GC1, para 28

⁴⁶⁶Ibid, para 10

⁴⁶⁷CRC Article 32(1)

⁴⁶⁸CRC Article 24(1).

⁴⁶⁹CRC Article 27(1)-(3)

⁴⁷⁰CRC Article 4

⁴⁷¹CRC GC5. Para 7

Although the ICESCR does not mention children explicitly, it is a core human rights treaty that, under Article 13(2)(b), guarantees the right to secondary education for every person, including children,⁴⁷² mandating States to make secondary education progressively available and accessible free to all. Unlike the CRC, it has strong language for a progressive move towards free secondary education. Article 2(1),⁴⁷³ alludes to the principle of progressive realization of ESCR which GC 13 interpret to mean that “States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 13.”⁴⁷⁴ Similar to Article 4 of the CRC, Article 2(1) of the ICESCR recognizes international assistance and cooperation as essential for realization of ESCR, especially in low-income countries.⁴⁷⁵ However, it is argued that in comparison with CRC, the ICESCR provision on international cooperation establishes extraterritorial jurisdiction in implementation of ESCR, including the right to secondary education.

SDG 4 sets explicit targets for the completion of free primary and secondary education by all children, by 2030.⁴⁷⁶ As soft law, SDGs are evidence of a global political consensus, including governments’ unanimous assessment that the financing for these goals is achievable by 2030.⁴⁷⁷ The CRC Committee acknowledges the standard of free secondary education in SDG 4, but has not been explicitly raising it with States.⁴⁷⁸ More so, the SDG framework tend to avoid the human rights language of obligations namely respect, protect and fulfill.⁴⁷⁹ The SDG framework is voluntary giving no clear obligations to States and international organizations”,⁴⁸⁰ and it lacks an indicator on the availability of free education.⁴⁸¹ It is argued that in accordance with the SDG Framework compulsory and free secondary education has to be progressively realized until 2030 only.⁴⁸²

The ACRWC,⁴⁸³ provides for the right to education for every child,⁴⁸⁴ and mandates States to make secondary education progressively “free and accessible to all.”⁴⁸⁵ The ACRWC provisions on secondary education are not very strong, giving States a lot of leeway and discretion on what is feasible. The aims of education are enshrined under Article 11(2) including holistic child development,⁴⁸⁶ and the preservation of “positive African values”.⁴⁸⁷ Like the CRC, the ACRWC mandates States to enforce

⁴⁷²ICESCR Article 13(2)(b)

⁴⁷³ICESCR Article 2(1)

⁴⁷⁴ICESCR GC13. Para 44

⁴⁷⁵ICESCR Article 2(1)

⁴⁷⁶ibid

⁴⁷⁷Sheppard supra note 10, at 111

⁴⁷⁸Todres and Alexander supra note 25, at 84

⁴⁷⁹ibid

⁴⁸⁰Beiter supra note 24, at 453

⁴⁸¹Supra note 114

⁴⁸²ibid

⁴⁸³ACRWC of 1990

⁴⁸⁴ACRWC Article 11(1)

⁴⁸⁵ACRWC Article 11(3)(b)

⁴⁸⁶ACRWC Article 11(2)(a)

⁴⁸⁷ACRWC Article 11(2)(c)

retention and completion of secondary education.⁴⁸⁸ It shares some similarities with the CRC, but seeks to provide an Africa-specific perspective on barriers to secondary education such as child labor (Article 15), the prevention of all forms of violence in schools (Article 16),⁴⁸⁹ parental role in education (Article 20),⁴⁹⁰ harmful cultural practices (Article 21), and access to education for marginalized children (Article 11(3)(e)).⁴⁹¹ It is argued that the ACRWC reflects the African regional consensus on State obligations to ensure progressive realization of the right to secondary education.

The SADC Protocol is a legally binding sub-regional instrument that recognizes basic education as a fundamental right, mandates compulsory and accessible secondary education, and promotes gender equality and removal of financial barriers to education.⁴⁹² It mandates universal secondary education and regional cooperation, but it is silent on free secondary education.⁴⁹³ It is argued that the language of the Protocol does not provide for strong obligations of Member States as most provisions are broadly worded and focuses on policy alignment rather than strict legal obligations with direct enforceability in national courts. In addition, SADC has a non-binding, SADC Regional Indicative Strategic Development Plan (RISDP) (2020-2030), which requires States to only provide universal access to secondary education by 2030.⁴⁹⁴

5.1.2. The key secondary education challenges faced by the selected Southern African countries that can be addressed by OP4

Chapter 3 analyses the implementation of education rights in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe resulting in the following socio-legal barriers to secondary education, most of which can be potentially addressed through OP4:

The Constitution of Botswana⁴⁹⁵ and that of Mauritius⁴⁹⁶ does not explicitly guarantee the right to secondary education thereby potentially weakening the enforceability and prioritization of children's rights to secondary education.⁴⁹⁷ The Constitution of Lesotho provides for the right to secondary education and State's duty to progressively ensure free, accessible secondary education, but it has weak implementation as mechanisms for guaranteeing free, accessible secondary education are not specified.⁴⁹⁸ For South Africa the Constitution guarantees the right to secondary education and State obligations to make it available and accessible, but it does not guarantee free secondary education.⁴⁹⁹ The Constitution of Zimbabwe provide for the right to State-funded secondary education⁵⁰⁰ and obliges the State to make it free and compulsory, but implementation has been weak. It is argued that gaps in

⁴⁸⁸ACRWC Article 11(3)(d)

⁴⁸⁹ACRWC Article 16

⁴⁹⁰ACRWC Article 20

⁴⁹¹Ibid

⁴⁹²SADC Protocol, Article 5

⁴⁹³Ibid

⁴⁹⁴RISDP supra note 134, at 45

⁴⁹⁵Constitution of Botswana

⁴⁹⁶Constitution of Mauritius

⁴⁹⁷CRC Committee GC 1, para 17

⁴⁹⁸Supra note 191

⁴⁹⁹Constitution of South Africa, Section 29(1)(b)

⁵⁰⁰Constitution of Zimbabwe, Section 75(1)(b)

Constitutions, and limited implementation of Constitutions are non-compliance with international human rights obligations on the right to secondary education which hinders full realization of this right. OP4 can assist to make Constitutions for Botswana and Mauritius guarantee free and accessible secondary education for all.

In addition, the Education Act in Botswana does not explicitly mention the right to secondary education but only mandate the Minister to ensure post-primary education.⁵⁰¹ Both the Lesotho Education Act and Children's Protection and Welfare Act does not provide compulsory secondary education.⁵⁰² The legislation of Mauritius does not genuinely reflect a child rights-oriented approach as it tend to avoid the human rights language of obligations.⁵⁰³ More still, the Education Act of Zimbabwe does not provide for compulsory secondary education.⁵⁰⁴ It is argued that absence of the right to secondary education and explicit mention of compulsory secondary education can result in policy gaps and inconsistencies, but the current scope of OP4 might not address compulsory education related challenges.

The RNPE of Botswana limits compulsory secondary education to Junior secondary school only, and targeted exemptions of school fees can be discriminatory and stigmatizing for children.⁵⁰⁵ Similar to Botswana, the Education and Human Resources Strategic Plan for Mauritius only makes secondary education compulsory up to Junior secondary school.⁵⁰⁶ The Child Grant Program in Lesotho is counterproductive as the money meant for social security end up paying for school fees for secondary education.⁵⁰⁷ The no-fee schools concept under the Amended National Norms and Standards for School Funding in South Africa is associated with continuing categorization of schools leading to parents having to pay fees unexpectedly if the status of their child's school changes.⁵⁰⁸ Zimbabwe limits BEAM support for indigent learners to tuition fees only risking children not being able to attend secondary school if they can't afford other related costs like school levies.⁵⁰⁹ It is therefore argued that notable gaps in some policy requirements that can perpetuate disparities in secondary education, can be addressed through the OP4 emphasis on free secondary education for all children.

There are several systemic barriers to accessing secondary education in Botswana, Lesotho, Mauritius, South Africa and Zimbabwe. The CRC Committee raises concerns about low completion rates among learners, high number of out of school children and school fees payment for secondary school in Botswana.⁵¹⁰ It is also concerned about high school fees, low enrolment rates, poor school infrastructure, overcrowding, lack of certified teachers and the long distances students must travel to attend school, expulsion of pregnant teenagers and adolescent mothers and limited access for children with disabilities, in secondary level in Lesotho.⁵¹¹ In Mauritius there is discrimination resulting from the

⁵⁰¹Botswana Education Act, Section 3(1)

⁵⁰²Supra note 191

⁵⁰³Mauritius Education Act, Section 37(2)

⁵⁰⁴Zimbabwe Education Act Section 5

⁵⁰⁵"Botswana Non-State Actors in Education." Education Profiles

⁵⁰⁶UNESCO supra note 233

⁵⁰⁷Lesotho Education Sector Plan 2016 – 2026, [46](#)

⁵⁰⁸Beiter supra note 15, at 2

⁵⁰⁹Mazambani & Tapfumaneyi supra note 325, at 445.

⁵¹⁰CRC Concluding Observations, Botswana (2019), para 52

⁵¹¹CRC Concluding Observations, Lesotho (2018), para 53

compulsory education policy, lack of universal access to school for all children for the duration of compulsory education, particularly among marginalized groups, and the exclusion of pregnant adolescent girls and adolescent mothers from mainstream secondary schools.⁵¹² South Africa has limited access to quality and inclusive education, high dropout rates at the end of the compulsory school phase, low quality of education, particularly in “no-fee schools”, and voluntary donations which contribute to school dropout in secondary schools.⁵¹³ Zimbabwe has high dropout rate for girls, low quality of education as a result of inadequate budget allocation, limited access to secondary education by marginalized groups in particular those living in poverty and those in remote and rural areas.⁵¹⁴ It is noteworthy that more or less similar concerns are also raised by the ACERWC in its concluding observations to Botswana, Lesotho, South Africa and Zimbabwe,⁵¹⁵ as well as the CESCR in its review of Mauritius, South Africa and Zimbabwe.⁵¹⁶ It is argued that the CRC Committee, the ACERWC and CESCR observations implies that most barriers to access secondary education are associated with direct and indirect costs of education as well as limited government funding towards secondary education, issues that can be addressed through OP4. Nonetheless, OP4 might not address systemic challenges such as poor quality of education, corporal punishment and adolescent pregnancies.

Botswana has not yet ratified the ICESCR,⁵¹⁷ and Lesotho has not yet reported under the ICESCR since ratification in 1992.⁵¹⁸ Mauritius has not been reporting under the ACRWC since ratification in 1992.⁵¹⁹ It is argued that non-ratification of treaties and non-reporting to treaty bodies weakens State commitment to the full realization of secondary education rights, limiting accountability and alignment with international education rights standards.

Countries studied are lagging towards full realization of secondary education both under the CRC and the SDG 4 goal. Botswana has consistently allocated substantial portions of its GDP to education with 6.8% in 1992 and 8.1% in 2020,⁵²⁰ but there is persistent underfunding of rural schools.⁵²¹ Gross secondary education enrollment ratios in Botswana, rose from 57% in 1995⁵²² to 72% in 2022.⁵²³ Lesotho's education budget as a percentage of GDP has fluctuated significantly, from 1993 (8,6%) to

⁵¹²CRC Concluding Observations, Mauritius (2023), para 38

⁵¹³CRC Concluding Observations, South Africa (2024), para 40(c)

⁵¹⁴CRC Concluding Observations, Zimbabwe (2016), para 68

⁵¹⁵ACRWC Concluding Observations, Botswana (2023), para 43; ACRWC Concluding Observations, Lesotho (2023), para 33 ACRWC Concluding Observations, South Africa (2023), para 36 ; ACRWC Concluding Observations, Zimbabwe (2024), para 41

⁵¹⁶ICESCR Concluding Observations, Mauritius (2019), para 57; ICESCR Committee Concluding Observations, South Africa (2018) para 70;

⁵¹⁷YourBotswana supra note 180

⁵¹⁸CRIN supra note 207

⁵¹⁹ACERWC supra note 284

⁵²⁰World Bank supra note 161

⁵²¹Makwinja supra note 162

⁵²²World Bank. “School Enrollment, Secondary (% Gross) – Botswana.”

⁵²³Statistics Botswana, Secondary Schools Stats Brief 2022, 1

2023 (6.7%),⁵²⁴ with gross enrollment ratios showing gradual improvement from 24% in 1992⁵²⁵ to 60% in 2017.⁵²⁶ Mauritius has maintained strong financial commitment to education, with allocation gradually increasing from 3.1% in 1990 to 4.4% in 2020 and 4.6% in 2023 of the GDP,⁵²⁷ with gross enrollment ratios increasing from 53% in 1990⁵²⁸ to 90% in 2020.⁵²⁹ South Africa has maintained substantial education spending of the GDP with 5% in 1995 and 6.1% in 2023,⁵³⁰ with gross enrollment ratios increasing from 90% in 1994 to 108% (including those who repeat classes/delay enrolment) in 2022.⁵³¹ However, SDG 4 review reveals that completion rates for upper secondary education slightly increased from 45.8% in 2015 to 50.9% in 2024.⁵³² It is argued that while countries are showing progress in making secondary education available and accessible, universal secondary education is not yet realized and OP4 can potentially improve the situation. One can also argue that, while OP4 can potentially contribute significantly towards addressing most socio-legal barriers to secondary education, it might not reasonably address systemic challenges such as corporal punishment and adolescent pregnancies.

5.1.3. The main rights and obligations related to secondary education outlined in the OP4 Resolution

Chapter 4 revealed that the HRC Resolution signals a potentially transformative shift in international child rights law.⁵³³ In relation to secondary education, Paragraph 1 of the Resolution outlines the proposed content of the OP4 as follows:⁵³⁴

- (i) Recognize secondary education as integral to the right to education.
- (ii) Require States to make public secondary education available free to all.
- (iii) Reinforce international cooperation as an essential tool for quality, equitable education.
- (iv) Streamline reporting mechanisms by integrating them into CRC periodic reports.

It suffices to say the Resolution's language affirms the need for a legally binding mandate on secondary education,⁵³⁵ which can assist in improving progress towards the full realization of secondary education rights for all children.

5.1.4. Whether OP4 enhances or does not add value to the realization of the right to secondary education in the context of selected Southern African countries

Chapter 4 examines the possible impact of OP4 and reveals the following:

⁵²⁴ World Bank, "School Enrollment, Secondary (% of Government Expenditure on Education) – Lesotho,"

⁵²⁵ World Bank, "School Enrollment, Secondary (% Net) – Lesotho,"

⁵²⁶ *ibid*

⁵²⁷ World Bank, "Government Expenditure on Education, Total (% of GDP) – Mauritius"

⁵²⁸ World Bank, "School Enrollment, Secondary (% Gross) – Mauritius"

⁵²⁹ *Ibid*

⁵³⁰ World Bank, "Government Expenditure on Education, Total (% of GDP) – South Africa"

⁵³¹ World Bank, "School Enrollment, Secondary (% Gross) – South Africa"

⁵³² UNESCO Institute for Statistics. South Africa – SDG 4 Country Profile, 3

⁵³³ HRC Resolution.

⁵³⁴ *ibid*

⁵³⁵ *ibid*

A binding protocol could strengthen accountability and elevate free public secondary education for all to an enforceable and justiciable right.⁵³⁶ This is particularly relevant in Botswana and Mauritius, where the Constitution does not explicitly guarantee the right to education, particularly free secondary education.⁵³⁷

One can argue that, if adopted, OP4 has the potential to validate and internationalize existing good practices, thereby improving commitment towards the realization of secondary education. As revealed in Chapter 3, countries like South Africa, Lesotho, and Zimbabwe, that already have robust laws and policies, could benefit from reinforced obligations to implement and expand their initiatives to make public secondary education free and compulsory for all children.

The binding nature of the protocol would require States to address systemic barriers to secondary education, such as indirect costs, underfunding of secondary education, and inadequate infrastructure, which are critical factors in countries like Lesotho,⁵³⁸ Botswana,⁵³⁹ and Zimbabwe⁵⁴⁰. It is argued that while free public secondary education can directly address some systemic barriers, having specific provision(s) on State obligations to address inequalities in secondary education can make OP4 more relevant to countries like Botswana, Lesotho, and Zimbabwe.

The language of the resolution, unlike that of the CRC Article 28(3), tends to impose a strong obligation to provide development cooperation to advance the right to secondary education.⁵⁴¹ It is argued that for countries like Zimbabwe and Lesotho, which somewhat require international support, a binding protocol with clear “extraterritorial State obligations”⁵⁴² can be useful to guarantee resource support for free public secondary education for all children.

There is arguably a concern that, without guaranteed international support, a binding protocol could create legal obligations that are unfeasible.⁵⁴³ Low-income countries like Zimbabwe⁵⁴⁴ and Lesotho⁵⁴⁵ still require external resource injection to make meaningful progress in realizing their obligations to make public secondary education available and accessible free to all.

Expanding treaty obligations through OP4 can exert normative pressure beyond existing commitments for those countries with limited capacity to implement the obligations.⁵⁴⁶ Countries like Botswana that have already hinted on lack of readiness to ratify the ICESCR, and all the countries that have not yet ratified OPIC might feel a strain to expand obligations on secondary education rights. It is argued in

⁵³⁶UNESCO Right to Education Handbook (2019), 275

⁵³⁷ Constitution of Botswana; Constitution of Mauritius, Article 3(2)

⁵³⁸CRC Concluding Observations, Lesotho (2018), para 54

⁵³⁹CRC Concluding Observations, Botswana (2019), para 53

⁵⁴⁰CRC Concluding Observations, Zimbabwe (2016), para 69

⁵⁴¹Vandenhoele supra note 65, at 44-45

⁵⁴²Beiter supra note 15, at 7

⁵⁴³Todres and Alexander supra note 25, at 87-88

⁵⁴⁴CRC Concluding Observations, Zimbabwe (2016), para 69(c)

⁵⁴⁵ Concluding Observations, Lesotho (2023), para 33(j)

⁵⁴⁶Cole supra note 431, at 407-408

such a situation a revised General Comment can assist in improving the commitment of States towards free public secondary education.

There remains a risk of somewhat overloading States with multiple overlapping obligations for countries like Zimbabwe and Lesotho, which face administrative limitations, and it affect reporting quality and compliance.⁵⁴⁷ It is argued that despite the proposition to integrate the OP4 reporting within the existing CRC, the CRC Committee and States will still have to anticipate an increased reporting and monitoring load.

It is common for some governments to postpone domestic socio-legal reforms awaiting international consensus on OP4 during a lengthy drafting and ratification process. This can potentially delay Constitution reviews for Botswana and Mauritius. For all the countries, treaty drafting can derail efforts to implement reforms suggested by treaty bodies. It can still be argued that an interim fast-tracked mechanism like “General Comment by treaty committees,”⁵⁴⁸ can help to push for progress pending OP4 finalization.

It can therefore be argued that whereas OP4 can expand secondary education rights, caution must be taken to consider the varied contexts of countries and other significant players/institutions for the full realization of free secondary education for all children. Resource constraints and institutional capacity might need to be dealt with forthwith to set the correct tone for OP4.

5.2. Recommendations

5.2.1. Strengthening Legal Commitments to Free and Compulsory Secondary Education

OP4 should provide clear, binding commitments for free and compulsory secondary education. This would address normative gaps in Article 28 of the CRC⁵⁴⁹ and reinforce national policy frameworks, especially in Botswana and Mauritius where the right is not fully guaranteed in law.⁵⁵⁰ This emphasizes the need for enforceable rights that can make children and child rights advocates demand State accountability.⁵⁵¹

5.2.2. Advancing Equity and Inclusion in Secondary Education

OP4 should obligate States to address indirect costs, discriminatory practices, and inclusive education challenges especially visible in Lesotho, Zimbabwe, and Botswana.⁵⁵² Specific references to inclusion for children with disabilities and pregnant girls should be integrated.⁵⁵³ It is argued that the scope of OP4 should go beyond free secondary education and provide State obligations to address all critical barriers to availability and accessibility of secondary education.

⁵⁴⁷ See Appendix 1

⁵⁴⁸Beiter supra note 15, at 4

⁵⁴⁹Vandenhoe, supra note 52, at P 290

⁵⁵⁰Constitution of the Republic of Botswana; Constitution of Mauritius, Article 3(2)

⁵⁵¹UNESCO Right to Education Handbook (2019), 275

⁵⁵²CRC Concluding Observations, Botswana (2019), para 52; CRC Concluding Observations, Lesotho (2018), para 53; CRC Concluding Observations, Zimbabwe (2016), para 68

⁵⁵³Ibid

5.2.3. Mandating International Cooperation Mechanisms for Secondary Education

OP4 should clearly operationalize extraterritorial obligations and mechanisms for international support,⁵⁵⁴ particularly for low- and middle-income countries like Lesotho⁵⁵⁵ and Zimbabwe⁵⁵⁶ with resource constraints to implement free secondary education. Taking note of the foundation laid by the CRC Article 28(3)⁵⁵⁷, CRC Article 4⁵⁵⁸ and ICESCR Article 2(1)⁵⁵⁹ emphasis should be made on the importance of international support in addressing any “teething problems”⁵⁶⁰ associated with the introduction of free secondary education until countries could embark on innovative domestic resource mobilization strategies. It is argued that some countries might not introduce free secondary education without international support.

5.2.4. Streamlining Reporting Mechanisms

There is a great need to advocate for integrating OP4 reporting requirements into existing CRC periodic reviews to reduce administrative burdens on States like Zimbabwe and Lesotho (has not yet reported under ICESCR)⁵⁶¹ with seemingly administrative challenges.⁵⁶² The HRC Resolution Para 1 serves as a template for simplification of the reporting procedure.⁵⁶³ It is argued that relevant institutions should consider supporting States to adapt their domestic monitoring and reporting mechanisms as well as the CRC Committee to align with the simplified reporting procedure, and to manage somewhat increased reporting demands.

5.2.5. Embedding Measurable Benchmarks for Realization of Secondary Education Rights

Realizing that it is not common to find benchmarks in treaty language, for the OP4 to be impactful in ensuring accountability it should be backed by clear, measurable benchmarks possibly designed by the CRC Committee to guide States in realizing education rights.⁵⁶⁴ There is also need to address concerns about State capacity⁵⁶⁵ by advocating for core minimum obligations tailored to each country’s context, especially for Botswana which has not ratified ICESCR⁵⁶⁶, and all the other countries that have not yet

⁵⁵⁴Vandenhoele supra note 65, at 44-45

⁵⁵⁵Concluding Observations, Lesotho (2023), para 33(j)

⁵⁵⁶CRC Concluding Observations, Zimbabwe (2016), para 69(c)

⁵⁵⁷Vandenhoele, et al., supra note 55, at 298

⁵⁵⁸CRC Article 4

⁵⁵⁹ICESCR Article 2(1)

⁵⁶⁰McCowan supra note 12

⁵⁶¹CRIN supra note 207

⁵⁶²See Appendix 1

⁵⁶³HRC Resolution. Para 1(d)

⁵⁶⁴UNESCO Right to Education Handbook (2019), P275; ICESCR GC13, para 45

⁵⁶⁵Cole supra note 431, at 407-408

⁵⁶⁶YourBotswana supra note 180

ratified OPIC.⁵⁶⁷ It is argued that benchmarks on free secondary education currently missing in SDG 4 framework should be prioritized.

5.2.6. Ensure Participatory Exploration and Drafting Processes

There is a great need to stress the importance of involving children, parents, civil society, and other critical stakeholders in exploring the possibilities of and drafting OP4 to ensure its provisions reflect realities in countries.⁵⁶⁸ CRC Article 12⁵⁶⁹ and HRC Resolution⁵⁷⁰ can be used to support the popular participation agenda. More still, participation of all critical stakeholders reduces chances of manipulation of secondary education rights by some States and other stakeholders with different perspectives. It is argued that involvement of key stakeholders affords them an opportunity to address global inequalities in secondary education⁵⁷¹ and shape prospects for children to have a better future.⁵⁷²

5.2.7. Drive Socio-Legal Reforms in Alignment with OP4

There is always need to ensure the implementation of country-specific socio-legal reforms reiterated by treaty bodies to pave way for States to make secondary education available free for all.⁵⁷³ Botswana should, inter alia, ratify ICESCR,⁵⁷⁴ legislate inclusive education, and prohibit corporal punishment in schools.⁵⁷⁵ Lesotho must, inter alia, enact laws for free secondary education and expand rural infrastructure.⁵⁷⁶ Mauritius should, inter alia, improve inclusivity and comply with ACRWC reporting.⁵⁷⁷ South Africa must, inter alia, strengthen infrastructure, regulate private education, and enforce inclusive policies.⁵⁷⁸ Zimbabwe should, inter alia, increase education budgets and ban corporal punishment in schools.⁵⁷⁹ It is argued that an improved socio-legal environment gives better chances for the implementation of OP4 if adopted and ratified.

⁵⁶⁷See Appendix 1

⁵⁶⁸HRC Resolution, para 5

⁵⁶⁹CRC Article 12.

⁵⁷⁰HRC Resolution, para 5

⁵⁷¹Todres and Alexander *supra* note 25, at 70-72

⁵⁷²Sheppard *supra* note 10, at 113

⁵⁷³Beiter *supra* note 15, at 5

⁵⁷⁴YourBotswana *supra* note 180

⁵⁷⁵CRC Concluding Observations, Botswana (2019), para 53; ACRWC Concluding Observations, Botswana (2023), para 44-46

⁵⁷⁶ CRC Concluding Observations, Lesotho (2018), para 54; ACRWC Concluding Observations, Lesotho (2023), para 34

⁵⁷⁷CRC Concluding Observations, Mauritius (2023), para 38; ICESCR Concluding Observations, Mauritius (2019), para 58

⁵⁷⁸CRC Concluding Observations, South Africa (2024), para 41; ICESCR Committee Concluding Observations, South Africa (2018), para 71; ACRWC Concluding Observations, South Africa (2023), para 37

⁵⁷⁹CRC Concluding Observations, Zimbabwe (2016), para 69; ACRWC Concluding Observations, Zimbabwe (2024), para 41

5.2.8. An Interim Fast-tracked Mechanism on Secondary Education Rights

Recognizing that the drafting and ratification of OP4 is a lengthy process, there is need for at least an interim mechanism possibly in the form of a revised “General Comment”⁵⁸⁰ under the CRC, if it can be done a bit quickly. The General Comment should emphasize making public secondary education available and accessible, free and compulsory to all, including the regulation of private secondary education.⁵⁸¹ It is noted that Botswana, Lesotho, Mauritius, South Africa, and Zimbabwe, just like any other countries, are not likely to meet SDG 4 targets,⁵⁸² hence, an international soft law on children’s rights may assist to trigger immediate action by States to address the visible barriers towards progressive realization of secondary education. It is argued that an interim mechanism might mitigate against the delayed implementation of socio-legal reforms pending international consensus on OP4.

5.3. Conclusion

Evidence shows that OP4 presents a transformative opportunity to strengthen the international legal protection⁵⁸³ and the practical realization of secondary education rights for children in the researched Southern African countries. The findings from Botswana, Lesotho, Mauritius, South Africa, and Zimbabwe reveal both the potential benefits and risks/ challenges associated with OP4, highlighting the need for a balanced and context-sensitive approach to the exploration of possibilities of and drafting of the Protocol. Whereas OP4 can significantly enhance legal protection and accountability for children’s secondary education rights in some countries in Southern Africa, potential solutions should be sought to address potential risks and challenges. As such, evidence points towards the need to have an OP4.

The Protocol’s emphasis on legally binding commitments to free secondary education⁵⁸⁴ could potentially address critical gaps in national constitutional and legislative frameworks, particularly in Botswana and Mauritius, where a legal vagueness persists. By elevating free secondary education to an enforceable right, OP4 could enhance country-specific accountability and direct socio-legal reforms. However, its success hinges on the capacity and political will of the States,⁵⁸⁵ as expanding obligations without adequate resource support could undermine implementation.

The issue of equity and inclusion should remain central to OP4 drafting, given the persistent barriers faced by marginalized groups like girls, children with disabilities, and rural learners in the studied countries.⁵⁸⁶ The findings point out the need for targeted interventions, including investment in school infrastructure and the elimination of indirect costs, to ensure meaningful access to secondary education by all children.

International cooperation remains crucial, particularly for resource-constrained countries like Lesotho and Zimbabwe. By operationalizing CRC Article 28(3), CRC Article 4 and ICESCR Article 2(1), OP4 can reinforce the obligation of developed countries to support education through development assistance,

⁵⁸⁰Beiter *supra* note 15, at 5

⁵⁸¹*Ibid*

⁵⁸²UNESCO. SDG 4 Data Digest 2021,46

⁵⁸³HRC Resolution, para 1

⁵⁸⁴HRC Resolution, para 1

⁵⁸⁵Cole *supra* note 431, at 407-408

⁵⁸⁶CRC Concluding Observations, Botswana (2019), para 52; CRC Concluding Observations, Lesotho (2018), para 53; CRC Concluding Observations, Zimbabwe (2016), para 68

technical cooperation, and capacity-building initiatives.⁵⁸⁷ As it is, international support is not an optional extra, but a necessary ingredient for the successful implementation of free secondary education in most low-income countries.

It suffices to say the successful drafting and adoption of OP4 significantly depends on the commitment of States, tailored strategies, participatory development of its provisions, and international commitment to ensure successful implementation. OP4 can be taken to represent not just an international legal instrument but a moral imperative, one that demands joint action to ensure every child's right to free secondary education is respected, protected, and fulfilled. It now depends on whether States and other critical secondary education stakeholders are ready for such an Optional Protocol. Future research should explore the long-term impact of a legally binding mandate on secondary education rights.

⁵⁸⁷McCowan *supra* note 12

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Appendices

Appendix 1

Table 2: Ratification of the CRC and Its OPs by the Selected Southern African Countries

| Country | Treaty | Entry into Force | Ratification Date | Time Between Entry into Force and Ratification | Initial Report Submission Date |
|---------------------|--------|------------------|-------------------|--|--------------------------------|
| Botswana | CRC | 2 Sep 1990 | 14 Mar 1995 | 4 years, 6 months | 15 Apr 2004 |
| | OPAC | 12 Feb 2002 | 4 Oct 2004 | 2 years, 7 months | 26 Oct 2012 |
| | OPSC | 18 Jan 2002 | 24 Sep 2003 | 1 year, 8 months | 26 Oct 2012 |
| | OPIC | 14 Apr 2014 | Not Ratified | N/A | N/A |
| Lesotho | CRC | 2 Sep 1990 | 10 Mar 1992 | 1 year, 6 months | 24 Sep 1997 |
| | OPAC | 12 Feb 2002 | 24 Sep 2003 | 1 year, 7 months | 5 Mar 2008 |
| | OPSC | 18 Jan 2002 | 6 Dec 2005 | 3 years, 11 months | 5 Mar 2008 |
| | OPIC | 14 Apr 2014 | Not Ratified | N/A | N/A |
| Mauritius | CRC | 2 Sep 1990 | 26 Jul 1990 | -1 month (ratified before entry into force) | 14 Oct 1991 |
| | OPAC | 12 Feb 2002 | 12 Feb 2009 | 7 years | 9 Dec 2014 |
| | OPSC | 18 Jan 2002 | 14 Jun 2011 | 9 years, 5 months | 9 Dec 2014 |
| | OPIC | 14 Apr 2014 | Not Ratified | N/A | N/A |
| South Africa | CRC | 2 Sep 1990 | 16 Jun 1995 | 4 years, 9 months | 4 Dec 1997 |
| | OPAC | 12 Feb 2002 | 24 Sep 2009 | 7 years, 7 months | 20 Jun 2014 |
| | OPSC | 18 Jan 2002 | 30 Jun 2003 | 1 year, 5 months | 20 Jun 2014 |
| | OPIC | 14 Apr 2014 | Not Ratified | N/A | N/A |
| Zimbabwe | CRC | 2 Sep 1990 | 11 Sep 1990 | 9 days | 6 Mar 1995 |
| | OPAC | 12 Feb 2002 | 22 May 2013 | 11 years, 3 months | 7 Mar 2016 |
| | OPSC | 18 Jan 2002 | 14 Feb 2012 | 10 years, 1 month | 7 Mar 2016 |
| | OPIC | 14 Apr 2014 | Not Ratified | N/A | N/A |

Source: Research Study of the OHCHR Database