

## *Editorial*



### **The African Children's Charter @ 30: A distinction without a difference?**

I would like to start with three recent concerning developments on children's rights in Africa that the media has highlighted. First, in Somalia the draft Sexual Offences Bill that allowed child marriage has ruffled feathers (UN News, 11 August 2020). In Cameroon, a video of soldiers executing two mothers and their children that went viral in 2018 almost came to a full circle when a military court conducted behind closed doors convicted four soldiers to a mere ten years' imprisonment (Human Rights Watch, 23 September 2020). In Nigeria too, the sentencing of a 13-year old boy for 10 years, 'in a *Sharia* court in Kano State in Northwest Nigeria after he was accused of using foul language toward Allah in an argument with a friend' (CNN, 16 September 2020) has drawn condemnation from organisations such as UNICEF.

The less informed individual who saw these child rights news items could be forgiven for thinking that there is almost no child rights progress on the African continent. But this could not be further from the truth, especially as the year 2020 marks the 30th anniversary of the adoption of the African Charter on the Rights and Welfare of the Child ("African Children's Charter" or "Charter"). In 1999, at the time of the coming into force of the African Children's Charter, Mugwanya offered a grim assessment of human rights in Africa when he professed that, 'the world at large and Africa in particular, stands poised between the extremities of hope and despair' (1999: 39). In the past 30 years, however, very commendable progress has been, for example: in addressing infant and child mortality; reducing the number of preventable deaths; improving access to and quality of education; enacting child rights laws; combating violence against children; and providing for access to justice. In fact, during the same few weeks that the above three child rights violations were highlighted in the

media, important milestones, including the declaration that Africa is free from wild poliovirus (August 2020), have been recorded.

Of course, Africa has transformed in multiple ways since the adoption of the Charter 30 years ago. The African continent's child demography is unique, as there is no other continent in the world where children are more central to a continent's future than in Africa. After all, according to a 2017 UNICEF report – Generation 2030: Africa 2.0 – children reportedly account for 47 per cent of its population (UNICEF, 2017: 7). The same report has underscored that the population projection of the continent by 2050 suggests that the continent will account for 42 per cent of all global births and almost 40 per cent of all children under 18 (2017: 7). As a result, in order to achieve the best out of the demographic dividend, and create an Africa fit for children, investing in education and health systems remains the leitmotif. Rapid urbanisation, globalisation, and the ever changing socio-cultural contexts which often mean the increasing erosion of social safety nets leading to increased vulnerabilities need to be acknowledged as part of the changing context (UNICEF, 2020: 8–9). The recorded economic growth in Africa in the last decade has led to the notion of “Africa Rising”, although there are concerns that limited political will in parts of the continent either does not prioritise allocation of resources for social wellbeing, or facilitates limited to no accountability for mismanagement of resources (UNICEF, 2020: 6–8). Moreover, while Africa remains relatively the region that is less connected to the internet, a technological revolution with both its advantages (for education, health etc) and its limitations (cyberbullying, automation leading to unemployment) are also part of the changes that inform child rights implementation (UNICEF, 2020: 10). The expression that the ‘world has changed remarkably from a world of States to a world of States and non-state actors like transnational corporations’ (Li-Ann, 2009: 296) applies to Africa too.

The 30th anniversary of the Charter prompts a natural inclination to celebrate as well as reflect on its achievements and areas for improvement. This *Editorial* intends to shed some light on the Charter, its monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (the “ACERWC” or “African Committee”), and provide some pointers for the future. First, some reflections on the Charter.

## 1 The Charter

The African Children's Charter, to date the only comprehensive instrument to guarantee children's rights at a regional level, was adopted on 11 July 1990 by the 26th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity. Its genesis was mostly UNICEF and civil

society driven (in particular the African Network for the Prevention against Child Abuse and Neglect- ANPPCAN) and this remained the case up to its early years. Preceded by the Organisation of African Unity's (OAU) 1979 Declaration on the Rights and Welfare of the Child and adopted by the OAU Assembly before the CRC became legally binding, the idea for an African Children's Charter was triggered as a spill-over of the negotiation process to adopt the United Nations (UN) Convention on the Rights of the Child (CRC).

Although progress related to its ratification has not been as fast as its international counterpart, the CRC, it entered into force on 29 November 1999, after 15 Member States of the OAU ratified it (Sloth-Nielsen and Mezmur, 2007: 330–331). As of September 2020, all Member States of the African Union (AU) have signed the African Children's Charter, and all but six have ratified it, those six being the Democratic Republic of Congo, Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Tunisia. The African Committee monitors the implementation of the African Children's Charter (Article 32 of the Charter). The Charter also introduced an inbuilt communications procedure, which is discussed in some detail further below.

We also do not (yet) have the benefit of access to the *travaux préparatoires* of the Charter, and my own efforts and that of others to find one have not come to fruition. Be that as it may, the 31 substantive provisions of the Charter reflect the foresight of the drafters, not only for a world that existed in the late 1980s, but to a large extent for a world that they anticipated.

At the time of the drafting of the CRC there was a concern about the limited number of African countries which were substantively and meaningfully involved (Mezmur, 2017: 128). A number of issues were not considered to have been adequately captured by the CRC (Ekundayo, 2015: 147), including: children living under apartheid; children in armed conflict; the protection of child refugees and internally displaced children; the special vulnerability of the girl child on matters such as access to education, harmful practices including female genital mutilation (FGM) and 'child marriage', using children in the form of begging, children imprisoned with their parents, prohibition to 'pronounce' the death penalty for crimes committed by a child, the need to provide special measures for 'female, gifted, and disadvantaged children' in education, and the notion of the 'responsibilities of the child' (Mezmur, 2017: 128–129; Sloth-Nielsen, 2007: 81; Chirwa, 2002: 157; Olowu, 2002: 127).

### 1.1 *Influencing Legislative Reform*

The pace and depth at which the precepts of the Charter have gradually been included in national legal systems has depended on a number of factors, and has undoubtedly been either initiated or assisted by the CRC. Irrespective of

these differentiations, such inclusion has been made through constitutions, comprehensive child rights legislation, as well as thematic laws.

The constitutionalisation of children's rights in Africa in general, and inclusion of the particular elements of the Charter, is on a positive trajectory. A quick look at some more recent constitutions, especially the so-called "Constitutions 4.0" as those adopted from 2010 in the 4th wave of constitution-making on the continent could be a good example. In this respect one can mention the Constitutions of Angola (2010), Kenya (2010), Madagascar, Somalia, Zimbabwe (2013), Tunisia (2014). In the context of these projections – the fact that income poverty is deep, and state capacity, measured by tax revenue, is low in Africa, will probably contribute to challenging the child rights achievements in the coming decades (Child Rights Now, 2019: 40). Incorporating children's rights in constitutions, as envisaged in the Charter, can play multiple roles, including for the purposes of legislative reform (Ghana, Ethiopia, South Africa) as well as policy (The Gambia, Ghana, Nigeria, Uganda) (UNICEF, 2008: 5–6). Moreover, those constitutional provisions in the constitutions of federal states play an important role in overriding any inconsistent provisions in state constitutions and laws.

In some cases, reference is made to the Charter as a basis for new legislation, such as in the case of Lesotho, Liberia, Rwanda, Sierra Leone and South Africa. In most cases, the laws specifically incorporate provisions related to the added-value areas of the Charter (UNICEF, 2020: 17). Apart from some academic publications on harmonisation of laws with the Charter, the African Child Policy Forum (ACPF) has conducted a multiple, years-long study on the topic and has identified a number of critical elements on harmonisation of the Charter (ACPF, 2007; ACPF 2011). A joint ACPF and African Committee harmonisation of laws report which updates the previous publications is also being finalised in 2020.

In this regard, four important findings are worthy of sharing here. First, many of the particular elements of the Charter mentioned above, including on the responsibilities of the child (Nigeria, South Africa, for example), have found their way into domestic legislations in Africa. Moreover, thematic legislation, for example on child marriage, or FGM, has often been either initiated and/or supported by the Charter's provisions and spirit. Secondly, the notion of "Africanisation" of child law – for example in diverse topics such as parental responsibilities, custody, children born outside of wedlock and African customary law, harmful practices, and dispute resolutions – have been ushered in (ACPF, 2009: 6–14). Thirdly, the Charter emphasises the role of the community much more than the CRC (for example in respect of health in Article 14(2)(J)) and, given resource constraints in particular, the

Charter has informed the adoption of legislations that rely on non-resource intensive legal regimes such as existing community practices and structures that promote children's rights. For example, Eswatini's (formerly known as Swaziland) Children's Protection and Welfare Act of 2012 relies heavily on Child Justice Committees that are composed of the chief and community members in rural areas for restorative justice. The Children's Act (2009) of Botswana created the Village Child Protection Committees serving at the community level and also facilitates community fostering of refugee children (Botswana) or while Family Councils within the communities that make decisions on the fostering of the child (in Cote D'Ivoire, for example) exist. It is also notable that some of the Regional Economic Communities (RECs) have adopted child policies and/or laws (for example East African Community and Economic Community of West African States) that reflect the particular elements of the Charter.

Fourth, despite the criticism that the Charter does not contain an explicit right to social security (Chirwa, 2002: 158), it provides for a number of important socio-economic rights. In doing so, it does not rely on a general claw-back clause in the form of "progressive realisation" or "within available resources" similar to Article 4 of the CRC (a concept critiqued by Seamus Byrne in his article featured in this issue). Van Bueren hailed it as 'the most progressive of the treaties on the rights of the child' in part for this reason (Van Buren, 1995: 402). Some provisions (for example 11(3)(b), and 13(3)) underscore the progressive nature of the obligations, and domestic legislation too has followed suit whilst not losing sight of the ACERWC's recommendation that '[p]rogressive realisation must be understood in the context of the urgency required to fulfil children's rights' (General Comment No. 5, 2018: 7–8). Moreover, issues pertaining to sanitation and access to water, which have become even more critical in the context of COVID19 (and reports that of the close to 3 billion people that lacked soap and water, a significant number are in Africa), are often not framed in "rights" terms as incorporated in Article 14 of the Charter, and it is an area in need of significant improvement.

### 1.2 *Influencing Domestic Case Law*

During the first decade and a half after its adoption, examples of domestic courts making reference to and/or relying on the provisions of the Charter were very rare. However, this has started to change significantly. Examples abound, but only few will be mentioned here.

For example, in Zimbabwe, in the *State v. C (A juvenile)* (CRB R 87/14) [2015] (ZWHHC 718 (30 December 2014)), the sentence to receive a moderate corporal punishment of three strikes with a rattan cane was challenged successfully on

the basis of its Constitution and the Charter. In *Mudzuru & Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (Const. Application No. 79/14, CC 12–15) [2015] ZWCC) 12) involving a constitutional challenge to the Marriage Act which allowed 16-year old girls to be married and to the Customary Marriages Act which did not set a minimum age for marriage, Article 21 of the Charter was used to arrive at the unconstitutionality of the two Acts. In Uganda, *Wafula Renny Mike v. Sarah Sheila Wanyoto & Another Civil Revision* 17 of 2014 involved an unsuccessful application seeking to challenge the decision of a Magistrate Grade II Court to grant a garnishee order to attach the applicant's account for the maintenance of his three children. The Court rejected the application reasoning that both the decision to attach the applicant's account, as well as the amount deducted for the maintenance of the children, was justified, among others, on the basis of Article 4 of the Charter on best interests of the child. Article 4(1) of the Charter is also invoked in a joint custody case in *Steve Sahabo v. Larissa Kaneza Misc Application No. 524 of 2019*.

In Kenya, *Organisation for National Empowerment v. The Principal Registrar of Births and Deaths & 2 Others* – Petition 289 of 2012 raised the question of whether children who are adopted under the Children's Act are entitled to birth certificates, and Articles 2 and 6 of the Charter were invoked to assert such a right. The Court further ordered the Registrar to issue all adopted children with birth certificates with no reference to parents as adopters. In *Ripples international & 11 others v. Commissioner of Police/ Inspector General of the National Police Service & 2 Others* – Petition 8 of 2012, the 11 petitioners were victims of child abuse and defilement between the years 2008 and 2012 as defined in the Sexual Offences and Children Acts of Kenya, but the authorities refused and otherwise failed to conduct prompt, effective and proper and professional investigations into the complaints. The Court, amongst other measures, issued a declaratory order that neglect and failure of the police to conduct prompt and effective investigations into the complaints of the petitioner's violated their fundamental rights and freedoms under Articles 1, 3, 4,16 and 27 of the Charter.

In Lesotho, *Rex V Malefetsane Mohlomi & Others* Review case No. 06/2013 CR. NO.10/2013 Review Order No. 1/2013 dealt with a referral from the trial Magistrate's Court to the High Court for review involving children allegedly in conflict with the law who had been tried jointly with the adults. The Court held that the 3rd and 4th accused were under the age of 18 as per the Children Protection and Welfare Act (CPWA) and the African Children's Charter and must be prosecuted under the juvenile system established by the CWPA. In South Africa, in *Bhe and Others v. Magistrate, Khayalitsha and Others* (Commission

for *Gender Equality as Amicus Curiae* 2005 1 SA 580 (CC)), the majority in the Constitutional Court partly relied on Article 3 of the Charter to determine that the customary law rule that espoused differential treatment between children born within and outside of marriage was tantamount to unfair discrimination on the basis of birth. In *S v. M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) (*S v M*) too, a case that concerned the role of a sentencing court in sentencing a primary caregiver of children, the Court took note of the added value of Article 30 of the Charter on children of imprisoned mothers. At the Supreme Court level, the *Centre for Child Law v. The Governing Body of Hoërskool Fochville* ([2015] ZASCA 155) judgment, which concerned the placement of English-speaking students in a school that offered tuition in Afrikaans only, underscored Article 4(2) of the Charter in respect of having children's views taken into court proceedings.

This promising shift can be ascribed to a number of developments, including increased judicial training, rising awareness about the Charter, activism by civil-society organisations as well as national human rights institutions, as well as the adoption of an increasing number of human rights and child rights friendly constitutions in Africa. What is more encouraging is not just the rise in the number of cases that make use of the provisions of the Charter; it is also the coverage of both civil and political and well as economic, social and cultural rights. Moreover, the diversity of the thematic issues for which the provisions are invoked, as well as the different levels of courts – from first instance up to the apex courts in a country that invokes the provisions of the Charter – is promising. Three final thoughts are worth sharing. First, the jurisprudential value of these and other similar cases would go a long way if courts in Africa also develop the practice of citing/looking at each other's judgments to facilitate intra-Africa learning (Skelton, 2009: 500). Second, the African Committee should also adopt a standard practice of asking State Parties to indicate through the state reporting process examples of case law that invoke the provisions of the Charter in domestic courts. Third, as some of the RECs are issuing judgments on children's rights issues, it is important to monitor such judgments and appraise the extent to which the Charter provisions are being upheld in such decisions.

### 1.3 *Influence within the African Union Organs*

There is a long list of institutions within the AU that are of critical importance for the promotion and the protection of the rights of the child in Africa, and collaborations with these organs have also been spurred through the Charter. At this juncture, it suffices to emphasise three that are of critical importance: the African Commission on Human and Peoples' Rights ("the African

Commission”); the African Court on Human and Peoples’ Rights (“the African Court”); and the Peace and Security Council (PSC). Notably, these organs also benefit from collaboration amongst each other, and with the African Committee, under the Africa Governance Architecture (AGA).

First, the Charter has continued to serve as a point of reference for the African Commission, both within its promotion and protections mandates. This has been done through concluding observations, general comments, resolutions, press releases and urgent appeals, and recent examples abound. For instance, in its Concluding Observations on periodic reports of the Islamic Republic of Mauritania, the Commission commended the government’s efforts in raising awareness about the content of regional instruments including the Charter (Mauritania COBs, 2018). Similarly, the Commission welcomed the ratification of international human rights standards including the Charter by the South African government in the course of the reporting period in its Concluding Observations (ACHPR, South Africa COBs, 2016). In its press release of 1 March 2018 addressing the abduction of school girls in Nigeria’s Yobe State, the Commission urged the government of Nigeria to fulfill its obligations under the Charter and ensure the release of the girls as well as the safety of children attending school (ACHPR, Press Release, 1 March 2018). Similarly, the Commission, in its 10 October 2019 press release to commemorate the 17th World Day against the Death Penalty, referred to the provisions of the Charter to urge States to take measures to protect the rights of children in the context of mitigating the effects of the death penalty on children whose parents have been sentenced to death or executed (ACHPR, Press Statement, 10 October 2019). It also appealed to States that have not yet ratified the Charter to do so and bring their domestic laws in line with it (ACHPR, Press Statement, 10 October 2019). In its General Comment No. 3 on the right to life, the African Commission referred to Articles 5 and 30 of the Charter (ACHPR, General Comment No. 5, 2015). Likewise, in its resolution which dealt with the States’ obligation to regulate private actors providing health and education services, the Commission referred to the Charter and Aspirations 4 and 6 of the Committee’s “Agenda 2040: Fostering an Africa fit for children” in the context of children’s survival and education (ACHPR, Resolution, 14 May 2019). In 2017, a Joint Letter of Appeal was sent to the President of Tanzania from the Commissioner Rapporteur on the Human Rights Situation in Tanzania, the Special Rapporteur on the Rights of Women in Africa and Chairperson of the ACERWC in connection with the statement made that would block pregnant girls’ and teen mothers’ access to school (ACHPR, Joint Letter, 3 August 2017). The Letter noted that the statement contravenes the right of girls’ right to education and equality as guaranteed by the Charter and urged the government to fulfil its obligations (ACHPR, Joint Letter,



3 August 2017). The relationship has grown from strength to strength, including possibilities for joint missions and, in fact, to date the apex of collaboration between the two bodies was reached in 2017 when a Joint General Comment on ending child marriage was adopted in 2017.

Second, in 2013, the African Committee applied for an Advisory Opinion from the African Court requesting it to declare the African Committee as one of the bodies that is entitled directly to bring cases to the Court (Advisory Opinion, Request 2/2013, 5 December 2014). The Court Protocol, in Article 5(1) listed those that are entitled to bring cases to the Court, including African Intergovernmental Organisations, but did not mention the Committee. The African Committee applied for the Advisory Opinion, being convinced that such access could strengthen its protection mandate, as the Court issues judgments that are binding and have a better enforcement mechanism than a decision on a communication by the African Committee. The basis of the application was Article 4(1) of the Protocol and Rule of Court 68(1), which allows a member state, the AU or any African organisation recognised by the AU to access the Court directly. Ultimately, in its Advisory Opinion (Advisory Opinion, Request 2/2013, 5 December 2014) the African Court agreed that the African Committee is an organ of the AU and has the right to bring the request for an Advisory Opinion (Advisory Opinion, Request 2/2013 paras. 47 and 48). However, it opined that the African Committee was not an 'intergovernmental organisation' and consequently lacked direct access to the Court (Advisory Opinion, Request 2/2013 paras. 66–74). The saving grace from the Advisory Opinion was the concession that it was 'highly desirable' for the African Children's Committee to have direct access to it as a way of complementing its mandate in the protection and promotion of the rights of the child in Africa (Advisory Opinion, Request 2/2013 paras 75). Subsequent to the Advisory Opinion, in 2016 the African Court itself prepared a *Note Verbale* initiating a process to amend the Court Protocol to give direct access to the African Children's Committee (Mezmur, 2018: 221). The amendment process is delayed in the AU bureaucratic process. This happened in the main part as a result of an unforeseen request (2017/2018) made by a few Member States (such as Kenya, Eritrea, Rwanda) within the framework of the Standing Technical Committee on Justice and Legal Affairs (STCJLA) as well as the Executive Council of the AU for a study to assess the implications of such a direct access. The African Union Commission on International Law has reportedly completed such a study, but it is not yet submitted to the STCJLA and the Executive Council. The amendment process needs to be expedited in earnest.

Third, the PSC of the AU, the continental version of the UN Security Council (UNSC), remains a critical role player on the continent. There are multiple

examples in the last decade where the PSC has either been given direction to integrate the Charter in its work or engaged with the African Committee. For example, in its July 2012 Decision, the Executive Council of the AU requested the PSC to take into account the rights of the child in its work and also cooperate with the ACERWC (July 2012, Doc. EX.CL/744(XXI) para. 7). Since 2014, a dedicated annual Open Session on children and armed conflict has been held (Mezmur, 2019: 648), which is a welcome departure from the previous occasions where the children and armed conflict agenda was subsumed within the women and conflict agenda. The 2019 Open Session was held on 16 April 2019, while a special session on children and COVID19 was held in May 2020 (PSC Press Statement, 14 May 2019). The 2020 Open Session is scheduled for November 2020 and it is anticipated that it will focus on “Silencing the Guns” – and plans to deal with the General Comment of the Committee on children and armed conflict (2020) and assess implementation of previous decisions of the PSC on the topic. While the follow up to the Communiqués and/or Resolutions emanating from these sessions needs to be improved, there is no doubt that they have contributed to keeping the PSC engaged regarding children and armed conflict issues. Moreover, an evaluation of the extent to which the PSC is bound by the Charter, and similar to the context of the UNSC (Field, 2013), whether its decisions and activities are in compliance with these obligations could add value. Are efforts to implement decisions of the PSC that might lead to a violation of child rights subject to review for compliance with the Charter, for instance by the ACERWC or the African Court?

#### 1.4 *Influence on UN Human Rights Systems*

Part of the extension of the influence of the Charter can (and should) also be detected within the UN human rights system. This is true both within the Charter-based system (for example the Human Rights Council) and treaty-based system (for example, the CRC Committee). In respect of the former, apart from the presence of Resolutions on “Regional arrangements for the promotion and protection of human rights” (11 April 2017, A/HRC/RES/34/17), other Resolutions passed by the Human Rights Council have every now and then drawn from the Charter’s provisions that often add to the already existing child rights standards.

For example, in the context of South Sudan, concern has been expressed about conscription of children under the age of 18 (an issue explicitly covered in Article 22 of the Charter) in paragraph 1 of the Human Rights Council Resolution on the situation of human rights in South Sudan (Human Rights Council, A/HRC/37/L.40 A/HRC/37/L.40, 20 March 2018). More directly, in a Report of the Special Rapporteur on the Situation of human rights in Eritrea (Human Rights Council, A/HRC/35/39, 7 June 2017) in paragraph 46, the

Note by the Secretariat indicates that the ACERWC issued its Concluding Observations on the report of Eritrea, and among others, 'raised a number of serious concerns' and included a recommendation that the Government:

Refrain from recruiting children into the army and other security forces, to ensure that those who violated that strict prohibition were punished and to refrain from using the educational system as a means of giving military training prior to full military service.

Furthermore, the Commission of Inquiry on Human Rights in Eritrea (Human Rights Council, A/HRC/32/CRP.1 8 June 2016) Report paragraph 7 identifies that the sexual and gender-based violence identified constitutes, inter alia, a violation of 'Articles 21 and 30 of the African Charter on the Rights and Welfare of the Child'. The Terms of Reference for the Commission of Inquiry on Burundi, intended to cover the human rights violations and abuses committed since April 2015, refers in paragraph 2 of Resolution 33/24 to mass arbitrary arrests and detentions, including cases involving children, and explicitly mentioned among the applicable law for the investigation is the Charter (Human Rights Council, Burundi COI Terms of Reference, 27 February 2017).

The role of the Charter provisions within the treaty bodies system, especially within the CRC Committee, is more pronounced. In the interests of space, one theme is identified here: child marriage. By virtue of Article 21, State Parties to the Charter have to address at least three critical elements, namely: prohibit betrothals, also known as "promise marriages" of both boys and girls; specify the minimum age for marriage to be 18 years with no exceptions; and make the 'registration of all marriages in an official registry compulsory'. However, Article 1 of the CRC which qualifies the age 18 as the definition of a child 'unless majority is attained earlier' has been interpreted by some as allowing for exceptions. In fact, until 2019 when it was removed through an amendment, the Joint General Recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices (CEDAW/C/GC/31-CRC/C/GC/18) (Joint GR/GC) allowed for the possibility for children that are below the age of 18 but above 16 years of age to marry, based 'on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition' (para. 20). Despite such an exception, in relation to the African countries, recommendations have been made to States not to allow any exceptions that permit marriages below the age of 18 based on the provisions of the Charter. Article 41 of the Convention, which requires States to comply with the 'more conducive' obligations for the realisation of children's rights

that they may have in national or international law, supports this approach. For a continent whose progress in addressing child marriage has either stagnated or is being reversed because of COVID19 and rapid population growth, this approach needs to be strengthened further.

## 2 The African Committee

The African Committee, established under Article 32, monitors the implementation of the Charter. Apart from considering State Party Reports as well as communications procedure, and undertaking investigative missions, it issues general comments and conducts studies (Article 42).

Since 2006, progress has been recorded both on the number as well as the quality of State Party reports received, and the concluding observations issued. Out of the 49 State Parties, 40 have submitted at least one report. Eight, namely Botswana, Cape Verde, Central Africa Republic, Djibouti, Equatorial Guinea, The Gambia, Libya and Mauritius, have never submitted. Sao Tome and Principe ratified in 2019 and does not yet have a report that is due. The creative manner in which the Committee included in its Revised Reporting Guidelines (November 2013, para. 5) the possibility for State Parties to use the information contained in their report prepared under the CRC and the African Charter on Human and Peoples' Rights to the African Committee by highlighting the specificities of the Charter remains a useful tool to assist to alleviate reporting burden. Furthermore, the level of government representation at the time of the consideration of State Party reports has consistently been high. As argued elsewhere (Mezmur, 2017: 142–143), few measures are needed to bolster the State Party process. At this juncture it is worth noting that the kind of support that the African Committee can provide, including through international cooperation with organisations such as UNICEF, remains critical for many State Parties that have too limited resources and suffer from ratification/reporting fatigue. Eswatini is an extreme example of this, as it ratified 29 international instruments including the African Children's Charter in 2011 (Sarkin, 2018: 92) and has very limited capacity to comply with its implementation and reporting obligations.

The communications procedure (Article 44) remains one of the most impactful tools the African Committee has in discharging its mandate. In fact the role of the communications procedure is considered fundamental to the protection mandate of the Committee, a reservation entered into it by Egypt (in *Dalia Lofty on behalf of Ahmed Bassiouny v. The Arab Republic of Egypt* (No. 008/Com/001/2016) and *Sohaib Emad v. The Arab Republic of Egypt*

Communication (No. 009/Com/002/2016)) has been declared incompatible with the object and purpose of the Charter.<sup>1</sup>

To date, the African Committee has finalised the consideration of ten cases: six on their merits which found violations against the respective governments; three that were declared inadmissible; and one is undergoing the implementation of an amicable settlement reached. A few examples are worthy of note. The *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v. Kenya* (No. 1/Com/1/2005) found a violation of the right to acquire a nationality; *Michelo Hunsungule and others (on behalf of children in Northern Uganda) v. Uganda* (No. 2/Com/002/2009) underscored the obligation of Uganda to uphold Article 22, and in particular not to recruit or use persons below the age of 18 in armed conflict; *The Centre for Human Rights (University of Pretoria) and La Recontre Africaine sur la Défense des Droits de l'Homme (Senegal) v. Senegal* (No. 3/Com/001/2012) addressed the issue of using children in the form of begging by religious teachers (*Marabouts*); *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v. Mauritania* (No. 007/Com/003/2015) dealt with contemporary forms of slavery. Another communication, *Institute for Human Rights and Development in Africa (IHRDA) v. Malawi (IHRDA v. Malawi* No. 004/Com/001/2014), which in particular requested the Government of Malawi to amend section 23(5) of its Constitution to raise the definition of a child from 16 to 18 years, was made a subject of an amicable settlement leading to the amendment of the constitutional provision (Mezmur, 2019(b)).

The mandate the Committee has under Article 45(1) to 'resort to any appropriate method of investigating' has enabled it to undertake investigative missions as a stand-alone mandate, or with a view to supplementing the communications procedure. Here, the added value of this procedure can be shown through the investigative mission undertaken to Tanzania on the situation of children with albinism in temporary holding shelters, and the central advocacy role played by the report from the mission.<sup>2</sup> It is also important to mention missions undertaken to Central African Republic (December 2014) and South Sudan (August 2014) in the context of children and armed conflict. These missions were permitted despite the fact that the two countries were not State Parties to the Charter at the time.

1 Available at: <http://www.acerwc.org/download/ruling-on-admissibility-of-communication-no-0080022016/?wpdmdl=10222>. Accessed 30 September 2020.

2 The report is available at: <http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694>. Accessed 15 September 2020.

Other activities, such as General Comments, the annual celebration of the Day of the African Child, or even issuing Urgent Appeals to States are important to both the promotion and protection mandates of the Committee. For example, I am happy to report that all the three examples mentioned at the outset of this *Editorial* involving Somalia, Cameroon and Nigeria were addressed under the Urgent Appeal procedure of the Committee where the State's corrective measure was requested.

The flexibility, as well as generous rules in respect of standing that the Charter provides individuals as well as groups within the individual complaints mechanism and for the purposes of investigative missions is commendable. Despite such appeal, however, the relatively small number of complaints brought before the African Committee suggests that the procedures need to be more known, and should also benefit from access to specialist representation and/or support to lodge a complaint, so that they can live up to their potential.

### 3 Looking Ahead

As we celebrate the Charter's 30th anniversary, the interpretation and application of the Charter provisions, and the work of the African Committee, need to continue to evolve and adapt. This should be done to address issues that have long existed, as well as those that are emerging.

While the obligations States have under child rights instruments is to undertake 'legislative, administrative, and other measures ...', 30 years into the life of the Charter, significant progress has been made on the legislative part, but not on the 'administrative and other measures' front. These include budgeting, coordination, the role of national human rights institutions, awareness raising, training, monitoring and evaluation of programmes and initiatives.

There are a number of critical issues of importance for children's rights in Africa in which the interpretation and implementation of the Charter should play an important role, such as addressing sexual and reproductive health rights issues, fighting corruption, and serving as a tool for resisting against the ever-dwindling civil society space on the continent. The jurisprudence of the African Committee on these important issues remains thin. For example, the effect that the Charter has had on sexual and reproductive health rights, including in addressing early pregnancy, family planning and access to contraceptives appears to be very minimal. How can the continent expect to reap the demographic dividend without reducing birth rates?

There is also a notable change in the nature of conflicts to which the Charter needs to be applied more forcefully, including: the denial or unlawful use of

humanitarian access; the sale of small arms; non-State armed groups; and for instances of extra-territoriality, including sexual exploitation and abuse by peacekeepers; and the impact of terrorism-related offences on children (Mezmur, 2019(a): 637).

The need to plan and execute the right to education, especially primary education, on the basis of the detailed elements of Article 11 of the Charter is even more important in moving forward. For example, it is projected that by the year 2068, the continent will be home to more than 40 per cent of the world's school-age children (UNICEF, 2019: 30). The provision of free early childhood education will also need somehow to find a legal basis. Moreover, for the coming decade or more, the rapid urbanisation of African regions and its potential implications for children's rights warrant more deliberate attention. For example, with reports that since 2014 there is a recorded reverse in the progress made in reducing the global urban population, and four out of five slum-dwellers reside in Asia and Africa (UNICEF, 2019: 42).

Other issues that are created as a result of advancements in technology, including social media and online sexual commercial exploitation, or as a result of world events, such as climate change, COVID-19, privatisation, and increased globalisation. For example, similar to the CRC, the African Charter does not contain a derogation clause, and it was not until the onset of COVID-19 and subsequent lockdowns that a detailed discussion on the position of the Charter on derogations started. There should be robust academic engagement to answer the question of whether the interpretation of the provisions of the Charter has remained dynamic and has changed sufficiently to respond to these evolving African and global situations.

While much emphasis was placed on getting Africa-wide ratification during the first two decades of the Charter, the realisation that resources and advocacy should be geared more towards monitoring implementation by those that have ratified seems to have prevailed lately. This move should be welcomed. In any case, the decision-making process and strategic considerations before a state ratifies a human rights instrument are not always straight forward. For example, in a one-week long ratification mission to Tunisia in 2014, it was not almost until the end of the mission that we learned about the main barriers for ratification – namely the right to freedom of religion as well as the right to peaceful assembly. It was not the Ministry in charge of justice, or children's affairs, or even foreign affairs, that are traditionally associated with the ratification of child rights instruments that were raising these issues, but the Interior Ministry, underscoring that a "one size fits all" approach would not work, and that there is a need to understand domestic role players and influencers better. The effort to get the remaining six African countries onboard will require

a more evidence-based engagement, and it should not divert away resources from monitoring the implementation of the Charter by State Parties.

The political dynamics towards AU human rights bodies is shifting. In fact, Amnesty International has recently described how failure to report, minimal compliance with decisions, not responding to urgent appeals, and starving the institutions of much needed human and financial resources is becoming an all too familiar feature of the system (Amnesty International, 2020). A careful navigation of this development will probably help to determine the future success or otherwise of the African Committee.

Already in the context of its 25th anniversary, Sloth-Nielsen had confirmed that the Charter has enjoyed ‘increasing academic interest’ (2017: 425). The operative word here is “increasing”, since it is indeed a fact that the academic engagement around the Charter is far from adequate, and is dominated by few voices including my own. In fact, it is thanks to this very *Journal* that dedicated an issue to the Charter in 2002 (Volume 10, issue 2), that many even learned about its very existence. In moving forward, we should ask critical questions such as: how do we increase academic engagement around the Charter? How do we capture the research being undertaken on the topic in languages other than English? How do we bring to the fold the next generation of African researchers to contribute to the debate? Possibly, more targeted scholarships, especially at the PhD level, could help to make a dent in this regard. Moreover, an Africa version of the Children’s Rights European Academic Network (CREAN), established to enhance exchange and collaboration among higher education institutions that are conducting research and teaching in children’s rights, can play a meaningful role. I could also add that expanding paid internship placement opportunities at the Committee Secretariat, similar to what the Centre for Human Rights at the University of Pretoria has done for the last few years, perhaps with an explicit addition to the terms of reference of interns to research and publish academic outputs, is also one good entry point to expand the interest as well as research on the Charter.

In the end, I may say, not without some pride, that a moment of unabashed 30th anniversary celebration is deserved. Such celebration should underscore the Charter’s complementarity with other relevant instruments, and acknowledge that its distinction from these instruments, however modest, continues to make a difference to the lived reality of children in Africa.

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