



## **The merits and demerits of the African Charter on the Rights and Welfare of the Child**

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### **1. Introduction**

The African Charter on the Rights and Welfare of the Child (the Charter) was adopted by the Organisation of African Unity (OAU) Assembly on 11 July 1990 and entered into force on 29 November 1999. It is a second global<sup>1</sup> and first regional binding instrument that identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic judicial or administrative proceedings. As a regional human rights instrument, the Charter is expected to place within the African context the children's rights discourse. In this contribution, I critically discuss the merits and demerits of the Charter.

### **2. Obligations of State Parties**

The obligations of State Parties created under the Charter are two-fold, namely, to “recognise the rights, freedoms and duties enshrined in this Charter” and to “undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter”.<sup>2</sup> It is noteworthy that these obligations apply equally to economic, social and cultural rights (second generation rights), and third generation rights as they do to civil and political rights.<sup>3</sup> The Charter therefore adopts a holistic approach to issues relating to the rights and welfare of the child by affirming the principle that rights are indivisible and interdependent. By contrast, the CRC provides that:

State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the

present Convention. 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.<sup>4</sup>

Although the CRC has been praised for codifying both civil and political rights and economic, social and cultural rights in one binding document,<sup>5</sup> article 4 of the CRC cited above expressly nods in favour of the views of opponents of economic, social and cultural rights. Among such views are that economic, social and cultural rights engender positive obligations; are cost intensive and can therefore only be realised progressively.<sup>6</sup> Such arguments have lost their force in contemporary times.<sup>7</sup> It is now accepted that economic, social and cultural rights entail negative obligations and therefore can be enforced immediately. Even where positive action is required, some economic, social and cultural rights do not require any more resources than civil and political rights do for their enforcement.<sup>8</sup> The Charter therefore has an edge over the CRC by avoiding any ideological differences between the two categories of rights.<sup>9</sup>

It must be noted that the obligations under the Charter do not affect any provisions that are more conducive to the realisation of children's rights contained in the law of the State Party or any other international convention or agreement in force in that State.<sup>10</sup> Thus, the Charter merely sets out minimum standards. This, it could be argued, was borrowed from the CRC.<sup>11</sup> The strength of the Charter, however, lies in the fact that it expressly proclaims its supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter.<sup>12</sup>

In the Charter, a child means every human being below the age of 18 years. While it is debatable whether this definition includes a foetus,<sup>13</sup> the Charter clearly sets out a uniform age at which childhood ends. This is unlike the CRC that appends a rider to that definition, namely, "unless, under the law applicable to the child, majority is attained earlier".<sup>14</sup> The CRC definition was motivated by the awareness of the fact that communities view durations of childhood differently. However, this definition may operate to deny children the rights under the CRC. This is not the case with the Charter that guarantees all persons below 18 the enjoyment of all rights under it while at the same time ensuring that young people enjoy favourable provisions in States where adulthood is attained earlier.<sup>15</sup>

### **3. Non-discrimination**

Non-discrimination lies at the centre of the Charter. Every child is entitled to enjoy the rights and freedoms guaranteed in the Charter without

discrimination.<sup>16</sup> It must be observed that the Charter is the second global<sup>17</sup> and first regional human rights instrument that extends the list of grounds on which discrimination is prohibited from characteristics of the direct subject (the child) to those of the child's parents or legal guardians. Thus, a child cannot be discriminated against on the ground of his parents' or legal guardian's race, ethnic group, colour, etc. Note must also be made of the inclusion of "fortune" as an additional ground of discrimination instead of "property". This fits perfectly with the African perception of "wealth" which goes beyond traditional property such as land and assets.<sup>18</sup> It should further be noted that, unlike article 3 of the CRC, the Charter does not make any reference to the "State". This implies that the obligation not to discriminate is binding not only on the State but other actors as well.

The Charter provides for special protection of children living under various forms of discrimination that finds no comparison in any other human rights instrument including the CRC and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>19</sup> The Charter enjoins State Parties individually or collectively to accord the highest priority to the special needs of children living under apartheid and in States subject to military destabilisation by the apartheid regime.<sup>20</sup> Obviously, this was intended to benefit disadvantaged children in previously apartheid South Africa. While the relevance of this provision may appear to be obsolete, a similar obligation applies with regard to children living under regimes practising ethnic, religious or other forms of discrimination and to those States subject to military destabilisation.<sup>21</sup> The significance of this obligation cannot be overemphasised. Africa has witnessed too many armed conflicts to list, a considerable number of military governments, and authoritarian governments that practice discrimination on the basis of ethnicity or regionalism that justify special measures to be taken for the welfare of children in those countries. The Charter deserves credit in this respect as it addresses one of the most relevant issues affecting the African child.

It must be noted, however, that, unlike the CRC, the Charter has not expressly included "disability" as a ground of discrimination, although it makes provision for special measures of their protection.<sup>22</sup> Secondly, like the CRC, the Charter does not provide for the right to equality before the law. The recognition of the child's legal personality is the precondition of his/her recognition as a rights holder. Although, this omission may not be fatal, the right to equality before the law strengthens the principle of child equality since the non-discrimination principle is not autonomous.<sup>23</sup> Thirdly, there is no specific mention of children belonging to minority or indigenous groups despite the existence of overwhelming evidence that many minority groups in Africa have been subjected to untold oppression and suffering.

#### **4. The best interest principle**

Article 4 of the Charter provides that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. This principle is by no means a new one. It has been recognised in domestic law of many countries. However, this principle has not been incorporated into many major human rights instruments. It has therefore been argued that by reason of its incorporation into the CRC, this principle exceeds traditional concepts of protection and that it is open to new development and legal explanation.<sup>24</sup> The Charter follows the CRC in codifying this principle. It, however, goes a step ahead of the CRC by stating that the best interests of the child must be “the primary consideration” in all actions concerning the child. This offers better protection for children since the best interests principle under the Charter is the overriding consideration.<sup>25</sup> In contrast, the CRC regards the principle as “a primary consideration” meaning that other considerations are equally determinant.

#### **5. Children as autonomous individuals**

The Charter joins the CRC in recognising children not only as people in need of protection but as autonomous beings as well. The Charter guarantees the child several participation rights.<sup>26</sup> Among these is the right to be given an opportunity for the child’s views to be held either directly or through an impartial representative in all judicial or administrative proceedings affecting him/her and that those views must be taken into consideration.<sup>27</sup> There is also a guarantee of the right of every child to participate in artistic and cultural life, and in the administration of justice<sup>28</sup> and the right of disabled children to participate in community life.<sup>29</sup> The Charter also guarantees the child the right to freedom of expression, freedom of association and assembly, and freedom of thought, conscience and religion.<sup>30</sup> Lastly, the guarantee of the child’s right to privacy<sup>31</sup> unequivocally establishes that the Charter regards the child as an autonomous person.

The conceptualisation of the child as an autonomous being in the Charter is significant considering the fact that children in Africa are not perceived as autonomous.<sup>32</sup> Children are normally considered to be deficient in their decision-making capabilities and deserving of protection. Decisions concerning children are often made by a group of male elders. At most, children are heard indirectly, *e.g.*, through aunties, uncles or grand parents. Specific guarantees for children’s participation and their right to privacy are therefore commendable.

However, the formulation of these rights in the Charter is problematic in several respects. First, article 4(2), which guarantees the right to be given an opportunity for the child to express his/her views in all judicial and administrative proceedings affecting the child, is very narrowly defined. The child has to be capable of communicating his/her own views for him/her to be heard. Thus, a child who is able to form an opinion but unable to communicate may not be heard. The CRC is preferable in this respect as it merely requires the child to be able to form an opinion.<sup>33</sup> Furthermore, the Charter states that a child will be heard “as a party to the proceedings”. This implies that a child has to be a party to given proceedings for him/her to be heard. Then, too, the Charter states that the views of the child must be taken into consideration “in accordance with the provisions of appropriate law”. This is less favourable as compared to the CRC, which states that the child’s views must be given “due weight in accordance with the age and maturity of the child”. Lastly, the opportunity of hearing the child under the Charter is restricted to judicial and administrative proceedings. This ignores many informal instances in which a child needs to be heard.

Secondly, the Charter qualifies several other participation rights provisions with “claw-back” clauses. For instance, the right to freedom of expression is subject to “such restrictions as prescribed by laws,” the right to freedom of association and freedom of assembly has to be exercised “in conformity with the law” and the right to privacy is subject to the right of parents or legal guardians “to exercise reasonable supervision over the conduct of their children”. Such clauses could render the rights granted meaningless.<sup>34</sup>

## **6. Survival rights**

A number of rights are guaranteed for the survival of children under the Charter. The first is the inherent right to life.<sup>35</sup> The Charter joins the CRC,<sup>36</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup> and the American Convention on Human Rights (ACHR)<sup>38</sup> in prohibiting the death penalty for crimes committed by children. The significance of this provision lies in the fact that at least 32 African States retain the death penalty and this could be and is applied to children as well.<sup>39</sup> This provision is therefore very crucial for the protection of children’s rights in Africa. Regrettably, the Charter does not say anything regarding the position of life imprisonment. This reflects the general tendency to regard life imprisonment as an obvious substitute for the death penalty.<sup>40</sup> Although it is still debatable that life imprisonment violates human rights,<sup>41</sup> contemporary human rights law clearly establishes that life imprisonment without a possibility of release is unacceptable.<sup>42</sup> The Charter should therefore have included a provision

similar to article 37(a) of the CRC to protect children from life imprisonment without a possibility of release.

The child's inherent right to life set forth in article 5 of the Charter is given additional emphasis and amplified in the second paragraph of this provision, which places States Parties under an obligation "to ensure, to the maximum extent possible, the survival and development of the child". In the following paragraphs, I discuss the merits and demerits of various survival rights guaranteed in the charter.

### 6.1. *Education*

Article 11 of the Charter provides for the right to education. Like the CRC, the Charter gives some indication as to what education should be directed at. The difference is that the latter adds those objectives that are peculiar to Africa: the preservation of positive African morals, traditional values and cultures; the preservation of national independence and territorial integrity; promotion of African unity and natural resources; and fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of "various African instruments on human and peoples rights".<sup>43</sup> Although also mentioned in article 29(d) of the CRC, the inclusion of the objective of the "the preparation of the child for responsible life in a free society in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin" is arguably more relevant to Africa than any other continent. This is so considering the fact that most armed conflicts have resulted from differences that have roots in ethnicity and religious orientation. Understanding, tolerance and friendship of peoples is therefore very crucial in Africa, and education has a great role to play in inculcating these virtues in society.

It must be noted that the issue relating to effective education opportunities for girls rarely occupies a high place on the agendas of general human rights bodies.<sup>44</sup> The Charter must therefore be commended for taking the lead in focusing State Parties' resources on gender discrimination in education. Article 11(3)(e) obligates State Parties to take special measures to ensure equal access of girls to education. State Parties are further enjoined to take all appropriate measures to ensure that a child who becomes pregnant before completing her education shall have an opportunity to continue with their education on the basis of her individual ability.<sup>45</sup>

Most provisions of the Charter relating to primary and secondary education do not depart from other instruments like the International Covenant on Economic, Social and Cultural rights (ICESCR),<sup>46</sup> but the Charter is weaker as regards higher education. The Charter, unlike article 13(2)(c)

of the ICESCR, does not obligate State Parties to progressively introduce free higher education. It also does not contain a provision similar to article 13(2)(e) of the ICESCR requiring the active pursuit of the development of a system of schools at all levels and the continuous improvement of the material conditions of teaching staff. It has been noted that education in Africa suffers from, among other things, stagnation in enrolment and a decline in quality of education.<sup>47</sup> Studies also indicate that African States as a result of their debt burden are unable to increase school places at the same rate and sometimes impose or increase school fees.<sup>48</sup> The inclusion of the provisions mentioned above would help states to use the Charter as a diplomatic tool in negotiating with international finance organisations to refuse any conditions that would be retrogressive to the fulfilment of education rights of children.

Also, the Charter makes no reference to pre-school education. Such omission is unfortunate considering that children's attitudes are formed in the pre-school years.<sup>49</sup> There is also no obligation imposed on State Parties, similar to article 28(1)(d) of the CRC, to take appropriate measures to make educational and vocational information and guidance accessible to all children.<sup>50</sup> Technical and vocational education is important for the effective preparation of all children for a useful occupation.<sup>51</sup> Regrettably, although about two-thirds of the food in Africa is produced by women, most of the technological training is aimed at boys and men.<sup>52</sup> It is therefore unfortunate that the provision guaranteeing equal access to vocational education was omitted in the Charter. Furthermore, the provision guaranteeing special measures regarding access to education by female children is not clear enough. It states that State Parties must "take measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community".<sup>53</sup> One interpretation would be that special measures are needed for three categories of children: female, gifted and disadvantaged children. The other is that special measures are required for female children who are disadvantaged but gifted. The third would be that female children generally require special measures. The last meaning would be preferable as females generally in Africa suffer from systemic discrimination in education. If article 6(3)(e) was intended to carry this meaning, the words "gifted" and "disadvantaged" are superfluous and ought to have been omitted. Lastly, article 11(5) states that State Parties must ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the Charter. This implicitly permits the use of corporal punishment. The Charter is therefore the only instrument that legitimises corporal punishment.<sup>54</sup>

## 6.2. *Health*

Article 14 of the Charter provides for the right to enjoy the best attainable state of physical, mental and spiritual health. Admittedly, the Charter breaks no new ground in guaranteeing the right to health, considering that this right has been recognised since the creation of the World Health Organisation in 1946.<sup>55</sup> However, like the CRC, the Charter earns credit by outlining particular measures State Parties have to pursue in order to implement this right fully. In this respect, the Charter exceeds the CRC in two ways. First, the Charter is the first instrument that requires resource allocation in respect of health. Article 14(g) obligates State Parties to integrate basic health service programmes into national development plans.<sup>56</sup> Secondly, the Charter includes two more measures than the CRC that State Parties have to take in order to realise the right to health fully. These are to ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of basic service programme for children, and to ensure through technical and financial means, the mobilisation of local community resources in the development of primary health care for children. These measures are particularly important as they anticipate the involvement of the people themselves in the planning and management of basic service programmes for children. The Charter therefore represents one of few instruments that expressly call for the participation of the populace in issues affecting their lives.<sup>57</sup>

It is noteworthy that primary health care has been proven to be a very effective approach to the improvement of people's health since the ICESCR was adopted.<sup>58</sup> It is therefore commendable that the Charter, following the lead of the CRC, emphasises effective primary health care. Most notably, the Charter enjoins State Parties "to take appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child" and in particular "those customs and practices prejudicial to the health and life of the child." While the CRC retains the credit for having been the first binding international instrument to prohibit harmful traditional practices, this prohibition is wider under the Charter as it incorporates reference to the child's dignity.<sup>59</sup>

However, the Charter is weak on health in two respects. It does not provide for the right of children to an adequate standard of living adequate for the child's physical, mental, spiritual, moral and social development. It also does not provide for the right of parents to social security and social insurance that would be necessary for maintaining the child's right to an adequate standard of living.<sup>60</sup>



## 7. The right to protection

The need for the protection of children in Africa is beyond doubt. It is not surprising therefore that a considerable segment of the Charter deals with the child's right to protection from threats to his/her physical or mental health and overall well being. I discuss the merits and demerits of these rights below.

### 7.1. *Identity rights*

The Charter joins the CRC in guaranteeing the child's identity rights.<sup>61</sup> These rights include the right to be given a name, to be registered immediately after birth, and the right to acquire nationality. The Charter deserves credit with regard to the acquisition of nationality. It provides that State Parties shall ensure that their constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if at the time of the child's birth he is not granted nationality by any other State in accordance with its laws. By this provision, States are obliged to bring their constitutional provisions in accordance with the provisions of the Charter with regard to acquisition of nationality of a child who would be stateless. In contrast, the CRC enjoins State Parties to ensure the implementation of nationality rights "in accordance with their national law and their obligations under relevant international instruments". This assumes that national law will be favourable in this regard and that a State Party has favourable international obligations. By contrast, the Charter does not make such an assumption. The weakness of the Charter, however, lies in the fact that it does not provide for the right of the child to preserve his/her identity.<sup>62</sup> This right is particularly important in cases of disappearances, child trafficking and abductions.<sup>63</sup>

### 7.2. *Child abuse/labour/exploitation*

Like article 32 of the CRC, the Charter provides for the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child's health or physical, mental, spiritual or social development.<sup>64</sup> Among the measures State Parties are particularly enjoined to take, the Charter adds to the measures similar to those stipulated under the CRC, one measure, namely, to promote the dissemination of information on the hazards of child labour to all sectors of the community. For African countries this measure is significant since the majority of the populace does not know most human rights provisions. The weakness with the child economic exploitation/labour provision, however, is that its definition is narrower in that it does not include education as one aspect that a form of exploitation or work might interfere with.<sup>65</sup>

Provisions on child abuse,<sup>66</sup> sexual exploitation,<sup>67</sup> drug abuse,<sup>68</sup> trafficking and abduction<sup>69</sup> are to a large extent similar to those of the CRC.<sup>70</sup> The Charter, however, prohibits the use of children in all forms of begging.<sup>71</sup> The Charter is the first international human rights instrument that contains such provision and that comes close to mentioning something about street children. Perhaps the weakness of the Charter in this regard is that it does not make further express provisions regarding the rights of street children. As regards sexual exploitation, the Charter has carefully avoided criticisms that have been levelled against the CRC. The CRC provides that State Parties must take all appropriate national, bilateral and multilateral measures to prevent “the exploitative use of children in prostitution or other unlawful sexual practices,” and “the exploitative use of children in pornographic performances and materials”.<sup>72</sup> The use of “exploitative” and “unlawful” has been criticised, rightly so in my view, to imply that the use of children under 18 in pornography and prostitution that is not exploitative or unlawful is permissible.<sup>73</sup> This does not augur well with other international law instruments like the 1949 Convention for the Suppression of traffic in Persons and of the Exploitation of the Prostitution of Others<sup>74</sup> and the 1949 Convention for the Traffic in Persons and of the Exploitation of the Prostitution in Others.<sup>75</sup> The Charter must therefore be commended for dropping the two words referred to above.<sup>76</sup>

### 7.3. *Juvenile justice*

The Charter incorporates a number of basic principles on which a juvenile justice system should be based. The Charter requires that a child accused or found guilty of a crime is entitled to “special treatment” in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.<sup>77</sup> The Charter breaks new ground for the protection of children’s rights in three respects. First, the Charter requires that a criminal case against a child must be determined “as speedily as possible”.<sup>78</sup> This entails a pace that is over and above that applicable to adults.<sup>79</sup> Secondly, the Charter expressly provides that rehabilitation of the child must be the essential aim of treatment of the child during trial and after conviction. This provision does not come out clearly in the CRC. The Charter is therefore more progressive as it strengthens the argument of some leading scholars in international law who contend that rehabilitation is a right of every prisoner.<sup>80</sup> Thirdly, the Charter guarantees every child the right to be afforded legal and other appropriate assistance in the preparation and presentation of his defence. This formulation is not qualified in any way and finds no comparison in any other human rights instrument

although it remains to be seen as to whether African States will implement this right.<sup>81</sup>

However, the Charter suffers from a number of weaknesses in relation to juvenile justice. First, the Charter requires State Parties to prohibit the press and the public from the trial of a child. Although this may sometimes be necessary, it is more important to allow proceedings involving the child to be open to public scrutiny considering that most decisions may have serious repercussions on the child and his/her family. There is also a well-founded fear that human rights violations may go unnoticed. It is therefore preferable to allow proceedings in camera only where the best interests of the child so require.<sup>82</sup> Secondly, the Charter ignores completely alternative measures of dealing with children to criminal proceedings and there is no provision declaring that imprisonment of the child must be used as a measure of last resort and for the shortest period of time. This is retrogressive considering that other international human rights instruments expressly contain these provisions,<sup>83</sup> and the importance of protecting children from the adverse effects of criminal proceedings and sanctions. Lastly, the Charter does not reiterate all rights surrounding the administration of justice, especially those in the ICCPR, e.g., the right against self-incrimination<sup>84</sup> and retrospective criminal laws and punishment,<sup>85</sup> and the right for child victims to be compensated for miscarriage of justice.<sup>86</sup> This omission is fatal especially for State Parties that are not bound by the ICCPR.

#### 7.4. *Right to family*

In Africa, the family is an important institution and forms the basis of the community within which rights are supposed to be enjoyed. Thus, the Charter articulates several protection provisions regarding the child's right to a family. The first relates to the age of marriage. The Charter represents the first binding human rights instrument that sets 18 as the minimum age of marriage and prohibits child marriage and betrothals.<sup>87</sup> This is a progressive provision as it seeks to protect children from the difficulties associated with early marriage. Another point for which the Charter deserves merit relates to who is the bearer of the duty to look after children. In various parts of Africa, the responsibility over children falls on particular members of the family depending on whether the family is matrilineal or patrilineal.<sup>88</sup> The Charter alters this position by providing that State Parties must take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during and after dissolution of marriage.<sup>89</sup> This is a necessary inroad considering that although the extended family structure of the family still exists, its survival is facing many challenges in contemporary times and, as a result, the traditional mechanisms of ensuring the protection of the child are increasingly diminishing.<sup>90</sup>

This often leaves children without proper protection from both the extended family and the child's parents.

The Charter, it must be observed, attaches particular importance to the need of the child to grow up with the mother. This is so apparently because the mother is considered to be the primary care taker of the child in most parts of Africa. In this regard, the Charter makes several special measures never articulated in any human rights instruments before relating to mothers facing criminal charges for which imprisonment may be imposed upon conviction. It provides that:

- (a) a non-custodial sentence must always be considered first when considering sentencing such mothers;
- (b) State Parties must establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) State Parties must ensure that a mother should not be imprisoned with her child;
- (d) death sentence should not be imposed on such mothers;
- (e) the essential aim of the penitentiary system should be the reformation, integration of the mother to the family and social rehabilitation.<sup>91</sup>

In order to ensure further protection of the child, the Charter proscribes the separation of the child from its parents unless "a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child".<sup>92</sup> The protection here is more ensured than under the CRC which entrusts the duty to determine whether the separation is in the best interest of the child to "competent authorities". In cases of inter-country adoptions, the Charter, like the CRC, permits it as a measure of last resort.<sup>93</sup> However, the Charter articulates a further obligation on State Parties to "establish a machinery to monitor the well being of the adopted child". This provision would operate to curb problems that accompany inter-country and domestic adoptions due to the lack of an international obligation by States to exercise a continuous duty regarding the welfare of the adopted child.

### 7.5. *Protection from disasters*

Amongst the most common problems that confront Africa are natural disasters, famine and armed conflicts.<sup>94</sup> Regarding these eventualities, the Charter is exemplary in two ways. First, the Charter sets out the highest standard with respect to the age of participation in armed conflict and recruitment into armed forces (*i.e.*, 18 years). It provides that State Parties must take "all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child."<sup>95</sup> Secondly, the Charter extends the application of its protection provisions of refugees to internally displaced children whether through natural disaster, internal armed

conflicts, civil strife, breakdown of economic and social order or howsoever caused.<sup>96</sup> It must also be noted that the Charter endorses the wider definition of 'refugee' in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>97</sup>

## 8. Duties

Like the African Charter on Human and People's Rights,<sup>98</sup> the Charter is distinguishable from other human rights instruments by its inclusion of duties in its provisions.<sup>99</sup> Not only does it recognise the principle that the promotion and protection of the rights and welfare of the child implies the performance of duties on the part of everyone,<sup>100</sup> but also gives expressed and implied recognition that children, too, have responsibilities depending on their evolving capacities.<sup>101</sup> This challenges the traditional view that only States are responsible in human rights law and reflects the African concept that the family is the basic unit of society. Duties in the Charter do not therefore mean allegiance to the State. Rather they compliment, not detract from, individual rights.<sup>102</sup> In the Charter the primary duty for the upbringing and development of the child rests with parents or other persons responsible for the child.<sup>103</sup> Among the specific duties entrusted to them, the problematic one is the duty to ensure that domestic violence is administered with humanity and in a manner consistent with the inherent dignity of the child. As observed above, this legalises corporal punishment.

As regards the duties of children, two concerns are worth mentioning. The first is these seem not to be correlative of any rights stipulated in the Charter although they are relevant for the notion that rights must be enjoyed responsibly.<sup>104</sup> Thus, one faces the difficulty of identifying the claim holders to whom some of the duties correlate and the relevant rights.<sup>105</sup> The second is that some duties may be used to justify violations of children's rights. For instance the child's duty to respect parents, superiors and elders at all times may undermine the child's right to participate in decision making in matters affecting the child in particular and other matters in general.

## 9. Enforcement

The Charter entrusts the functions of promotion and protection of its provisions to the Committee of Experts on the Rights and Welfare of the Child (the African Committee).<sup>106</sup> This Committee has wider powers than the CRC's. Not only does it have power to examine state reports, it also has power to receive individual and interstate communications,<sup>107</sup> and to conduct

investigations.<sup>108</sup> The Committee on the Rights of the Child only has power to examine state reports. Secondly, the Charter is very wide in relation to persons who can bring communications before it. Any person, group or non-governmental organisation recognised by OAU or Member States or the UN may bring communications before the Committee.

However, there are three weaknesses regarding the enforcement of the Charter. To begin with, article 44(2) of the Charter states that every communication “shall be treated in confidence”. Confidentiality has been used by African States under the guise of facilitating an amicable solution to control human rights monitoring mechanisms.<sup>109</sup> This principle has been cited as one of the factors that accounted for the inefficiency of the African Commission in the early years of its existence. Publicity and its resultant shame have a considerable deterrent effect in preventing future human rights violations. The transparency of the Committee would also not be monitored if the confidentiality principle were strictly adhered to. Secondly, the Charter does not mention anything (*e.g.*, exhaustion of local remedies) regarding the admissibility of communications. Lastly, the wisdom of having a separate body to monitor children’s rights is troublesome. The African Commission has suffered from persistent financial difficulties.<sup>110</sup> The effectiveness of the Committee is likely to be affected greatly by this. Considering that the functions of the Committee and the African Commission are similar, it is economically unwise to have a separate body to deal with children’s rights.

## 10. Conclusion

In conclusion, the contribution that the Charter has made to the children’s rights discourse cannot be ignored. It is particularly strong when it comes to specifying issues that are relevant to the African child and in its features of simplicity in language. The Charter makes several provisions that have not been articulated in any human rights instrument before, apart from making several improvements on the CRC. However, the Charter is not without weaknesses. Most of them take the form of omissions. The Charter has omitted quite a few provisions that would be relevant for the better promotion and protection of children’s rights in Africa. Other weaknesses are shared with the CRC. It is noteworthy that most of the weaknesses in the Charter may be cured by reason of the fact that all African States parties to the CRC. Thus, to the extent that the CRC provides better protection, State Parties to the Charter will be bound by the CRC.

## Notes

- <sup>1</sup> The first is the Convention on the Rights of the Child (CRC). See A.G. Mower (1997), 4.
- <sup>2</sup> Art 1.
- <sup>3</sup> Economic, social and cultural rights are often explained in terms of their distinct historic origin. These rights developed from the socialist ideals in the late 19th century and from the rise of the labour movement in Europe. They are distinguishable from first generation rights, civil and political rights, which are associated with the 18th century Declaration on the Rights of Man and third generation rights that comprise of rights of peoples and which enjoyed recognition relatively later. See MCR Craven (1995), 10–11; B. de Villiers “Social and economic rights” (1994), 559; B. de Villiers (1996).
- <sup>4</sup> Art 4.
- <sup>5</sup> E.g. see J. Sloth-Nielsen (1995), 414–415.
- <sup>6</sup> Such argument and others have been adequately rebuffed. See Craven (n 3 above) 10–16; S.W. Scot and P. Macklem (1992); S Liebenberg (1999), 41-I; E. Mureinik (1992); *South African Journal on Human Rights* 464–486; P. de Vos (1997), 68–71; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996(4) SA 744, 1996 (10) BCLR 1253 (CC); *The Government of the Republic of South Africa and others v. Grootboom and others* 2000 (II) BCLR 1169 (CC).
- <sup>7</sup> *Ibid.*
- <sup>8</sup> E.g. labour rights as compared to fair trial rights or the right to vote.
- <sup>9</sup> For the same reasons, I disagree with Kamchedzera who criticises the Charter for not having a provision similar to art 4 of the CRC. See GS Kamchedzera (1998), 556–557.
- <sup>10</sup> Art 1(2).
- <sup>11</sup> See art 41.
- <sup>12</sup> See art 1 (3).
- <sup>13</sup> F. Viljoen (2000).
- <sup>14</sup> Art 1 of the CRC.
- <sup>15</sup> Art 1(2) of the Charter states that it does not affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a State Party or in any other international covenant in force in that State.
- <sup>16</sup> Art 3.
- <sup>17</sup> The first is art 2 of the CRC. See Sloth-Nielsen (n 5 above), 409.
- <sup>18</sup> See Kamchedzera (n 9 above), 557.
- <sup>19</sup> Adopted by the General Assembly of the UN on 23 December 1965 and entered into force on 4 January 1969.
- <sup>20</sup> Art 26(1).
- <sup>21</sup> Art 26 (2) places an obligation on State Parties to “accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilisation”.
- <sup>22</sup> Art 13 of the Charter guarantees mentally or physically disabled children the right to special measures.
- <sup>23</sup> G. van Bueren (1995), 40.
- <sup>24</sup> J. Wolf (1990), 129; van Bueren (*ibid.*), 46; Sloth-Nielsen (n 5 above), 409.
- <sup>25</sup> Other scholars who have noted the difference between the use of “the” and “a” before “primary consideration” include van Bueren, Mower, Kamchedzera, Viljoen and Sloth-Nielsen. See van Bueren (n 23 above), 46; Mower (n 1 above) 24; GS Kamchedzera (1999), 520–521; Sloth-Nielsen (n 5 above), 408; Viljoen (n 13 above), 219.

<sup>26</sup> These rights mark a total break from previous international approaches to children's rights and have become an essential element in the arena of children's rights. See Sloth-Nielsen (n 5 above) 403; M. Lückner-Babel (1995).

<sup>27</sup> Art 4(2).

<sup>28</sup> See arts 12 and 17 of the Charter respectively.

<sup>29</sup> Art 13.

<sup>30</sup> Arts 7, 8 and 9 respectively.

<sup>31</sup> Art 10.

<sup>32</sup> This varies from one community to another depending on the factors that determine the end of childhood.

<sup>33</sup> According to Lucker-Babel (n 26 above), 398, the child need not be able to communicate his/her views in order to enjoy this right.

<sup>34</sup> It must be noted, however, that the African Commission has recently interpreted claw-back clauses in a manner that ensures that rights are not limited unjustifiably. The Commission has required four conditions to be satisfied for a limitation in domestic law to be considered compatible with the Charter by virtue of claw-back clauses, namely:

- (a) the limitation should be exercised with due regard to the rights of others, collective security, morality and common interest;
- (b) the justification for limitation must be strictly proportionate with and absolutely necessary for the purposes that follow;
- (c) a limitation may not erode a right such that the right itself becomes illusory;
- (d) limitations must be consistent with the obligations of State Parties under the Charter.

See Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Thirteenth Annual Activity Report paras 41–42; Communications 147/95, 145/95, *Sir Dawda K Jawara v. The Gambia*, Thirteenth Annual Activity Report. These communications are discussed in C.A. Odinkalu (2001), 241–242 & C. Heyns (2001), 160–161. For innovative interpretation of claw-back clauses see also the Tanzanian decision of *K de Rumbuni v. The Attorney General*, Civil Appeal Suit No. 32 (1992), discussed in E.A. Ankumah (1996), 177. The Committee on the Rights and Welfare of the Child is likely to take this approach.

<sup>35</sup> See art 5(1).

<sup>36</sup> See art 37(a).

<sup>37</sup> See art 6(5). The ICCPR was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 May 1976.

<sup>38</sup> Art 4(5). The ACHR was adopted by the Organisation of the American States on 22 November 1969 and entered into force on 18 July 1978.

<sup>39</sup> See Amnesty International "Abolitionist and retentionist Countries" <<http://www.web.amnesty.org/rmp/dplibrary.nsf/ff6dd728f6268d0480256aab003d14a8/daa2b602299dded08025688100506b1!OpenDocument>> (accessed on 25 October 2001).

<sup>40</sup> Van Zyl Smit has noted that in all forums where there is a death penalty, even those that argue against the death penalty are quick to propose life imprisonment as its substitute. See D. van Zyl Smit (1999).

<sup>41</sup> Murphy has, for instance argued that, long term imprisonment is "a kind of death (of personhood)" and "a kind of slow torture and psychic mutilation and should no doubt be banned", (Quoted in van Zyl Smit, *ibid*, 31). Art 37(a) of the CRC prohibits life imprisonment "without a possibility of release." Walter Tarponosky, member of the HRC, has also said that rigorous imprisonment of even 30 years could infringe the rule against cruel, inhuman or degrading punishment, see UN GAOR, Committee on Civil and Political Rights para 6 UN Doc CCPR/C/SR 149 (1979). *S v. Nehemia Tjijo* unreported decision of 4 September 1991,



quoted extensively in *S v. Tcoeb* 1993 (1) SACR 274 (Nm), held that life imprisonment “robs the prisoner of . . . hope. Take away his hope and you take away his dignity and all desire he may have to continue living the concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a goal waiting only for death to set him free.” The German Constitutional Court has refused to make such conclusions, see BVerf GE 45, 189, 229–238.

<sup>42</sup> *Wynne v. UK* 19 Eur. H.R. Rep. 333 (1995); *Hussein v. UK* 22 Eur. H.R. Rep. 1 (1996) [1994]; *R v. Secretary of State for the Home Dept, ex parte Doody Pegg Pierson & Smart* [1994] 1 A.C. 531; *Lebach case*, BVerf GE 35, BVerf. GE 45, Decision nr 93-334 DC of January 20 1994 of Conseil Constitutionnel, Italy corte. Cost sentenza September 27 1983 nr 274 Foro It 2333; *S v. De Kock*; *S v. Tcoeb*; *WA Schabas* (1997), 499; *Van Zyl Smit* (n 40 above), 40–41.

<sup>43</sup> Art 11(1). The danger though is that such objectives may lead to the indoctrination of children rather than to inform them impartially.

<sup>44</sup> Van Bueren (n 23 above), 247.

<sup>45</sup> Art 11(6).

<sup>46</sup> Adopted by the UN General Assembly on 16 December 66 and entered into force on 3 January 1976.

<sup>47</sup> Van Bueren (n 23 above), 237.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 234.

<sup>50</sup> See art 28(1)(d) of the CRC.

<sup>51</sup> ILO Convention on the Basic Aims and Standards of Social Policy.

<sup>52</sup> Van Bueren (n 23 above), 239.

<sup>53</sup> Art 6(3)(e).

<sup>54</sup> Corporal punishment whether as a criminal punishment or domestic disciplinary measure has been considered by international human rights bodies and several domestic courts to contrary to the right to dignity and the right not to be subjected to torture, cruel, inhuman and degrading treatment. *Tyrer v. UK* (1978) 2 EHRR 1; *S v. A Juvenile* 1990 (4) SA 151 (ZS); *S v. Williams* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC); *Sv Petrus & Another* [1985] LRC (Const) 699 (Botswana CA); *A v. UK* (1998), *S v. Ncube*, *S v. Tshuma & S v. Nhlovu* (2) SA 702 (ZS); *Ex parte A-G, Namibia: In re Corporal punishment* 1991 (3) SA 76 (NsS). The HRC has stated that the prohibition against torture extends to a prohibition of corporal punishment and excessive chastisement,” and amputation and stoning. See General Comment 20 adopted by Human Rights Committee UN Doc HRI/GEN/1/Rev.3, 15 August 1997, para 5. Similar comments are found in Concluding Observations of the Human Rights Committee: Iraq, UN Doc. CCPR/C/79/Add.84, 19 November 1997 para 9; the Concluding Observations of the Human Rights Committee: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997 para 12; The UN Commission on Human Rights Special Rapporteur Res 1997/38 at 125 and Report of the UN Special Rapporteur on torture, UN Doc E/CN.4/1997/7 para 6.

<sup>55</sup> Mower (n 1 above), 32.

<sup>56</sup> According to van Bueren, national development plans have been dominated by financial considerations rather than human rights obligations and international law has yet to have an impact on resource allocation by many States rather than mere piecemeal health provisions. See van Bueren (n 23 above), 294.

<sup>57</sup> For instance, lack of popular participation has been said to be responsible for the poor performance of African economies. According to Sakar Mahmud “The current poor performance of most African economies is related to rigid political controls and the absence of mass participation in policies of national concern. Corruption which engulfs most public

offices in Africa, stems from lack of popular participation . . . Thus, lack of participation contributes to ineffective public control and loss of the possibilities for economic development in the long run.” Quoted in J. Oloka-Onyango (2000), 25.

<sup>58</sup> Van Bueren (n 23 above), 298.

<sup>59</sup> *Ibid* 307 & 309.

<sup>60</sup> In contrast to the Charter, the CRC provides for this right in art 26 although its full realisation has to comply with “national law”.

<sup>61</sup> Art 6.

<sup>62</sup> The CRC provides for this right in art 8. This article further provides that where a child is illegally deprived of some or all of the elements of his or her identity, State Parties must provide appropriate assistance and protection, with a view to speedily re-establishing his/her identity.

<sup>63</sup> Disappearances have occurred in Argentina, Australia, Chile, Guatemala, Peru and the Netherlands. Van Bueren (n 23 above), 119–120. Africa is not immune to these occurrences and one way of dealing with them is by guaranteeing the right to preserve the child’s identity and imposing an obligation on states to provide appropriate assistance and protection with regard to re-establishing a child’s identity.

<sup>64</sup> Art 15.

<sup>65</sup> Compare with art 32 of the CRC.

<sup>66</sup> Art 16.

<sup>67</sup> Art 27.

<sup>68</sup> Art 28.

<sup>69</sup> Art 29.

<sup>70</sup> Arts 34, 35, 36, 33 of the CRC.

<sup>71</sup> Art 29(1)(b).

<sup>72</sup> Art 34.

<sup>73</sup> Van Bueren (n 23 above), 277.

<sup>74</sup> The Preamble to this Convention describes prostitution as “incompatible with the dignity of the human person and endangers the welfare of the individual.” Quoted in van Bueren (n 23 above), 277.

<sup>75</sup> Art 20 of this Convention enjoins State Parties to punish any person who procures, entices, and leads away for the purposes of prostitution another person even with the consent of that person. Quoted in van Bueren (n 23 above) 277.

<sup>76</sup> Art 27(1)(b) & (c) of the Charter provides State Parties must take measures to prevent “the use of children in prostitution or other sexual practices” and “the use of children in pornographic activities, performances and materials”.

<sup>77</sup> Art 17.

<sup>78</sup> Art 17(2)(c)(iv). Art 40(2)(b)(iii) of the CRC uses the phrase “without delay.” In my view, “as soon as possible is much stronger”.

<sup>79</sup> The Human Rights Committee has stated that the duty to bring a juvenile “as speedily as possible” for adjudication is an unconditional duty on State Parties and not dependent on the State Parties resources. See CCPR/C/21/Add. 1; van Bueren (n 23 above), 175 & 180.

<sup>80</sup> Schabas (n 40 above) *passim*, van Zyl Smit (n 40 above); C. Reis (1997).

<sup>81</sup> Compare with arts 40(2)(iii) of the CRC and 14(2)(d) of ICCPR.

<sup>82</sup> Van Nijnatten (1989). Van Bueren (n 23 above), 182.

<sup>83</sup> *E.g.* arts 37(b) and 40(3)(b) of the CRC, art 11 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by the UN General Assembly on 29 November 1985.

<sup>84</sup> See art 14(3)(g) of the ICCPR.

<sup>85</sup> See art 15 of the ICCPR.

<sup>86</sup> See art 9(5) of ICCPR.

<sup>87</sup> It is actually possible in Africa to marry a girl who is still in her mother's womb. See I. Nguema (1990), 269.

<sup>88</sup> A Armstrong et al. (1995), 344–358.

<sup>89</sup> Art 18(2).

<sup>90</sup> Armstrong et al. (n 88 above), 336.

<sup>91</sup> Art 30.

<sup>92</sup> Art 19(1).

<sup>93</sup> Art 24(b).

<sup>94</sup> Kamchedzera (n 9 above) 549, 553.

<sup>95</sup> Art 22(2). Recall that a child means any person below 18 under the Charter. However, those who advocate for the recognition of greater child autonomy contend that the restriction on the minimum age of recruitment and participation violates the child's right to freedom of association and expression. See van Bueren (n 23 above), 335–336; C. Jesseman (2001), 150–152.

<sup>96</sup> Art 23(4).

<sup>97</sup> Art 23(1).

<sup>98</sup> Adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986.

<sup>99</sup> Article 31 of the Charter provides: "Every child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

- (a) To work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) To serve his national community by placing his physical and intellectual abilities at its service;
- (c) To preserve and strengthen social and national solidarity;
- (d) To preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of the society;
- (e) To preserve and strengthen the independence and integrity of his country;
- (f) To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of the African Unity."

<sup>100</sup> Para 8 of the Preamble to the Charter.

<sup>101</sup> *E.g.* art 31 of the Charter.

<sup>102</sup> See R. Murray (2000), 40–41; M.W. Mutua (1995), 370; C.R.M. Dlamini (1991), 197. For the justification of imposing duties in the Charter specifically, see Kamchedzera (n 25 above), 522–526.

<sup>103</sup> Art 20(1).

<sup>104</sup> It is settled that for each right there has to be a corresponding duty. Duty bearers range from individuals, families, communities, schools and other institutions to the state, development agencies like the UN and the international community. What is important is that the duties at each level of society and the relevant duty bearers must be identified if the human rights of other people are to be realised. See Kamchedzera (n 25 above), 522–523.

<sup>105</sup> *E.g.* duties in art 31(b), (d) and (f) of the Charter.

<sup>106</sup> Art 32.

<sup>107</sup> Art 44.

<sup>108</sup> Art 45.

<sup>109</sup> The same argument has been raised with respect to the African Commission. See Murray (n 102 above), 170; Ankumah (n 34 above), 38–39.

<sup>110</sup> Viljoen (n 13 above), 227–228.

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