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The African Charter on the Rights and Welfare of the Child

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CHAPTER 14

The African Charter on the Rights and Welfare of the Child

JULIA SLOTH-NIELSEN[*]

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14.1 INTRODUCTION AND BACKGROUND

Now having passed the 25th anniversary of its adoption, the African Charter on the Rights and Welfare of the Child (hereinafter the 'African Children's Charter', the 'ACRWC' or 'the Charter') has come to be recognised as the principle human rights instrument dealing with children's rights on the continent. It was developed in 1990 in the slipstream of the global treaty, the United Nations Convention on the Rights of the Child ('CRC').[1] It required the ratification of 15 Organisation of African Unity ('OAU') member states before it could enter into force. Almost a decade passed before the required number of states ratified the African Children's Charter, causing it to come into force on 29 November 1999. Since the advent of the African Union ('AU'), the successor to the OAU, the African Children's Charter has been brought into the fold of the new continental organisation.

One may identify political and legal reasons for the adoption of this document. On a political level, the OAU's reaction stemmed from a perception of exclusion or marginalisation of African states in the drafting process of the CRC. It is true that African involvement in the drafting process was limited, as exemplified by the fact that for at least five of the nine years that the working group took to draft a final proposal, only three African states participated. However, by 1989, nine African states were participating in the activities of the working group.

The first vocal opposition to the UN process was raised in Africa at a workshop and conference entitled 'Children in Situations of Armed Conflict in Africa', organised by

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1 UN General Assembly 44th Session, UN Doc A/Res/44/25 (1989).

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the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) and the United Nations Children's Fund (UNICEF). This took place from 9 to 11 May 1988 in Nairobi, Kenya. Pursuant to the meeting, the OAU, in collaboration with ANPPCAN and UNICEF, set up a working group of African experts. This group produced a draft charter, which formed the basis of the eventual African Children's Charter.

Some of the specific issues omitted from the CRC, which were identified by those involved in the drafting process of the African Children's Charter, were the following:[2]

(a) The situation of children living under apartheid was not addressed.
(b) Disadvantages influencing the female child were not sufficiently considered.
(c) Practices that are prevalent in African society, such as female genital mutilation and circumcision, were not mentioned explicitly.
(d) Socio-economic conditions, such as illiteracy and low levels of sanitary conditions, with all their threats to survival, pose specific problems in Africa.
(e) The community's inability to engage in meaningful participation in the planning and management of basic programmes for children was not taken into account.
(f) The African conception of the community's responsibilities and duties had been neglected.
(g) In Africa, the use of children as soldiers and the institution of a compulsory minimum age for military service are issues of great importance.
(h) The position of children in prison and that of expectant mothers caught up in the criminal justice system was not regulated.
(i) The CRC negates the role of the family (also in its extended sense) in the upbringing of the child and in matters of adoption and fostering.

Since the entry into force of the Charter, periodic elections have been held to establish the membership of its monitoring body, the African Committee of Experts on the Rights and Welfare of the Child ('ACERWC'). After a slow start, the Committee has played a much more prominent role in the African Union human rights architecture, as will be detailed below. State party reporting to the Committee commenced in 2007, and to date more than 30 state-party reports have been received. Current ratification of the Charter stands at 47 state parties, with only seven member states of the AU remaining to ratify.

The Charter has enjoyed increasing academic interest,[3] and the 25th anniversary of the Charter in November 2015 was celebrated with a high-level conference attended

2 These grounds have been forwarded by Mulhoga *Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child* (paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape, 1992); and Wako *Towards an African Charter on the Rights of the Child* (paper delivered at a workshop on the Draft Convention on the Rights of the Child, Nairobi, 9–11 May 1988).

3 See eg Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' 2002 *The International Journal of Children's Rights* 127; Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' 2002 *The International Journal of Children's Rights* 157; Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Children's Committee of Experts: raising the gauntlet' 2002 *The International Journal of Children's Rights* 179; Sloth-Nielsen & Mezmur 'A dutiful child: the implications of article 31 of the

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by more than 400 non-governmental organisations ('NGOs'), practitioners and academics. South Africa submitted its combined initial 1st and 2nd periodic report[4] to the ACERWC in 2014 and it was considered by the Committee in 2015, whereupon concluding observations were issued.[5] Some aspects of the concluding observations are described in applicable sections below.

14.2 RELATIONSHIP WITH OTHER INTERNATIONAL LAW INSTRUMENTS[6]

14.2.1 African Charter on Human and Peoples' Rights

The 'parent' African human rights document, pre-dating the African Children's Charter, is the African Charter on Human and Peoples' Rights ('the African Charter'). The OAU Assembly of Heads of State and Government adopted the African Charter in 1981. Having entered into force in 1986, it has subsequently been ratified by all 53 AU (previously OAU) member states.

By implication, and explicitly, the African Charter provides for the protection of children. It deals with the rights of 'every individual' and of 'peoples' under the jurisdiction of a state party. A plain-language interpretation supports the conclusion that children are also protected, both as 'individuals' and as 'peoples' (members of a group).

The African Charter provides special or specific protection to children in three respects:

(a) Some rights in the African Charter, such as the right to education, are of much greater relevance to children than to any other sector of the population.

(b) The African Charter proclaims the family as 'the natural unit and basis of society'. States have a duty to assist the family and protect its 'physical health and morals'. The care of children within the context of the family is seen as a 'virtue' in the African 'historical tradition'.

African Children's Charter' 2008 *Journal of African Law* 159; Lloyd 'The African regional system for the protection of children's rights' in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 33; Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009); Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' 2009 *AHRLJ* 482; Durojaye 'The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' 2013 *CILSA* 385; Johnson 'Strengthening the monitoring and compliance with the rights of the African child' 2015 *The International Journal of Children's Rights* 365.

4 Available at http://www.acerwc.org/download/south_africa_initial_report_under_the_acrwc-2/?wpdmdl=8787.

5 Available at http://www.acerwc.org/download/concluding_observations_south_africa/?wpdmdl=8754.

6 The International Covenant on Civil and Political Rights of 1966, which deals with the rights of everyone to basic civil and political rights, but it also deals explicitly with some of the rights of children. Article 24 provides that children have the right to protection, that every child must be registered at birth, and for the right to acquire a nationality. In the International Covenant on Social, Economic and Cultural Rights of 1966 ('ICESCR'), the right of 'everyone' to the enjoyment of the best attainable standard of health is guaranteed. Of particular relevance to children, state parties are placed under an obligation to reduce the stillbirth rate and infant mortality. The ICESCR further recognises the right of 'everyone' to education, including the provision of free compulsory primary education.

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(c) State parties to the African Charter are further under obligation to 'ensure the protection of the rights of the child as stipulated in international declarations and conventions'.

These provisions of the African Charter have led to the inclusion of a paragraph on 'the protection of children and young persons', especially in respect their socio-economic rights, in the 'Guidelines for National Periodic Reports'. These are guidelines in terms of which state parties have to submit their periodic country reports. The guidelines go beyond the provisions of the African Charter by, for example, requiring information about children in employment, including provisions on the minimum age for employment. The guidelines further require 'statistical and other available data showing the number of children and young persons in the various age groups who are in fact working, and the sectors or type of work in which they are employed. However, the reporting function of state parties to the African Commission has been of limited value in improving the position of children in Africa. Those reports which have been submitted and considered have addressed the panoply of issues affecting children too superficially.

14.2.2 UN Convention on the Rights of the Child

As the global child rights instrument which inspired the drafting of the regional instrument, it is noteworthy that all AU member states have ratified the CRC, Somalia being the most recent (in 2015). It's role in Africa has been significant and this is discussed further in chap 13. Suffice it to record that all African states have thus far submitted at least one report to the CRC Committee. There is increasing collaboration and interaction between the CRC Committee and the ACERWC. As of 2017, there will be five African members of the CRC Committee, and as of November 2015, the chairperson of the CRC Committee is also the chairperson of the AECRWC. There is one further member common to both committees.

14.3 SUBSTANTIVE RIGHTS IN THE CHARTER

14.3.1 The implementation clause

The implementation clause is set out in art 1, entitled 'The obligations of state parties'. State parties are required to recognise the rights, freedoms and duties enshrined in the Charter and to undertake the necessary steps, in accordance with their constitutional process and with the provisions of the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.[7] Next, art 1(2) details that nothing in the Charter shall 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 Convention or

7 This wording differs from the implementation provision of the CRC (art 4) in so far as it does not specifically refer to administrative measures. Furthermore, with regard to economic, social and cultural rights, art 4 only requires states to undertake such measures 'to the maximum extent of their available resources and, where needed, within the framework of international co-operation'. The implications of the absence of this phrase in the implementation article of the African Children's Charter are explained below under para 14.3.4.

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agreement in force in that state. Since all state parties which are currently signatories to the Charter have ratified the CRC, it follows that the higher standards contained in that instrument are the ones to which they will be held. An example in point is the restriction on deprivation of children's liberty as a last resort and for the shortest appropriate period of time contained in art 37*(b)* of the CRC, which principle is absent from the Charter. Conversely, though, where Charter standards are superior to those in place in the international arena, African state parties to the Charter will have to adhere to the Charter standards. An example of this is in relation to child marriage as the Charter sets a fixed age of 18 for the marriage of girls and boys, whereas the CRC is silent on this issue, and the recent Joint General Comment on Harmful Cultural Practices of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') and the CRC Committee allows for exceptions to the minimum age for marriage under certain specified conditions.[8]

The final sub-article of the implementation clause links implementation directly to the need to combat harmful customs, traditions, cultural or religious practices which are inconsistent with the rights, duties and obligations contained in the Charter: these practices must, to the extent of such inconsistency, 'be discouraged'. This places state action to address harmful cultural and customary practices at the heart of the implementation of the Charter, and this obligation cannot be deflected with arguments that culture and custom are community or family concerns alone.

The ACERWC States Parties Reporting Guidelines[9] for the submission of initial and periodic reports require, in addition to reporting on the above, that as part and parcel of the section dealing with general measures of implementation, state parties must provide information on existing or planned mechanisms at the national or local level for coordinating policies relating to children and for monitoring the implementation of the African Children's Charter. They must also provide information on the measures that have been taken or are foreseen to make the principles and provisions of the Children's Charter widely known to adults and children alike, and measures they have taken to widely disseminate their reports to the public at large in their own countries.[10]

14.3.2 The definition of a child

The definition of a child contained in the Charter is regarded as being superior to that of the CRC,[11] in so far as it does not permit exceptions for when majority is attained before the age of 18 years. The Charter adopts a 'straight 18' position, which is important on a continent plagued by child marriage, which can give rise (in private law) to the attainment of majority.[12] The definition of a child as any person aged

8 CEDAW/C/GC/31-CRC/C/GC/18 para 19 provides that 'in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions'.

9 Available at the ACERWC website, www.acerwc.org (hereinafter 'ACERWC reporting guidelines').

10 ACERWC reporting guidelines.

11 Article 1.

12 See chap 1 above.

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below 18 years is reinforced in art 21 dealing with child marriage, since the article requires state parties to prohibit all marriages of persons aged below 18 years.

Almost throughout the continent,[13] the last decade has seen the development of new rights-based child protection legislation in which the age of childhood is confirmed as being the age of 18 years, in conformity with the Charter provisions. Hence, customary conceptions of the stage or age at which the young transition to adulthood (eg though attainment of puberty or taking a wife) are abating in favour of a standard approach to the age at which young persons are beneficiaries of children's rights.[14]

Abortion is not mentioned explicitly in the African Children's Charter. At first glance, the definition of the child (as 'every human being') seems to suggest that the Charter is only concerned with human beings and not with the unborn. According to this interpretation, the right to life does not extend to the unborn, and abortion is consequently allowed. According to another reading, the term 'human being' is sufficiently vague to allow individual states enough leeway to determine what exactly constitutes a 'human being'. Such an interpretation allows states to either outlaw abortion or to allow it.

14.3.3 The four pillars

As was the case under the CRC from the deliberations of the early meetings of the CRC Committee, the ACERWC has highlighted the rights to non-discrimination (art 3), the paramount principle of the best interests of the child (art 4), the child's right to survival and development (art 5) and the right to participate (arts 7 and 12) as the four pillars of the ACRWC. State parties are encouraged to provide relevant information on the application of these principles in the implementation of all other Charter articles.[15]

The right to non-discrimination as formulated under the Charter differs in minor respects from the equivalent article (art 2) of the CRC. Reference is made to non-discrimination on the basis of 'fortune', which is highly relevant on a continent where vast socio-economic disparities prevail, and which may result in discrimination against children who are poor. Some of the further grounds on which discrimination is outlawed are discrimination based on the birth or other status of the child, the parent or the legal guardian. Although the marital status of the parent is not explicitly mentioned as a ground for non-discrimination, it may be included under 'birth' and 'other status', making discrimination between children born in or out of wedlock (or

13 An exception is to be found in Malawi's Child Care Protection and Justice Act 22 of 2010, which covers children until the age of 16 years, in conformity with the definition of a child in the Constitution of Malawi as being a person aged below 16 years. However, in response to a communication brought against Malawi to the Committee in relation to its definition of a child, the government reached a friendly settlement in October 2016 with the party who brought the communication and agreed to take steps to revise the country's constitution and the applicable legislation by December 2018. (ACERWC Communication No 004/Com/001/2014, available at http://www.acerwc.org/amicable-settlement-on-communication-no-004/).

14 Sloth-Nielsen 'Modern African childhoods—does law matter?' in Freeman (ed) *Current Legal Issues: Volume 14: Law and Childhood Studies* (2012).

15 ACERWC reporting guidelines para 12.

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'marital' and 'non-marital') contrary to the Charter. Second, non-discrimination on the grounds of disability is not mentioned in the Charter provision although there is a dedicated Charter provision on children with disabilities at art 15.

The best-interests principle also differs on the face of it in its reach and scope. This is because the standard is allegedly superior in that it promotes the application of the best-interests principle as *the* paramount consideration, not (as in the CRC) as *a* paramount consideration (meaning one principle among others that may be in competition). However, the ACERWC has stated that the provision cannot be interpreted to mean that any other concern or consideration is inevitably trumped, and that the scope of application of the best-interests principle is similar to the scope of application of the CRC equivalent.[16]

In its response to South Africa following the submission of the country's state party report in 2015, the Committee commended the state party for all its measures, including its constitutional provision and very progressive court judgments, especially from the Constitutional Court, to ensure the best interests of children.[17]

The child's right to survival and development (which is the third right identified as a pillar) relates to two main areas of concern: first, the protection of the right to life by law and the prohibition on the death penalty upon those under the age of 18 at the time of the commission of an offence, and, secondly, the obligation of states to ensure to the maximum extent possible the survival, protection and development of the child. This right therefore implicates a host of interventions to improve infant and child morbidity and mortality rates, as well as interventions in the early years to optimise the child's opportunities for development (such as early childhood development programmes).

The child's rights to express views freely in all matters and to disseminate his or her opinions, subject to such restrictions as are prescribed by law, are dealt with in art 7. Article 4 (right of the child to communicate in all judicial or administrative proceedings affecting the child) and art 12 (right to participate in cultural and artistic life) are also relevant to the issue of child participation. There have been numerous initiatives undertaken to provide children in Africa with the spaces and opportunities to exercise their right to express views in general, and to participate in judicial and administrative proceedings affecting them, in particular.[18] However, a recent study of initiatives in Ethiopia, Kenya, Rwanda, Sudan, South Sudan, Somalia, Tanzania and Uganda concluded that, despite the presence of laws and policies that guarantee child participation, as well as important initiatives and processes on child participation, consulting with children and taking their views into account is still a very recent trend and efforts to include children are still mostly new and uncoordinated. A key challenge identified, and which was cross-cutting amongst all

16 The author was present at a Committee meeting in May 2015 when this was discussed.

17 ACERWC Concluding Observations to the Initial State Party Report of the Government of the Republic of South Africa para 24. However, the Committee recommended that the state party undertake further appropriate measures to respect and promote the principle of the best interests of the child not only in law, but also in practice, in policies, as well as in all settings, including in the family and community settings.

18 African Child Policy Forum *A Study on Child Participation in Eastern Africa* (2015).

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actors, was with regard to conceptualising child participation and translating the concept into practice in different contexts.[19]

14.3.4 Protection rights

The Charter is expansive in the protection rights afforded to children. Apart from the provisions dealing with harmful cultural practices, dealt with under para 14.3.5 below, the text provides:

(a) for special measures of protection for 'handicapped' children[20] in art 13;
(b) that children be protected from child labour (art 15);
(c) for their protection from torture, inhuman or degrading treatment—and especially physical or mental injury or abuse, neglect, or maltreatment, including sexual abuse—whilst in the care of parents or other caregivers;[21]
(d) for children's right to special treatment when accused of or found guilty of having contravened the penal law (art 17);
(e) for state parties to take all necessary measures to ensure that no child takes a direct part in hostilities and that they refrain from recruiting any child;[22]
(f) for expansive measures of protection for refugee children, including those displaced internally through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order, or for any other reason (art 23);
(g) for additional measures of protection for children who are the subjects of intercountry adoption, including that this be considered only where the child cannot be placed in a foster or adoptive family, or otherwise cared for in a suitable manner in the country of origin (art 24); and
(h) that children enjoy protection against sexual exploitation (art 27), drug abuse (art 28) and sale trafficking and abduction (art 29).

A unique provision, found nowhere else in an international law instrument, is art 30, which envisages special treatment for the children of imprisoned mothers. This provision was also the subject of the ACERWC General Comment No 1, discussed in more detail at para 14.4.4 below.

Apart from requiring reporting on the above groups of vulnerable children, the ACERWC guidelines for state party reporting also require state parties to report specifically on other forms of abuse and exploitation, such as begging,[23] early pregnancy, children belonging to minority groups, and children who need special

19 African Child Policy Forum *A Study on Child Participation in Eastern Africa* iii.
20 The use of the word 'handicapped' is no longer seen as being appropriate and the modern version is children with a disability. However, the word 'handicapped' was a direct translation from the French '*handicappe*'.
21 Article 16. The text incorrectly reads 'whilst in the care of the child', but this is an obvious misprint.
22 Article 22. Article 22(3) provides further for the protection of the civilian population during armed conflicts and for states to take all feasible measures to ensure the protection and care of children affected by armed conflict (both international and internal armed conflicts).
23 The use of children for begging is prohibited by art 29*(b)*; see further ACERWC reporting guidelines para 29*(d)*(v).

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protection on account of being in risky or vulnerable conditions and situations, such as street children or HIV/AIDS orphans.[24]

By comparison to the CRC, the African Children's Charter increases the level of protection for children in a number of important respects:[25]

(a) While the CRC allows for child soldiers to be recruited and to be used in direct hostilities,[26] the African Children's Charter outlaws the use of child soldiers.[27]

(b) In terms of the CRC, child marriages are allowed because art 1 stipulates that childhood ends at 18 years, unless majority is acquired at an earlier age. The African Children's Charter is explicit in its prohibition of child marriages.[28] In fact, it adds that legislation must be adopted to specify the minimum marriage age to be 18 years.

(c) In its protection of child refugees, the ambit of the African Children's Charter is extended to include 'internally displaced children',[29] something the CRC does not cover.[30] The causes for internal displacement are also all-inclusive.

In doing so, it has fulfilled the objective of supplementing the CRC with regional specificities.

14.3.5 Socio-economic rights

The preamble to the African Children's Charter refers explicitly to children's socio-economic circumstances, 'noting with concern that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care'. In the implementation clause (art 1) the African Children's Charter, first, merely requires the adoption of legislative and other measures to give effect to its provisions, without any distinction as to the rights concerned, be they civil and political or social and economic. Secondly, any reference to budgetary limitations, the availability of resources and the progressive realisation of the right contained in the African Children's Charter is conspicuously absent in art 1. I have previously argued that this omission is not accidental, but that the poor socio-economic circumstances of most African countries at the time of development of the treaty would have rendered any disclaimer or claw-back provision pertaining to budgetary limitations (available resources) and progressive

24 ACERWC reporting guidelines para 29*(f)* and *(g)*.

25 See Viljoen 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' 1998 *CILSA* 199 at 207–211. For a fuller comparison of the comparative advantage of the African Children's Charter, see Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?' 2008 *SAPR/PL* 1.

26 Articles 38(2) and 38(3) of the CRC.

27 Article 22(2) of the African Children's Charter.

28 Article 21(2) of the African Children's Charter.

29 Article 23(4) of the African Children's Charter.

30 Article 22 of the CRC.

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realisation potentially a universal damper on any implementation of socio-economic rights at all.[31]

However, references to the nature of the state obligation abound within the text of specific articles of the African Children's Charter which articulate socio-economic rights. Thus, the child's right to survival and development must be ensured 'to the maximum extent possible'.[32] The child's right to education must be implemented through state parties taking all appropriate measures with a 'view to achieving full realisation of this right'.[33] As regards the rights of children with disabilities, state parties shall 'ensure, subject to available resources, to a disabled child and to those responsible for his care, assistance for which application is made and which is appropriate to the child's condition'.[34]

As regards content, the Charter's socio-economic rights commence with art 5, which provides for the child's right to survival, protection and development, which, as mentioned, state parties are bound to ensure to the maximum extent possible. Further to this, the right to education is accorded to 'every child'.[35] The standard required for the implementation of this right is that 'all appropriate measures' must be taken with a view to achieving 'full realization' of the right. Elements of this include the provision of free and compulsory basic education, the obligation to encourage the development of secondary education and to progressively make it free and accessible to all, and to make higher education accessible on the basis of capacity and ability by 'every appropriate means'.[36] Article 14 spells out the specifics of the right to health, which lays unusual emphasis on the participation of beneficiaries in the implementation of health services: art 14(2)*(i)* concretely requires state parties to the African Children's Charter to ensure meaningful participation at local level in both planning and management related to health-care issues.

Although Chirwa[37] bemoans the absence of a right to social security in the African Children's Charter, it can be argued that the requirement that the state supports parents where they are unable to provide materially for their children (art 20, see below at para 14.3.6) adequately deals with the situation where a minimum floor of benefits must be assured.

14.3.6 Charter rights in the context of culture, religion and tradition

In Africa, children often form part of a rural traditional setting where customs rather than formal law prevail. However, in an ambitious leap, the African Children's Charter asserts its own primacy above culture and customs that are prejudicial to the health or life of a child and discriminatory to the child on the basis of sex or other

31 Sloth-Nielsen 'Socio-economic rights under the African Charter on the Rights and Welfare of the Child: progress and prospects' in Chenwi & Chirwa *Judicial Enforcement of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 155.
32 Article 5(2).
33 Article 11(3).
34 Article 13(2).
35 Article 11.
36 Article 11(3)*(c)*.
37 Chirwa 'Combatting child poverty: the role of economic, social and cultural rights' in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* 96.

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status. This is stated upfront in art 1, the clause dealing with the primary obligation of state parties. They are therefore required to discourage all such practices that are inconsistent with the rights duties and obligations contained in the Charter to the extent of such inconsistency. There are numerous instances of such practices in traditional African society,[38] such as female genital mutilation, killing of baby twins, mutilation of children with albinism, arranged marriages, male primogeniture and practices such as *ukuthwala* and virginity testing.[39] Although many of these practices are not dealt with explicitly, they may be addressed with reference to the general prohibition against harmful cultural practices.

In its response to South Africa's state party report, the Committee had occasion to address harmful practices thus: 'The Committee calls upon the Government of South Africa to take all the necessary measures to combat the practice of *ukuthwala* which subject girls to forced marriage. Further, the Committee recommends the State Party to address the issue of death and mutilation of boys as a result of botched circumcision. In addition the Committee recommends that the State Party undertake measures with a view to ban virginity testing of children.'[40]

In addition to the general injunction to combat harmful cultural and traditional practices, art 21 (entitled 'Harmful social and cultural practices') deals even more explicitly with this issue. The article enjoins state parties to take appropriate measures to eliminate these practices in so far as they affect the welfare, dignity, normal growth and development of the child. In particular, this article is aimed at customs and practices prejudicial to the health or life of a child and those which are discriminatory on the grounds of gender. Article 21(2) of the African Children's Charter makes a special example of child marriages by explicitly outlawing 'the betrothal of girls and boys', adding that the minimum marriage age should be fixed at 18 years and that marriages should compulsorily be registered in an official registry.[41]

Combating child marriage is an AU priority, with a campaign to end child marriage having been launched in 2014. In 2015, the ACERWC added its weight to that campaign by appointing from among its members a special rapporteur on child

38 Paragraph 65 of ACERWC Concluding Observations: South Africa (2015): 'The Committee calls upon the Government of South Africa to take all the necessary measures to combat the practice of *ukuthwala* which subject girls to forced marriage. Further, the Committee recommends the State Party to address the issue of death and mutilation of boys as a result of botched circumcision. In addition the Committee recommends that the State Party undertake measures with a view to ban virginity testing of children.'

39 See the report of the Special Representative of the Secretary General on Violence against Children *Protecting Children from Harmful Practices in Plural Legal System with a Special Emphasis on Africa* (2012) available at http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf.

40 Concluding Observations: South Africa, para 68.

41 The CRC does not contain an explicit provision on child marriage. The prohibition on harmful cultural and social practices in that treaty is to be found in art 24, which deals with health rights. In December 2014, the CRC Committee released Joint General Comment No 18 (CRC/C/GC/18) with the Committee monitoring the implementation of CEDAW (the treaty dealing with discrimination against women). The general comment allows exceptionally the conclusion of a marriage from the age of 16, provided that free and informed consent is given by the parties and that the exception is sanctioned by a judicial authority. Culture may not be used as a rationale for the application of this exception. It is arguable though that the 'straight 18' provision of the Charter is preferable, as there is no leeway for evasion of the rule.

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marriage. In addition, the Committee intends to finalise a joint general comment on child marriage with the African Commission on Human and Peoples' Rights, which will be tabled for possible approval in April 2017.[42]

South Africa was urged by the ACERWC to adopt a uniform minimum age of marriage at 18 years in conformity with the Charter provision.[43]

14.3.7 The role of parents, families and kinship groups

Article 20, which deals with parental responsibilities, details the nature of the parental obligation, as well as the obligations of state parties towards those fulfilling a parenting function. Article 20(2) provides that 'in accordance with their means and national conditions', state parties must take all appropriate measures to assist parents and other persons responsible for the child in case of need, including by providing 'material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing'. This formulation of the provision of material assistance in relation to crucial socio-economic rights suggests an immediate obligation[44] on the part of the state, and is one which makes sense in situations of extreme family poverty where the state is perforce the provider of last resort.

The Charter has been criticised for is evident failure to outlaw domestic discipline. This is because art 20(1)*(c)* provides that parents or persons with responsibilities for the child shall have the duty 'to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child'. However, the ACERWC has consistently interpreted the 'inherent dignity' of the child to require that parental corporal punishment be outlawed as violating this provision.

14.3.8 The responsibilities of the child

The Charter is unique in providing for the responsibilities of the child in art 31.[45] The article is contracted from a similar provision in the so-called mother treaty, the African Charter on Human and Peoples' Rights. Article 31 of the ACRWC provides, in particular, that children are to have responsibilities towards family and society, as well as duties to work for the cohesion of the family; to respect parents, superiors and elders; and to preserve African cultural values. This is in keeping with the African philosophy of human rights: that the individual's enjoyment of his or her rights is intrinsically linked with his or her reciprocal duty to the society, from which he or she derives these rights. These responsibilities can play an important role in children's participation in society and can help to contribute to their overall development.

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42 The 28th Ordinary Session of the ACERWC was held jointly with the African Commission in October 2016 in order to discuss the draft Joint General Comment. At the time of writing, the General Comment is not yet available on the ACERWC website.

43 'The Committee therefore strongly recommends that the Government of South Africa harmonize its civil, customary, and common law definition of the child in line with article 2 of the Charter and to ensure the effective implementation of article 21(2) of the Charter which prohibits child marriage and sets the minimum age of for all types of marriages to be 18.' (Concluding Observations: South Africa, para 18.)

44 See, for instance, ACERWC Concluding Observations: Liberia (2015) 7.

45 Sloth-Nielsen & Mezmur 2008 *Journal of African Law* 159.

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However, art 31 has in the past been seen as an ambiguous provision. One of the duties spelt out in the Charter is for children to respect their parents, superiors and elders at all times. Some have argued that this can conflict with children's right to participation, freedom of expression, association and thought. However, the child's duty towards his family and parents is closely linked to the duties of parents, and others who are responsible for the child, to raise that child to adulthood to the best of their abilities and capacities. The reciprocal nature of the duties and responsibilities between parent and child in the family context is further evident from art 20, which provides for the duty of caregivers to carry out the tasks associated with a child's upbringing and development, ensuring that the best interests of the child are their basic concern at all times. It is therefore imperative that all aspects of art 31 be interpreted so that the principle of the best interests of the child is respected at all times. Furthermore, there are two qualifications to this article: the duties of the child are subject to his or her age or ability and are subject 'to such limitations as may be contained in the present Charter'. This article challenges the traditional view in international human rights law that it is states which are primarily responsible as duty bearers, and reflects the African concept that the family is the basic unit of society.

Fortunately, the ACERWC has clarified the meaning and import of art 31 in a draft general comment, which will likely be adopted at the Committee session in 2017.

14.3.9 Conclusions related to substantive content

Viljoen therefore sums up the 'African' in the Charter when he writes that: 'Although it resonates with African realities and sometimes steers very close to its mother text, the African Charter, the philosophy underlying the Children's Charter is not one of 'difference or otherness' but rather 'the need for complementarity and contextualisation.'[46] It is an instrument 'both in keeping with African traditions and values and well-suited to its unique social, economic, political and cultural environment, whilst at the same time, maintaining its universalist outlook'.[47]

14.4 THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

14.4.1 Appointment, mandates and rules of procedure

The Committee consists of 11 experts in the field of children's rights and welfare, nominated by state parties, but elected in their personal capacities by the AU Assembly Heads of State and Government.[48] They consequently serve as independent, 'uninstructed' experts rather than as government functionaries. If there is any conflict of interest with their home state in a matter related to the ACRWC, they do not participate in those proceedings (eg when considering that state party report to the ACERWC, or participating in an investigative mission to that country). No two members of the ACERWC may be from the same state at any one time. Members serve

46 Viljoen *International Human Rights Law in Africa* (2012) 396.
47 Ibid.
48 Articles 33–36 of the Charter.

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a five-year term. Initially the Charter provided that they were eligible to serve only one term, but the Charter was amended in 2015 to allow a Committee member to serve two terms. Currently (in 2017) two members of the Committee are serving a second term, having been re-elected in 2015.

A resolution[49] adopted by the AU Executive Council in January 2016 will ensure that there is gender parity in the composition of the Committee (which has traditionally been weighted towards female members); regional representation will also be enforced, that is, two seats each for Southern Africa, Central Africa, North Africa and East Africa, and three seats for West Africa. Since currently the Committee membership does not fully comply, the next elections will see candidates from Southern Africa, West Africa and East Africa being ineligible for consideration.[50]

After some delay after the entry into force of the Charter in 1999, a secretariat was established at the seat of the AU in Addis Ababa. Currently, the secretariat comprises three staff members dedicated to Committee work. In addition, the AU staff cohort is complemented by a legal officer and a communications officer supported with donor funds.

The Committee's first meeting was held from 29 April to 2 May 2002. Most of the Committee's 29 meetings have taken place in Addis Ababa, though the Committee has met in Algeria. The Committee functions as an AU institution and is ultimately responsible to the AU Assembly of Heads of State and Government, to which it reports twice a year.

The Committee has developed successive multi-year strategic plans to guide its work. The strategic plan[51] which is currently in operation (from 2015–2019) identifies three strategic areas of focus for the Committee's work: political commitment and national ownership of the Charter (evidenced by further ratifications and timely reporting to the Committee), an enabling legal and policy environment (the harmonisation of national laws and policies with the Charter) and accelerated progress towards implementing children's rights.

The Committee has recently revised its rules of procedure, covering a wide range of issues such as voting by the committee, agenda of sessions and records of meetings.[52]

14.4.2 Consideration of state party reports[53]

To date, the Committee has received more than 30 state party reports and has already begun to receive periodic reports from state parties (eg from Kenya, Rwanda and Burkina Faso). In 2014, the Committee launched a campaign for universal ratification

49 EX.CL/953 (XXVIII) adopted at the 28th Ordinary Session of the Executive Council (23–28 January 2016).

50 Article 33(3) of the Charter.

51 The strategic plan is available on the ACERWC website at http://www.acerwc.org/strategic-plan/.

52 The revised rules are available on the Committee website at http://www.acerwc.org/rules-of-procedure/.

53 Article 43 of the Charter. An initial report must be submitted within two years of entry into force of the Charter in a country, and thereafter every three years. Some initial reports remain to be submitted. There are ongoing discussions about harmonisation of the Charter with the CRC (which requires periodic reports every five years) to lessen the burden of reporting upon state parties.

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of, and reporting under, the Charter in an effort to secure that all member states submit a report. This campaign lead to a flood of reports being submitted in that year and the next, with the result that the Committee scheduled its first extraordinary session in October 2015 aimed at ensuring that all submitted reports were timeously considered. A steady flow of state party reports continue to be submitted. The Committee's concluding observations to the states whose reports have been considered are (for the most part) available on the ACERWC website.[54]

The Committee has also received complementary reports from civil society organisations (CSOs) and civil society organisation coalitions,[55] which are ordinarily considered at a pre-session (in a private session) before the formulation of the list of issues that the Committee desires the state party to provide further information on. The Committee has recently approved guidelines for CSO reports, explaining the desired length and format, and advising CSOs how to conduct themselves and what to expect during their participation in the pre-session of the ACERWC.[56]

There are also guidelines for state party reports, which have recently been revised. These, too, are available on the Committee website.

14.4.3 Communications[57]

In the first communication finding issued by the ACERWC—*Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v The Government of Kenya*—a complaint alleging a violation of mainly art 6, in particular sub-arts (2), (3) and (4) (the right to have a birth registration and to acquire a nationality at birth), and art 3 (prohibition on unlawful/unfair discrimination) was lodged against the Government of Kenya for failing to acknowledge the nationality claims of children of Nubian troops who had fought for the British prior to independence and whose forefathers had elected to stay in Kenya upon independence. As a result of these two alleged primary violations, a list of 'consequential violations', including art 11(3) (equal access to education) and art 14 (equal access to health care), were also alleged.[58] Finding a clear violation of both arts 6 and 3 of the African Children's Charter in respect of non-registration of the children's birth, and discriminatory practice in this regard, the ACERWC also found in favour of the applicants as regards the alleged 'consequential violations'.

54 See www.acerwc.org.

55 Only in one instance thus far was there no complementary report submitted by CSOs, so that the Committee was perforce not able to infuse the views of CSOs of that country into its discussion with the relevant government.

56 The guidelines are available on the ACRWC website, www.acerwc.org.

57 Article 44 of the Charter. See, in general, Sloth-Nielsen 'Children's rights litigation in the African region: lessons from the communications procedure under the ACRWC' in Liefaard & Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2016) 249. Only recently has a complaints mechanism been available in relation to the CRC Committee, after the entry into force in April 2014 of the third Optional Protocol to the Convention on the Rights of the Child.

58 Communication No Com/002/2009, Decision No 002/Com/002/2009 (2011).

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In relation to the first communication received by the Committee, a finding against the Government of Uganda in respect of art 22 of the Charter concerning the recruitment of child soldiers into government armed forces was made. The period during which this occurred was 2002–2005 when the Lord's Resistance Army had destabilised Northern Uganda and government troops were attempting to regain control. Delays characterised the deliberations on this communication, including the need for a field visit by Committee members to ascertain certain factual issues at grassroots level.[59] The ultimate decision did find a violation of art 22 by the Government of Uganda, but did not find evidence for additional violations claimed by the applicants.[60]

A decision in a communication brought against Senegal by the Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Défense des Droits de l'Homme (Senegal)[61] was finalised at the 24th session of the Committee in April 2015. The complaint traversed a range of socio-economic rights violations impacting the position of *talibés*, aged between 4 and 12 years, who are sent away by their parents to live in Quranic schools known as *daaras* in the urban centres of the Republic of Senegal, allegedly to receive religious education. The respondent state was alleged to have failed to bring perpetrators to book or deal decisively with the phenomenon of the *talibés*, causing numerous Charter violations, including related to the provisions of art 4 (best interests of the child), art 5 (the right to survival and development), art 11 (the right to education), art 12 (the right to leisure, recreation and cultural activities), art 14 (the right to health and health services), art 15 (prohibition of child labour), art 16 (protection against child abuse and torture), art 21 (protection against harmful social and cultural practices), and art 29 (prohibition of sale, trafficking and abduction of children). The Committee concluded that, despite the measures the respondent adduced it had undertaken to prevent and address the problem, it had failed to discharge its Charter obligations sufficiently and was therefore in breach of the Charter.[62]

The Committee is currently considering further communications that have been received (which remain *sub judice* until a finding on admissibility and the merits has been made and communicated to the AU Executive Council and the state concerned).

The Committee has also developed and thereafter revised its guidelines for the consideration of communications.[63] Among other issues addressed are the possibility of hearings on the merits of the communication, the possibility of independent experts providing information to the Committee, and the possibility of a Committee

59 A fuller discussion of the reasons for the delay between receipt of the communication and final adjudication upon it can be found in Sloth-Nielsen in Liefaard & Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* 254.

60 See in general Sloth-Nielsen in Liefaard & Doek *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* 249.

61 Decision No 003/com/001/2012.

62 See paras 25, 32, 35, 37, 43, 47, 48, 54, and 67 of the finding, among others.

63 See ACERWC Revised Guidelines for the Consideration of Communications, available at http://www.acerwc.org/download/revised_communications_guidelines-2/?wpdmdl=8763.

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undertaking a fact-finding investigation to establish the veracity of the complaint. This the Committee indeed undertook in relation to the communication brought against the Government of Uganda.

It is proposed that the communications mechanism provides an increasingly useful vehicle for the Committee to develop its jurisprudence, whilst at the same providing remedies for victims of rights violations on the continent.

14.4.4 General comments

The first general comment of the Committee was issued in November 2013—'General Comment No 1 on article 30: Children of incarcerated and imprisoned parents and primary caregivers'.[64] A second one, on art 6 of the Charter (the right to name, nationality, registration of birth and combating statelessness), was thereafter formulated through a consultative process and adopted in 2014.[65] The Committee is currently finalising a general comment on art 31 (the responsibilities of the child) as well as a joint general comment on child marriage with the African Commission on Human and Peoples' Rights. In future, it is planned to formulate a general comment on general measures of implementation of the Charter and systems-strengthening. Future general comments, should they emerge, will not repeat themes that the CRC Committee has already covered in its general comments or that it is intending to draft.

14.4.5 Investigative missions, studies and special envoys

The ACERWC has an extensive mandate to collect and document information, to commission inter-disciplinary assessments of situations on African problems in the fields of the rights and welfare of the child, and to organise meetings as part of its promotional and protective mandate (art 42*(a)*(i) of the Charter). In addition, the Committee has an explicit investigative mandate in art 42.[66] Two early missions took place to investigate the situation of children affected by the conflict in Darfur and to Northern Uganda. There are now Guidelines for the Conduct of Investigations which the Committee has adopted.[67] They spell out the aims of missions, types of missions, the procedure for their conduct, and the need for independence and impartiality during the conduct of the mission, as well as the requirement of a report and follow-up after the mission. The guidelines confirm that missions can be requested by any person or body (eg an NGO) or initiated by the Committee itself.

Two examples of the recent conduct of missions by the ACERWC can be adduced.

In 2014, following on a request by a range of international NGOs and UN agencies concerned about the outbreak of conflict in South Sudan and in the Central African

64 ACERWC 22nd Ordinary Session (2013) ACERWC/GC/01.

65 ACERWC General Comment No 1 (2013) available at http://www.acerwc.org/download/general_comment_on_article_30_of_the_acrwc_english/?wpdmdl=8597.

66 Article 45(1) states that '[t]he Committee may resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from State Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter'.

67 Available at http://www.acerwc.org/download/acerwc_guidelines_on_the_conduct_of_investigation_missions/?wpdmdl=8668.

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Republic, the Committee undertook investigative missions to each of these regions. The missions were followed by a press conference in which the Committee's findings were aired, and a written report was published for each of the two tours, after submission to the AU Assembly of Heads of State and Government (as required by art 45(3) of the Charter). The mission reports can be accessed on the website of the Committee.[68]

In 2015, at the invitation of an NGO named Under the Same Sun, which deals with the rights of persons with albinism, the Committee undertook an investigative mission to the Lakes region of Tanzania. The aim was to gain firsthand information about the removal of children from families and communities, and their placement in temporary holding shelters, to protect them from attacks on their life and limbs, which had escalated alarmingly. The Committee report, which contains short, medium and long-term recommendations to address the plight of these children and to overcome the violence against children with albinism in society more generally, was presented to the AU Assembly of Heads of State and Government in July 2016.[69] As regards envoys, the ACERWC appointed a special rapporteur on child marriage in 2014 in support of the AU campaign to end child marriage.

14.4.6 Day of the African Child

Although the institution of the Day of the African Child (DAC) on 16 June predates the coming into operation of the Charter,[70] it now falls under the auspices of the ACERWC. Each year the ACERWC selects the theme for the following year[71] and commissions a concept note detailing the scope and ambit of the issues at stake related to that theme, which is then sent out to state parties six months before the events are planned for the celebrations. A wide variety of events characterise celebrations in countries around the continent, such as musical shows, plays, radio shows, conferences, marches and so forth.

68 Available at http://www.acerwc.org/investigation/missions-reports/.

69 ACERWC *Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters—Tanzania* (2016) available at http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694.

70 It was inaugurated by the then OAU while South Africa was still languishing under the throes of apartheid.

71 Topics covered so far have included 'Right to protection: stop violence against children' (2006), 'Combat child trafficking' (2007), 'Right to participate: let children be seen and heard' (2008), 'Africa fit for children: call for accelerated action towards their survival' (2009), 'Planning and budgeting for the wellbeing of the child: a collective responsibility' (2010), 'All together for urgent action for street children' (2011), 'The rights of children with disabilities: the duty to protect, respect, promote and fulfil' (2012), 'Eliminating harmful social and cultural practices affecting children: our collective responsibility' (2013); 'A child-friendly, quality, free and compulsory education for all children in Africa' (2014), 'Ending child marriage' (2015), and 'Conflict and crisis in Africa: protecting all children's rights' (2016); see Infohub of the African Child Policy Forum, available at https://app.box.com/s/vfr64bpfcvl3lmajk70zxos4tm9wasro.

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14.4.7 Interaction with NGOs and international NGOs, including observer status

The Committee has an expansive relationship, both formal and informal, with civil society organisations and with international NGOs and entities with AU liaison offices, such as the European Union. At a level of formal interaction, the ACERWC has followed the lead of the African Commission on Human and Peoples' Rights[72] in soliciting applications for observer status from NGOs concerned with the rights of the child in Africa. The committee has received more than 20 such applications and has recently revised its Guidelines for the Consideration of Observer Status.[73] NGOs with such status are given additional 'space' in committee meetings to raise issues pertinent to their work and that of the Committee.

The Committee has also welcomed the presentation of civil society reports to complement those submitted by states. Indeed, such civil society reports have been submitted in all but one instance thus far, mostly drafted by groups of civil societies working within a country, in the form of an ad hoc coalition. To facilitate the uniform preparation of such reports, and the timing of their presentation,[74] the ACERWC has drafted Guidelines on Complementary Reports, the Conduct of and Participation in Pre-Session of the ACERWC (2015).[75]

14.5 THE AFRICAN CHARTER AND SOUTH AFRICA

14.5.1 Reporting to the ACERWC

South Africa ratified the ACERWC on 7 January 2000, evidently despite some initial reluctance.[76] This reluctance stemmed from the inclusion of 'duties' of the child, and because of the explicit reference in the Charter to apartheid. There was, thereafter, a long delay in the submission of the initial report to the ACERWC (the initial report was due within two years of entry into force of the Charter: art 43(1)*(a)*). The initial report was finally submitted in November 2014. It must be noted, however, that although the initial report to the Committee on the Rights of the Child on the CRC had been submitted timeously in 1997, significant delays characterised the submission of the first periodic report to that Committee, such that a combined first, second and third periodic report was submitted only after the submission of the initial report to the ACERWC. The latter report was considered at the October 2016 session of the Committee on the Rights of the Child.

A combined report from South African civil society was considered by the ACERWC in April 2014, following upon which a list of issues was developed and

72 The monitoring body for the African Charter on Human and Peoples' Rights, based in Banjul, The Gambia.

73 See http://www.acerwc.org/download/criteria-for-granting-observer-status/?wpdmdl=9919.

74 At a pre-session of the Committee held six months before the state party report is considered, so as to enable the ACERWC to contextualise the state party report and to formulate a list of issues to which the state party must respond.

75 Available at http://www.acerwc.org/download/csos_reporting_guidelines_under_the_charter/?wpdmdl=8729.

76 Viljoen 'Why South Africa should ratify the African Charter on the Rights and Welfare of the Child' 1999 *SALJ* 116.

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directed to the Government of the Republic of South Africa to respond to. The government delegation was received by the Committee in October 2014. The delegation included the Deputy Minister of Social Development, the Deputy Minister of Police and representatives from a number of government departments, including the then Department of Women, Children and Persons with Disabilities (since disbanded), which had coordinated the drafting of the initial report, and the Department of Justice and Constitutional Development (as it then was termed). Children also formed part of the government delegation.

Concluding observations from the ACERWC were availed in January 2015. The Committee, whilst noting significant advances, such as the adoption of the Children's Act 38 of 2005, expressed numerous concerns. At a general level, it lamented the prevalence of violence, corruption, poverty and inequality, and a lack of adequate training for persons who work for and with children, all of which seriously impede children's enjoyment of their rights.[77] The Committee was concerned about ongoing disparity between rich and poor, and recommended that the state party address the income equality that exists between races, as well as between urban and rural communities, in particular through more effective pro-poor policies, and budgeting and expenditure that is sensitive to child rights.[78]

The ACERWC commented on the disestablishment of the Department of Women, Children and People with Disabilities, which had occurred after the 2014 general election. This body had been instituted to serve a coordinating function for the furtherance of children's rights. While noting that the state can exercise some level of margin of appreciation in establishing a 'permanent' overall coordinating mechanism to strengthen implementation and monitoring of the rights of children and increase the visibility of children in government, the Committee said that 'a coordination system that is not permanent, not stable, not effective, not high enough to decision making structure/office in a State, not participatory, and not adequately accountable stands a high chance of not contributing to the adequate realisation of child rights standards in the Charter'.[79] As a result, the Committee recommended that the state party should consider these factors in the establishment or designation of a new coordinating body.

As a further general response, the Committee recommended that the state party devise a more inclusive and participatory process to involve CSOs in the development and implementation of policies, laws, budgets and programmes that affect the realisation of children's rights. A final general recommendation was to the effect that South Africa should ensure more effective implementation of Charter rights by allocating the necessary budget for the promotion and protection of children's rights and ensuring its effective and efficient use, as well as by holding accountable officials who are involved in corruption.[80] Some further specific issues to which the Committee has responded are highlighted in the text above.

77 Concluding Observations: South Africa, para 6.
78 Concluding Observations: South Africa, para 9.
79 Paragraph 12.
80 Paragraph 7.

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14.5.2 ACRWC in South African jurisprudence

South African courts have increasingly cited the ACRWC as a source of authority for findings related to children's rights. *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*[81] dealt with art 21(1)*(b)* in the context of discrimination on the basis of sex. In *Minister for Welfare and Population Development v Fitzpatrick*,[82] the Constitutional Court cited the Charter in relation to the principle of the best interests of the child. In *AD v DW*[83] the principle of subsidiarity enshrined in art 24*(b)* of the African Charter was cited, with the court noting that it was couched in somewhat stronger terms than the equivalent CRC provision, namely that intercountry adoption should only be considered as 'the last resort'.[84]

In *TMC v TC*[85] the court cited art 4(1) of the Charter in support of a discussion of the best interests of children whose mother had removed them surreptitiously to another town pending a divorce action being launched. In *C v Department of Health and Social Development, Gauteng,*[86] the Constitutional Court quoted art 19(1) of the ACRWC to the effect that '[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'. In *S v De Villiers*[87] the court even quoted the ACERWC's General Comment No 1 (on Children of imprisoned mothers and primary caregivers).

This does not purport to be a complete list of cases in which the Charter has featured. However, it illustrates the reach of the ACRWC in the domestic legal system as a source of authority.

14.6 CONCLUSION

At the conclusion of the first 25 years of the existence of the ACERWC, the Committee commissioned a forward-looking review of the next 25 years in an attempt to crystallise an agenda for 2040. The final report and justification explaining the 10 goals chosen is entitled 'Africa's Agenda for Children 2040: Fostering an Africa Fit for Children'.[88]

The ten aspirations are the following:

(a) Aspiration 1: the African Children's Charter, as supervised by the African Children's Committee, provides an effective continental framework for advancing children's rights.
(b) Aspiration 2: an effective, child-friendly national legislative, policy and institutional framework is in place in all member states.
(c) Aspiration 3: every child's birth and other vital statistics are registered.
(d) Aspiration 4: every child is born alive and survives infancy.

81 2005 (1) SA 580 (CC).
82 2000 (3) SA 422 (CC).
83 2008 (3) SA 183 (CC).
84 Paragraph [12].
85 [2013] ZANCHC 25 (25 March 2013).
86 2012 (2) SA 208 (CC).
87 2016 (1) SACR 148 (SCA).
88 Available at www.acerwc.org.

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(e) Aspiration 5: every child grows up well-nourished and with access to the basic necessities of life.
(f) Aspiration 6: every child benefits fully from quality education.
(g) Aspiration 7: every child is protected against violence, exploitation, neglect and abuse.
(h) Aspiration 8: children benefit from a child-sensitive criminal justice system.
(i) Aspiration 9: every child is free from the impact of armed conflicts and other disasters or emergency situations.
(j) Aspiration 10: African children's views matter.

If these aspirations are even partly achieved, Africa will have become a better place for her children.

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