

Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count

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ABSTRACT: November 2017 marks the 18th anniversary of the coming into force of the African Charter on the Rights and Welfare of the Child, its transition from 'childhood' to 'adulthood'. The anniversary indeed offers an opportunity to reflect and take stock of the limited progress so far, and the work that remains to be done, in our collective efforts to create an African fit for children. Apart for discussing the 'slow start' the Charter faced, as well as reservations entered into it by few States, the piece focuses on three substantive issues that the Charter has added value on, namely, the definition of a child, child marriage, and children and armed conflict. The section that follows delves briefly into the core business of the African Committee, namely, consideration of State party reports, dealing with individual complaints, and conducting investigative missions. The piece concludes that, despite limitations, the Charter is not counting its days but making its days count.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Joyeux 18ème anniversaire à la Charte africaine des enfants: ne pas compter ses jours mais faire en sorte que ses jours comptent

RÉSUMÉ: Novembre 2017 marque le 18ème anniversaire de l'entrée en vigueur de la Charte africaine des droits et du bien-être de l'enfant, son passage de 'l'enfance' à 'l'âge adulte'. L'anniversaire offre en effet l'occasion de réfléchir et de faire le point sur les progrès limités jusqu'ici, et le travail qui reste à faire, dans nos efforts collectifs pour créer une Afrique convenable pour les enfants. Outre les discussions sur le 'démarrage lent' de la Charte, ainsi que sur les réserves émises par quelques Etats, cet article se concentre sur trois questions de fond sur lesquelles la Charte apporte une valeur ajoutée: la définition d'un enfant, le mariage des enfants et les enfants dans le contexte des conflits armés. La section qui suit décrit brièvement les principales activités du Comité africain, à savoir l'examen des rapports étatiques, le traitement des plaintes individuelles et la conduite de missions d'enquête. La pièce conclut que, malgré les limites, la Charte ne compte pas ses jours mais fait en sorte que ses jours comptent.

KEY WORDS: African Charter on the Rights and Welfare of the Child, implementation, child marriage, child soldiers, African Committee of Experts 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 (African Children's Rights Charter or Charter) came into force on 29 November 1999. The coming into force materialised a month after the 15th instrument of ratification was submitted to the then Organization of African Union (OAU, now the African Union (AU)). November 2017 thus marks the 18th anniversary of the Charter, counting from the years since it has come into force.

For children, and in children's rights discourse, 18th birthdays are very important. For an individual, 18 years marks, in the large majority of countries in Africa as well as globally, the age of the legal transition from childhood to adulthood. It is considered to be a time at which full legal autonomy is acquired. It is also often accompanied by full responsibility of the individual. In other words, it is a time that is often characterised by the assumption of acquiring maturity.

A stock-taking exercise of the various anniversaries of the Convention on the Rights of the Child (CRC), for instance its 18th as well as 25th anniversaries, have been undertaken by different stakeholders. These stakeholders include academics,¹ UN agencies,² and treaty bodies.³ A similar exercise by stakeholders in relation to the African Children's Rights Charter would assist to inform progress, but would also reflect on the work that remains to be done in maximising the potential of the Charter to contribute to the creation of an Africa that is fit for children.

Admittedly, it is not an easy task to determine causation, or establish a linear relationship, between the ratification of the African Children's Rights Charter by a State, on the one hand, and subsequent behavioural change in the form of law and policy reform, and the design and implementation of programmes, on the other. In the same streak, the link between the obligations to undertake 'other measures' (such as

¹ See, for instance, K Arts 'Twenty-five years of the United Nations Convention on the Rights of the Child: achievements and challenges' (2014) 61 *Netherlands International Law Review* 267-303.

² See, for instance, UNICEF '25 years of the Convention on the Rights of the Child: Is the world a better place for children?' (2014) available at https://www.unicef.org/publications/files/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf (accessed 10 October 2017)

³ See, for instance, Institut international des droits de l'enfant (IDE) and OHCHR '18 candles: The Convention on the Rights of the Child reaches majority' (2007) available at <http://www.ohchr.org/Documents/Publications/crc18.pdf> (accessed 10 October 2017).

institutional frameworks, or allocation of resources) in accordance with the provisions of the Charter and the recommendations provided to a State within the framework of Concluding Observations from a monitoring body,⁴ is not always apparent.

With this as a backdrop, an article of this nature can aim to assess the maturity or otherwise of the Charter, and explore its general contribution to the conceptualisation and implementation of children's rights in Africa. What has been the significant added value of the only child rights focussed regional instrument in the world in the last 18 years?⁵ What are some of the important developments in relation to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and its work on State party reporting, individual complaints, and investigations? What is the synergy of the Charter with the African human rights architecture, in particular with the African Commission on Human and Peoples' Rights (African Commission), and the African Court on Human and Peoples' Rights (African Court)? What are some of the main challenges faced in implementing the African Children's Rights Charter?

This piece, however, will be limited in scope. It will start with a discussion on the drafting, as well as 'slow start' the Charter faced. This is followed by a section that raises a few issues in relation to the ratification of the Charter, as well as reservations entered into it by a number of States. The next section focuses on three substantive issues that the Charter has added value on, namely, the definition of a child, child marriage, and children and armed conflict. The section that follows delves briefly into the core business of the African Children's Committee, namely, consideration of State party reports, dealing with individual complaints, and conducting investigative missions. Subsequently, some reflections on the future of the Charter as well as the work of the Committee is proffered in the form of concluding remarks.

2 A QUICK DRAFTING, LEADING TO A SLOW START?

The 1979 Declaration on the Rights and Welfare of the Child⁶ of the OAU served as a precursor to the African Children's Rights Charter. To a limited extent, the 1924 Geneva Declaration on the Rights of the Child⁷ and 1959 Declarations on the Rights of the Child have also served as a background in informing the content of the Charter.⁸

4 Such as the African Committee, or UN Committee on the Rights of the Child (CRC Committee).

5 Unfortunately, the search for a *travaux préparatoires*, or any background documents that chronicle the discussions that unfolded during the drafting and adoption of the Charter has proven elusive to date.

6 Available at www.chr.up.ac.za/chr_old/hr_docs/african/docs/ahsg/ahsg36.doc.

7 Available at <http://www.un-documents.net/gdrc1924.htm>.

8 Available at <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>.

However, the influence of these non-binding instruments on the African Children's Rights Charter pales in comparison when the extent to which the provisions of the CRC (not only what is contained in the CRC, but also what is not) have informed its content.

In fact, the idea for the African Children's Rights Charter was triggered as a spill-over of the negotiation process to adopt the CRC.⁹ In particular, the very limited number of African countries that were meaningfully involved in the drafting of the CRC stood as a concern.¹⁰ Therefore, in 1988, with the support of UNICEF, the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN)¹¹ convened a meeting that aimed to look at the draft CRC, and deliberate on the extent to which it covers peculiar issues that children in Africa were facing at the time.¹² The main recommendation of the meeting was the need to draft and adopt an Africa specific instrument on children's rights.

There is an adequate amount of literature interrogating¹³ and comparing the provisions of the Charter with the CRC.¹⁴ Suffice to mention that the issue of children living under apartheid,¹⁵ the involvement of children in armed conflict, the protection of refugees and internally displaced persons, the special vulnerability of the girl child including in relation to accessing education during and after

⁹ See, in general, D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal on Children's Rights* 157; BD Mezmun 'The African Committee of Experts on the Rights and Welfare of the Child: an update' (2006) 6 *African Human Rights Law Journal* 550. D Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127; J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in African context' in Alen *et al* (eds) *The UN Children's Rights Convention: theory meets practice* (2007) 81.

¹⁰ One of the reasons for a separate African Charter on the Rights and Welfare of the Child was that during the drafting process of the CRC, Africa was underrepresented. Only Algeria, Morocco, Senegal and Egypt participated meaningfully in the preparatory meetings. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument.

¹¹ More details on ANPPCAN available at <http://www.anppcan.org/>.

¹² P Ankut 'The African Charter on the Rights and Welfare of the Child: linking principles with practice' (2007/2008) available at <http://www.fairplayforchildren.org/pdf/1299577504.pdf> (accessed 10 October 2017).

¹³ See, for instance, B Thompson 'Africa's Charter on Children's Rights: a normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432; F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *CILSA* 199; F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C Davel (ed) *Introduction to child law in South Africa* 214.

¹⁴ See, for instance, O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underline and repeat the Convention on the Rights of the Child (CRC)'s provisions?: examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 143; BD Mezmun 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero sum game?' (2008) 23 *SA Public Law* 1; T Kaime *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective* (2009).

¹⁵ Article 26 of the Charter.

pregnancy,¹⁶ are some of the provisions added by the African Children's Rights Charter to the CRC.

The time that lapsed between the starting of the drafting and the adoption of the African Children's Rights Charter is only about two years. This can be seen as being a reasonably short amount of time especially as compared to the 10 years it took for the drafting of the CRC. This analysis is reversed when one compares the amount of time it took for the coming into force of the Charter (9 years) with the Convention (less than 1 year). There was no ratification of the Charter in 1990 and 1991, immediately after its adoption. The first ratification came in 1992 by Seychelles,¹⁷ and the 15th ratification, triggering the coming into force of the Charter, only happened 7 years later, in 1999.¹⁸

It is worth recalling that out of the first 20 countries that ratified the CRC, and led to its coming into force on 2 September 1990,¹⁹ only Sweden is a developed country. Others were developing countries. Half of the 20 State parties on that list are African countries: Egypt, Ghana, Guinea, Guinea Bissau, Mauritius, Niger, Senegal, Sierra Leone, Sudan, and Togo. In addition, the largest number of first signatories of the CRC, on 26 January 1990, were African countries:²⁰ Burkina Faso, Gabon, Guinea Bissau, Kenya, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, and Togo.²¹ However, most of these African countries did not show the same level of enthusiasm towards the African Children's Rights Charter.

If indeed the Charter reflected the peculiar concerns of African countries in relation to children, why did it then take 9 years, from 1990-1999, to receive the 15 ratifications needed for the Charter to come into force? For the purpose of comparison, it is worth noting that the African Charter on Human and Peoples' Rights was adopted in 1981 and came into force in 1986, just after 5 years.

There is neither any one answer, nor a way to conclusively identify the reason(s) for such a delay. However, it is possible, but also important, to tender a few possible explanations. The short time it took for the drafting of the African Children's Rights Charter might have limited the level of awareness about its existence among States in Africa. There is anecdotal evidence that some States confused it with the CRC, and assumed that they have either ratified or are in the process of ratifying it. Moreover, the extent to which UNICEF²² has been able to allocate resources to advocate for the ratification of the

¹⁶ Article 11(6) of the Charter.

¹⁷ On 13 February 1992.

¹⁸ In accordance with article 47(3) of the Charter which states that '[t]he present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

¹⁹ Article 49(1) of the Convention.

²⁰ See, United Nations Treaty Collection, available at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11&chapter=4&clang=_en (accessed 10 October 2017).

²¹ As above.

²² Which is the official custodian of the CRC.

Charter is not clear. The same can be said of ANPPCAN, and other CSOs in Africa. While there is a systemic practice of advocating for the ratification by the AU Office of Legal Counsel (OLC) including during AU Summits, it is doubtful if such a practice existed in the 1990s. Since the African Children's Committee was created only in 2002, it did not get the chance to play any role in lobbying for ratification in the 1990s. If the reason for the delay for ratification resulted from African countries harbouring doubts about some of its contents, it would have led to a significant number of reservations upon ratification, which, as is shown in the next section, was not really the case. It is important that current and future engagements and plans aimed at reaching universal ratification of the Charter will need to take some of this information on board.

3 THE COMMITMENT TO BE BOUND: RATIFICATIONS, AND RESERVATIONS

As at October 2017, the ratification of the Charter stands at 48 countries. The latest ratification of the Charter, in July 2016, was by the Central African Republic.²³ Subsequently, between August 2016 and January 2017, there remained 6 countries that have not ratified the Charter. These countries are the Democratic Republic of Congo (DRC), Saharawi Republic, São Tome and Principe, Somalia, South Sudan, and Tunisia. In January 2017, with the re-admission of Morocco into the AU, this list of countries increased to 7. With the exception of Morocco, all 6 countries have signed the Charter, and have received a promotional visit by the African Children's Committee, advocating for ratification.

A number of systemic efforts are exerted to urge ratification of the Charter. For instance, the African Committee has undertaken promotional missions to advocate for ratification of the Charter to Tunisia (2013), to Saharawi Republic (2014), to DRC (2015), and to São Tome and Principe (2016). A long list of subsequent decisions of the AU Executive Council urge member States that have not ratified the Charter to do so.²⁴ The Secretariat of the African Committee regularly sends *note verbales* to States as a reminder about ratification. In 2013, the African Children's Committee started a two years campaign aimed

²³ Available at https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf (accessed 10 October 2017).

²⁴ See, for instance, EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child (ACERWC) – Doc. EX.CL/858(XXV) (2014); EX.CL/Dec.923(XXIX) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Doc. EX.CL/977(XXIX), (2016); EX.CL/Dec.977(XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc. EX.CL/1033(XXXI) (2017).

at accelerating ratification and reporting.²⁵ A theme of the Day of the African Child (DAC) focussing on the same topic has also been commemorated in 2015. It is hoped that all these and other efforts would bring about a universal ratification of the Charter in the foreseeable future.

It still begs the question, if indeed, the African Children's Rights Charter is an African fingerprint on children's rights, why then is there not a universal ratification after 18 years of the coming into force of the instrument? Why was it a challenge for Somalia and South Sudan, the two countries that ratified the CRC more recently, to undertake a parallel ratification process for the African Children's Rights Charter? Why is Tunisia, whose government announced in 2013 that it will ratify all AU human rights instruments, taking too long to ratify the Charter?

Ratification of the Charter without reservations is also critical for the enjoyment of all the rights in the Charter by all children. African countries, in general, are not known for the practice of entering many reservations to both regional and international human rights treaties. It is therefore no surprise that the number of countries that entered a reservation to the African Charter is limited. These countries are Botswana (reservation on Article 2 on the definition of a child),²⁶ Egypt (reservations on child marriage,²⁷ adoption,²⁸ children of imprisoned mothers,²⁹ and on the mandate of the Committee to receive communications and undertake investigative missions³⁰), Mauritania (on the right to freedom of religion),³¹ and Sudan (on the right to privacy,³² on the education of children who fall pregnant,³³ and child marriage³⁴).

While the number of reservations entered by State parties is relatively small, it is notable that the majority of the reservations entered by the four State parties can be considered to be far reaching, thereby placing serious limitations on the enjoyment of rights under the Charter. In fact, some of these reservations appear to be against the object and purpose of the Charter. For example, Botswana's reservation challenges the very core, scope of application, as well as added value of the Charter. Moreover, Egypt's reservations to articles 44 and 45 of the

²⁵ In EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV), para 3, the Executive Council of the AU 'Welcomed the Committees campaign on the Universal Ratification of and Reporting on the implementation of the African Charter on the Rights and Welfare of the Child which builds towards the 25th anniversary of the adoption of the Charter in 2015.

²⁶ Article 2 of the African Children's Rights Charter.

²⁷ Article 21(2) of the African Children's Rights Charter.

²⁸ Article 24 of the African Children's Rights Charter. Notably a similar reservation that the government of Egypt entered into in the CRC has already been withdrawn.

²⁹ Article 30 of the African Children's Rights Charter.

³⁰ Articles 44 and 45 of the African Children's Rights Charter.

³¹ Article 9 of the African Children's Rights Charter.

³² Article 10 of the African Children's Rights Charter.

³³ Article 11(6) of the African Children's Rights Charter.

³⁴ Article 21(2) of the African Children's Rights Charter.

Charter is jurisdictional in nature, and deprives the African Children's Committee from exercising its mandate in full. Even though the question of who has the mandate to decide on the validity or otherwise of reservations entered into human rights treaties is still not settled,³⁵ there are few examples that suggest that the African Committee should be able to exercise such a mandate in relation to the Charter.³⁶

In relation to Egypt's reservations under articles 44 and 45, it is questionable if reservations on procedural/jurisdiction related provisions of a human rights instrument are generally permitted.³⁷ In addition, an argument can also be made that, as the practice in the UN human rights treaty making process establishes, where States would like to make a communication procedure optional, such a procedure is often introduced through an 'Optional Protocol' which would be a separate treaty from the 'mother' instrument.³⁸ However, in the case of the African Children's Rights Charter, individual complaints and the mandate to undertake investigative missions is in-built in the Charter. It can also be contended that the object and purpose of the African Children's Rights Charter, which in general is to promote and protect the best interests of children in all actions in Africa, as provided for in Article 4 of the Charter, is directly linked to its individual communications process and investigations procedure, which, in the absence of effective domestic remedy, serve as a recourse.³⁹

In a number of occasions, the Executive Council of the AU has asked State parties that have entered reservations on the application of the provisions of the Charter to consider the withdrawal of such reservations. This was done, for instance in 2014,⁴⁰ and in 2016.⁴¹ In a marked departure from these and other related previous decisions,

³⁵ See, in general, I Ziemele and L Liede 'Reservations to human rights treaties: from Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 *The European Journal of International Law* 1135; L Helfer 'Not fully committed?: reservations, risk, and treaty design' (2006) 31 *Yale Journal of International Law* 367.

³⁶ See, for instance, General Comment No 24 of the United Nations Human Right Committee which considered itself to have the mandate to review the reservations entered into the ICCPR. See too the case of *Loizidou v Turkey*, ECHR (1995) Series A, No 310 and the case of *Belilos v Switzerland*, ECHR (1988) Series A, No 132.

³⁷ In the case between *Loizidou v Turkey*, the European Court of Human Right held that States may not make a reservation in relation to an Article of the Convention that does not deal directly with substantive rights and freedoms, but instead with procedural or formal matters.

³⁸ See, for instance, the CRC, the International Covenant on Civil and Political Rights, and International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, and the Convention on the Elimination of Discrimination against Women, all of which provide for an optional protocol that establishes the individual complaints as well as investigation/inquiries mechanisms under each treaty.

³⁹ As General Comment 24 of the Human Rights Committee noted, reservations that purport to evade an essential element, such as monitoring implementation of human right instrument in the design of that instrument, which is also directed to securing the enjoyment of the rights, are incompatible with its object and purpose of that treaty. For the Human Rights Committee's General Comment 24, see UN Doc. CCPR/C/21/Rev.1/Add. 6 (1994), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en.

⁴⁰ EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV), para 3.

during the 28th AU Summit in Addis Ababa in June/July 2017, the Executive Council emphasised the 'right of Member States to formulate reservations on the African Children's Rights Charter in accordance with the relevant international laws, particularly the Vienna Convention on the Law of Treaties of 1969'.⁴² Despite this decision, there can be comfort in that article 19(c) of the Vienna Convention on the Law of Treaties prescribes that reservations incompatible with the object and purpose of a treaty are invalid.⁴³ As a result, it is difficult to make a legally valid argument to uphold some of the current, and potential future reservations to the African Children's Rights Charter. In moving forward, these and related issues on reservations need to be addressed by the African Children's Committee, in consultation with State parties.

4 EXAMPLES OF SUBSTANTIVE PROVISIONS

This section highlights three provisions of the African Children's Rights Charter that have added value to the implementation of children's rights in Africa. These provisions are article 2 on the definition of a child, article 21(2) on child marriage, and article 22 on children and armed conflict. The effort is not to undertake an exhaustive analysis of these provisions, but to shed some light on what their strengths have been so far, and where appropriate, offer proposals on how the conceptualisation, interpretation and implementation of these provisions can be improved.

4.1 Definition of a child

It would be incomplete to discuss children's rights in connection with a child rights instrument, without first establishing who a child is. After all, the scope of application of the African Children's Rights Charter is linked to the definition of a child. It is rightly argued that age is a criterion that can help to escape the ambiguities and contradictions of other definitions of a child, as it gives predictability regarding which rule or provision will apply to whom.⁴⁴

Article 2 of the African Children's Rights Charter offers a clear and concise definition of the child as 'every human being under 18 years' of

⁴¹ EX.CL/Dec.923(XXIX) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc. EX.CL/977(XXIX), para 3.

⁴² EX.CL/Dec.977(XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc. EX.CL/1033(XXXI), para 5. Article 2(1)(d) of the Vienna Convention on the Law of Treaties, allows State parties to international treaties to place reservations on provisions of a treaty they ratify or accede to.

⁴³ Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969.

⁴⁴ See M Grahn-Farley 'A theory of child rights' (2003) 57 *University of Miami Law Review* 867.

age. In addition, unlike the CRC provision,⁴⁵ there are no limitations or attached considerations, so that it may be applied to as wide-ranging a number of children as possible. It contains no loopholes relating to exemptions for national law that undercut the guarantee of universal rights for all children without distinction.⁴⁶

It is promising to witness that some of the law reform efforts on the African continent reflect the impact of the African Children's Rights Charter on standard-setting exercises at the national level. In this respect, the definition of a child is one example.⁴⁷ Apart from ordinary law, a number of constitutions too have emulated article 2 of the Charter.⁴⁸ These include the South African Constitution of 1996,⁴⁹ the 1995 Constitution of Uganda,⁵⁰ the 2011 Transitional Constitution of the Republic of South Sudan,⁵¹ the 2010 Constitution of Angola,⁵² the 2010 Constitution of Kenya,⁵³ and despite non-ratification of the Charter, the 2012 Provisional Constitution of the Republic of Somalia.⁵⁴ The choice of age 18 in the African Children's Rights Charter can be perceived to have contributed to the construction of a uniform identity of the child⁵⁵ without exposing persons below the age of 18 to different, and sometimes low level, protections under traditional, religious, or customary laws.

⁴⁵ This provision is ambiguous and weak, lacking specific protection within the African context in order to take into account child betrothals, child participation in armed conflict and child labour.

⁴⁶ See S Grover 'On recognizing children's universal rights: what needs to change in the Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 260.

⁴⁷ The constitutions of South Africa and the Democratic Republic of Congo, for example, follow the ACRWC's definition of a child without exception – that is, as persons under the age of 18 years. Furthermore, in Nigeria, where the 1943 Children and Young People's Act classified only those people under 17 years as juvenile offenders, the Child's Rights Act of 2003 rectifies this and puts the age at 18. A similar problem transpires under Chapter 44 of the Children and Young Persons Act of 1945 of Sierra Leone and will most likely be addressed when the Child Rights Bill becomes an Act. Egypt adopted a Children's Code in 1996 that regulates the duties and functions of institutions providing juvenile justice services to children and applies to all persons under the age of 18. In addition, it is interesting to note that although Morocco is not a party to the African Children's Rights Charter, under Law no 11 of 1999, which amends and supersedes section 446 of the Penal Code, a child is defined as a person under the age of 18. In section 2, the Kenyan Children's Act specifically defines a 'child' as any person under the age of 18 years. The adoption of the definition of a child with no exception (in consonance with the African Children's Rights Charter) is not without practical advantage in the lives of African children, as it helps to extend the protection of the rights under the Charter and the CRC to a larger group of persons and to the maximum extent possible.

⁴⁸ Violations of article 2, albeit very limited, are also present. In Namibia, the 1998 Constitution reads in article 15(2) that '[f]or the purposes of this paragraph child shall be under the age of sixteen (16) years'.

⁴⁹ Section 28(3).

⁵⁰ Article 257(c).

⁵¹ Article 17(4).

⁵² Article 24 of the Constitution states that 'the age of majority shall be 18'.

⁵³ Article 260.

⁵⁴ Article 29(8).

⁵⁵ There are a number of places in the world where children are governed by customary law that does not define childhood by reference to numerical age.

The added value of article 2 has not only been in relation to proactive and 'voluntary' measures undertaken by State parties to align their laws and practice. Article 2 has also started to be used in enforcing the obligation of State parties under regional human rights law. For instance, as provided in more detail below,⁵⁶ article 2 was used to convince (some would prefer to say 'coerce') the government of Malawi to amend its Constitution⁵⁷ by raising the definition of a child from 16 years to 18 years.

A regional standard that helps to align the definition of a child also facilitates protection of children across various jurisdictions in a region. In other words, a person that is considered to be a child in a particular jurisdiction benefits from the same status as a child in another jurisdiction within the region. This is important in particular in the context of international migration, trafficking, and intercountry adoption.

However, it is also important to highlight the few limitations that an interpretation of article 2 needs to address concretely. While article 2 indicated the end of childhood, the beginning of childhood, and its implications and interactions in relation to sexual and reproductive health rights, including abortion, should benefit from some guidance. Moreover, article 2 should not only be seen as prescribing age, but emphasis should also be placed on the use of the term 'child'. In a discourse where different terms such as 'youth', 'young person', 'minor', 'infant', 'juvenile', 'nubile', 'toddler', and even 'kid' are used, it is critical that legislation provides an overarching definition of a person below the age of 18 as a 'child'.

Moreover, in the context of the CRC, it has been observed that the 'Convention provides a framework of principles; it does not provide direction on the specific age, or ages, at which children should acquire such rights'.⁵⁸ The same can be said of the Charter, which might explain the wide state of influx in minimum ages on the continent. While determining whether a minimum age for a particular purpose (such as criminal responsibility, consent to medical treatment, surgery, sexual consent, standing in court, entering into contracts, the end of compulsory education etc) is congruent with the letter and spirit of the CRC is not simple,⁵⁹ such minimum ages should also pay attention to best interests, non-discrimination, as well as 'the evolving capacities of the child' principle.⁶⁰

⁵⁶ See sec 5.2 below.

⁵⁷ Sec 23(5) of the Constitution of Malawi.

⁵⁸ R Hodgkin and P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 4.

⁵⁹ Although, ages such as the minimum age for criminal responsibility has been established by the CRC Committee to be 12, see CRC Committee, General Comment 10 (2007) para 33 in this regard.

⁶⁰ See article 5 of the CRC.

4.2 Child marriage

Closely linked with the definition of a child is the issue of child marriage, a phenomenon that continues to pose a serious human rights challenge to the African continent. Article 1(3) of the African Children's Rights Charter, captioned '[o]bligation of State Parties', sets the initial tone with which State parties to the Charter should address harmful practices. It reads that '[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged'. While the obligation to 'discourage' is indeed an obligation of a very limited scope, the specific provision on harmful practices in article 21 elevates the nature of obligations that State parties have under the Charter in relation to harmful practices.

Article 21 of the Charter, entitled '[p]rotection against harmful social and cultural practices', states in full:

1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) those customs and practices prejudicial to the health or life of the child; and
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

By virtue of articles 1(3) and 21, the drafters of the Charter have provided solid ground upon which efforts to address harmful practices, in particular child marriage, can and should be undertaken. In fact, the only place in the Charter where the words 'effective action' is used is in relation to the obligation to child marriages in article 21(2). The provision acknowledges that while legislation is an important element in prohibiting and preventing child marriages and betrothals, it is not an end in itself. This appears to be the main reason why article 21(2) reads by saying 'including legislation'.

There are three critical elements underscored by article 21(2). First, the efforts of State parties should not only be towards prohibiting child marriages, but also betrothals, also known as 'promise marriages'. Moreover, these efforts should not only be about girls, which notably constitute most of the global child marriage population but should also be applicable to boys. It is also notable that the Charter avoids the two rather confusing notions, namely, 'early marriage' and 'forced marriage'. As a result, the consent of a child for child marriage is not relevant and would still constitute a violation of article 21(2) is undertaken by a child, by definition a person below the age of 18, as provided for under article 2 of the Charter.

Secondly, specifying the minimum age for marriage to be 18 years for both boys and girls is not an issue that the Charter leaves room for negotiation. The use of the instructive 'shall' in relation to specifying the minimum age at 18 years is a testament to this assertion.⁶¹ This stands in clear contrast with the Joint General Recommendation 31/Comment of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices (2014). In this Joint General Recommendation/Comment an exception to the age 18 is provided.⁶²

Thirdly, the requirement to make 'registration of all marriages in an official registry compulsory' is relevant from both the prevention and addressing of child marriages. Official registries for marriages usually have in-built age verification processes. This requirement is also critical for the African continent whereby religious (such as Christian, Muslim and Hindu marriages), and customary/traditional marriages are recognised by the laws, sometimes the Constitutions, of State parties to the African Children's Rights Charter.⁶³ For instance, as an anecdote, a mission to Niger⁶⁴ in 2016 by the Special Rapporteur of the African Union on Ending Child Marriage has been informed that the requirement by the municipal officials asking the bride and groom to kiss in public during the marriage ceremony has been identified as a barrier for the formal registration of marriages. It should be viewed as falling within the obligation to undertake 'all appropriate measures' that such barriers as the requirement to kiss in public be addressed with a view to encourage registration of all marriages as required by the Charter.

The notable impact of article 21 has been to spur legislation on the continent prohibiting and addressing child marriage,⁶⁵ even though legislative standards that still leave room for exceptions for marriage to

⁶¹ The so-called 'love marriages', where children themselves decide to marry, finds no solace in the provisions of the Charter.

⁶² The relevant part, para 20 of the Joint General Recommendation/Comment reads '[a]s a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age 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 culture and tradition'.

⁶³ Since what is required is the mere registration, and not necessarily a requirement to conduct all marriages through the formal state non-religious or non-traditional manner, it still accommodates those cultural or religious diversities prevalent throughout the continent.

⁶⁴ Notably, Niger has one of the highest numbers of child marriages on the continent.

⁶⁵ See, for instance, Egypt, the Child Law 126 (2008) article 31; Eritrea, Transitional Civil Code article 581 as amended by article 46 of Proclamation 1/1991; The Gambia, The Children's Act (2005), sections 2(1) and 24; Ghana, Children's Act (1998) includes in section 13 the right not to be betrothed, be a subject of a dowry transaction, or be married, while below the age of 18.

be undertaken below the age of 18 remain in some jurisdictions.⁶⁶ To assist in addressing these efforts, the African Children's Committee, together with the African Commission, is finalising a Joint General Comment on ending child marriage in Africa. On the basis of the Charter provisions, two significant initiatives of the African Union that are relevant in the context of child marriages have been launched and rely heavily on the relevant provisions of the African Children's Rights Charter. The first one is the African Union Campaign on Accelerated Reduction of Maternal Mortality in Africa. The second one is the AU Campaign on Ending Child Marriage in Africa.

It is also critical to highlight, the extent to which article 21 of the Charter is proving instrumental in court decisions on the African continent. In 2015, in *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*, the Constitutional Court of Zimbabwe found child marriage to be a violation of the Zimbabwe Constitution of 2013.⁶⁷ The Zimbabwean Constitutional Court relied heavily on article 21(2) of the African Children's Rights Charter in declaring that it has 'direct effect', and that section 22 of the Marriages Act,⁶⁸ which allows for child marriage is unconstitutional.⁶⁹ The High Court of Tanzania also issued a judgment on a similar case, where it declared that sections 13 and 17 of the Law of Marriage Act⁷⁰ are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys (which provides for the possibility of girls to marry at the age of 14 with the consent of the court, and at the age of 15 with the consent of their parents) and that they have lost their usefulness and deserve to be declared null and void.⁷¹

⁶⁶ Examples include cases in which guardians, a minister, a heads of state/government have the legal authority to consent to marriage of children especially girls in accordance with customary or statutory law. See for instance Guinean Children Code (2008) (Loi L/2008/011/AN) article 268; Kenya, The Hindu Marriage and Divorce Act Chapter 157, Revised edition 2008 (1984) article 3(1); and Madagascar, Family Code Law No 2007-022, 20 (2007) article 3.

⁶⁷ For a review of the case, see J Sloth-Nielsen and K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: a review' (2015) 15 *African Human Rights Law Journal* 554.

⁶⁸ Chapter 5:11.

⁶⁹ Sloth-Nielsen and Hove (n 67 above) 561.

⁷⁰ Cap 29 R.E. 2002.

⁷¹ See Girls Not Brides 'High Court judgement in Tanzania rules age of marriage laws discriminatory and unconstitutional' (13 July 2016) available at <https://www.girlsnotbrides.org/high-court-tanzania-child-marriage/>; Human Rights Watch 'Tanzania needs to renew commitment to ending child marriage' (11 October 2016) <https://www.hrw.org/news/2016/10/11/tanzania-needs-renew-commitment-ending-child-marriage>.

4.3 Children and armed conflict

The impact of armed conflict on children is staggering.⁷² Aware of the significant importance of the subject of children and armed conflict, the African Children's Committee dedicated its first continental report to this topic.⁷³ In the last decades, the use of child soldiers by both government forces and armed groups in African countries has been witnessed and condemned by the international community.⁷⁴

Among the reasons that required the adoption of the African Children's Rights Charter was the use of children as soldiers and the need to institute a minimum age of 18 for military service.⁷⁵ Under article 22(2), the African Children's Rights Charter prohibits the recruitment and use of children under 18 in both international and internal armed conflicts and requires states to 'take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.' Unlike the CRC and the Optional Protocol, it adopts a 'straight 18' position. Moreover, the rule on the protection and care of children who are affected in armed conflict also applies 'to children in situations of internal armed conflicts, tension and strife'⁷⁶ has its own appeal.

By adhering to 18, it is not implied that someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age.⁷⁷ Rather, it is necessary for international law to grant comprehensive protection for all persons under the age of 18 years who are deemed to be in need of protection. Under the African Children's Rights Charter, the obligation that a State undertakes is 'to take all necessary measures to ensure' that no child takes a direct part in

⁷² See UNICEF *25 Years of the Convention on the Rights of the Child: Is the World a Better Place for Children?* (2014) 9 which highlights that '[a]lthough the number of armed conflicts around the world has decreased from a peak of 52 in 1991 to 33 in 2013,5 the new century has already seen major conflicts in Afghanistan, Iraq and the Syrian Arab Republic, among other countries. In a world in which more than 1.5 billion people are experiencing political and social instability or large-scale criminal violence, there is no climate of peace and certainly no peace dividend'.

⁷³ African Children's Rights Committee 'Continental Study on the impact of conflict and crises on children in Africa' (2016) available at <http://www.acerwc.org/download/continental-study-on-armed-conflict-and-crisis-on-children/?wpdmdl=10007> (accessed 10 October 2017).

⁷⁴ For example, the UN Security Council (UNSC) passed a number of resolutions condemning the use of child soldiers. These include resolution no. 1261 (1999), 1314 (2000) and 1539 (2004).

⁷⁵ L Muthoga 'Introducing the African Charter on the Rights and Welfare of the 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) as cited in F Viljoen 'The African Charter on the Rights and Welfare of the Child' (2000) in CJ Davel (ed) *Introduction to child law in South Africa* 219.

⁷⁶ Article 22(3) of the African Children's Rights Charter.

⁷⁷ M Gose *The African Charter on the Rights and Welfare of the Child: an assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 28.

hostilities and refrain in particular, from recruiting any child.⁷⁸ This should also cover children who are involved in non-combatant status but in the meantime are at the risk of real danger.

While the reference 'constitutional processes' in article 1 of the Charter is not interpreted by the African Committee to mean an obligation to constitutionalise the provisions of the Charter, constitutionalisation of children's rights is often welcome. In this respect, in Central African Republic, the 1994 Constitution and in Burundi the February 2005 Constitution⁷⁹ provide the age of 18 as minimum age to join armed forces. Subsidiary legislation setting a minimum age for military service at 18 is also in abundance.⁸⁰ However, out of about 50 States globally (mostly in the north⁸¹) that allow under-18s to join the armed forces of a State,⁸² some are African countries.⁸³

Despite some of the progress, according to the Special Representative of the Secretary General on Children and Armed Conflict (SRSG), the current state of affairs in relation to children and armed conflict still leaves much to be desired. According to the SRSG, as at 2016, there were about 59 parties to a conflict at the global level involved in 14 countries that are listed in the SRSG's report's annexes.⁸⁴

⁷⁸ Article 22(2) of African Children's Rights Charter.

⁷⁹ Article 45 of the African Children's Rights Charter.

⁸⁰ In Madagascar, by way of example, the minimum age of recruitment for national service has been raised to 18 years by Act No. 2005-037 of 20 February 2006. In Zimbabwe, in terms of the National Service Act [Chapter 11:08] persons can volunteer to join the army only at the age of 18 years. In Malawi, a new Defence Force Act came into force in September 2004, replacing the earlier Army Act, which removed any possibility of under-18s serving in the Defence Force (previously the Malawi Army). The Act provided that the Defence Force had three components: the regular Defence Force, the Defence Force reserve and the militia. In Algeria, while the age for voluntary recruitment is unclear, the National Service Code makes explicit reference that the age for conscription into the regular armed forces is set at 19 years of age. In Angola, under Law 1/93, military service was compulsory for all men aged between 20 and 45, and voluntary recruitment is set at 18 years of age. The Botswana Defence Force Act of 1977 provided that recruitment to the armed forces was on a voluntary basis and that recruits had to appear to be 18. In Comoros military recruitment is governed by law No. 97-06(AF), which provides that the minimum age for entrance into the armed forces is 18. In Burkina Faso Decree No. 2000- 374/PRES/PM/DEF of 1 September 2000 allowed for recruitment from the age of 18, provided that the recruit was unmarried and enjoying full civic rights.

⁸¹ US, and the UK, as well as some countries in Eastern Europe and Asia.

⁸² Child Soldiers International 'The Issue' (2016) available at <https://www.child-soldiers.org/where-are-there-child-soldiers> (accessed 10 October 2017).

⁸³ For instance, Seychelles, despite being a State party to the African Children's Rights Charter still maintains the possibility of under 18s being recruited into the armed forces as its Defence Act does not explicitly prohibit the enlistment of any person under the age of 18 years. In fact, it explicitly allows for the possibility for under 18s to join its armed forces on a voluntary basis. In Cape Verde, in accordance with Article 31 of Legislative Decree No. 6/93 of 24 May 1993, the minimum age for special voluntary recruitment into the Cape Verdean armed forces is 17 years. In Chad-the 1992 General Statute of the Army provided that a person under the age of 18 could be enrolled with the consent of a parent or guardian.

⁸⁴ SRSG CAAC '20 years of the children and armed conflict mandate' (August 2016) available at https://childrenandarmedconflict.un.org/wp-content/uploads/2016/08/Children-in-Conflict_WEB.pdf 5 (accessed 10 October 2017).

Out of the 59 parties, while the largest majority are non-State armed groups, eight are government forces.⁸⁵ Out of this, 5 were Africa States namely Central African Republic, Mali, Somalia, South Sudan, and Sudan.⁸⁶ In 2017, Central African Republic was delisted.

The African countries where armed groups recruit children below the age of 18 are the Central African Republic, the Democratic Republic of Congo, Mali, Nigeria, Somalia, South Sudan, and Sudan.⁸⁷ There seems to be a correlation between the recruitment of children by armed forces and by armed groups. The SRSG also indicates that the abductions of children in the context of armed conflict is a continuing problem in Africa, and in fact increasing in few contexts, particularly by the Lord's Resistance Army (LRA), *Al-Shabaab*, *Boko Haram*, and Islamic State in Iraq and the Levant (ISIL).⁸⁸

There are a number of issues that the interpretation of the African Children's Rights Charter by the African Committee can add value to the promotion and protection of the rights of children in the context of armed conflict. For instance, the arrest and detention, and in some instances torture and ill treatment of children that are accused of association with terrorist organisations or terrorist activities, needs closer scrutiny if the enjoyment of the rights in the Charter are to be realised by all. Prevention detention, used under the guise of protecting children from joining terrorist organisations such as *Boko Haram*, and ISIL has led to arrests of children in Cameroon, Nigeria and Libya.⁸⁹ The use of children for suicide bombing has been flagged as one of the issues in need of attention especially in the context of *Boko Haram* and *Al-Shabaab* activities. For instance, it has been reported that there has been an increase of suicide bombings carried out by children in Cameroon and Nigeria in the context of the *Boko Haram* violence.⁹⁰

Another issue worthy of exploration relates to the denial of humanitarian access, including its use as a weapon of war and its relationship with children's rights. Activities of this nature have reportedly increased, for instance, in the context of the conflict in South Sudan.⁹¹ It begs the question how the provisions of the Charter, especially articles 22 and 5, as well as relevant standards from

⁸⁵ As above.

⁸⁶ As above.

⁸⁷ Child Soldiers International (n 82 above).

⁸⁸ SRSG CAAC 'Annual report of the Secretary General on children and armed conflict' (20 April 2016) (A/70/836-S/2016/360) available at http://www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E para 9 (accessed 10 October 2017).

⁸⁹ Child Soldiers International 'Submission to the 75th Pre-session of the UN Committee on the Rights of the Child: Cameroon' (August 2016) available at <https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=19c99637-7122-4356-927e-4748db4d617f> (accessed 10 October 2017).

⁹⁰ UNICEF, 'Nigeria regional conflict: 10-fold increase in number of children used in 'suicide' attacks', 12 April 2016, available at http://www.unicef.org/media/media_90827.html (accessed 10 October 2017).

⁹¹ SRSG CAAC 'Annual report of the Secretary General on children and armed conflict' (24 August 2017) (A/72/361-S/2017/821) available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2017/821 para 152 (accessed 10 October 2017).

international humanitarian law, should be interpreted and applied. Moreover, the relative success or lack thereof of the Charter can also be measured by the extent to which its provisions and their interpretation have an impact on non-state armed groups, and are also applied in instances of extraterritoriality including sexual exploitation and abuse by peacekeepers. Other areas in need of further interpretative guidance include the relevance of the provisions of the Charter in reducing the impact of violent extremism on children, children displaced by armed conflict, and attacks on schools and hospitals. It is important that the work of the African Children's Committee address these issues in the foreseeable future.

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

The African Children's Rights Charter established the African Committee with the mandate to promote and protect the rights established by the Charter.⁹² The African Children's Rights Committee has the power to consider State party reports as well as individual and inter-state communications, which presumably gives additional teeth to its provisions.⁹³

5.1 State party reporting

One of the central obligations of State parties under the African Children's Rights Charter is to submit initial and periodic reports.⁹⁴ Part of the core businesses of the African Committee is to consider such reports and provide Concluding Observations. While initial reports are due two years after the entry into force of the Charter for the State party concerned,⁹⁵ and periodic reports are due every three years thereafter,⁹⁶ the Committee considered its first reports only in 2008.⁹⁷

Despite such a slow start, the reporting process has garnered some traction. As a result of the momentum, in 2014, the Committee held its first extraordinary session dedicated for the consideration of State party reports. To date, the number of States that have reported has increased to 36. In fact, six countries have reported twice,⁹⁸ and Burkina Faso stands out as the only State that has reported three times.

⁹² Article 32 of the African Children's Rights Charter.

⁹³ Articles 44 and 45 of the African Children's Rights Charter.

⁹⁴ Article 44(1)(a) of the African Children's Rights Charter.

⁹⁵ As above.

⁹⁶ Article 44(1)(b) of the African Children's Rights Charter.

⁹⁷ The initial reports of Egypt and Nigeria.

⁹⁸ Cameroon, Kenya, Nigeria, Rwanda, South Africa and Tanzania.

There still remain 11 State parties with overdue reports,⁹⁹ and Central African Republic's initial report will be due in August 2018.

While the Rules of Procedures of the Committee make provision for the consideration of the situation of children's rights in a State party in the absence of a State party report, the Committee seems to have preferred not to invoke such a rule but rather engage and support State parties to report. Such an approach is reflected in the most recent AU Executive Council report, in which it asked the Committee to continue to support the efforts of State parties that have not reported to enable them to report.¹⁰⁰

To date, the great majority of reports submitted by States are of good quality and the engagement during the constructive dialogue has often been composed of high level and multi-sectoral members of delegation. The submission of complementary reports by CSOs has also informed both the dialogue as well as the contents of concluding observations. What is in need of further improvement include an engagement with national human rights institutions around reporting and follow up, consolidation of the method and process of the follow up to implementation of Concluding Observations conducted by the Committee, as well as the extent to which the recommendations contained in concluding observations are focused, actionable, and to a certain extent prioritised.¹⁰¹ While the Committee has already undertaken measures to reduce the reporting fatigue by States,¹⁰² it would also be worthwhile to explore the advantages and disadvantages of aligning the timing for periodic reports from every three years to every five years.

5.2 Individual complaints and investigative missions

Probably by design, the first three individual complaints decided on their merits by the African Committee have focused on issues on which the African Children's Rights Charter has added normative value.¹⁰³

⁹⁹ Botswana, Burundi, Cape Verde, Djibouti, Equatorial Guinea, Gambia, Guinea Bissau, Mauritius, Seychelles, Swaziland, and Zambia. In 2014, the Executive Council of the AU '[w]elcomed the Committees campaign on the Universal Ratification of and Reporting on the implementation of the African Charter on the Rights and Welfare of the Child which builds towards the 25th Anniversary of the adoption of the Charter in 2015 and URGES the 7 Member States who have not yet ratified the Charter, to expedite their ratification process for possible completion on or before the end of 2015'. See EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV) para 3.

¹⁰⁰ EX.CL/Dec.977 (XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc.EX.CL/1033(XXXI) (2017).

¹⁰¹ 'Prioritization' does not mean making a hierarchy between rights, but rather identifying and labeling few recommendations as in need of urgent attention.

¹⁰² Such as indicating in its guidelines for reporting that States that have submitted a report to the CRC Committee, can use the elements of the same report and submit to the African Committee by highlighting the specificities of the African Children's Rights Charter.

¹⁰³ Table of cases available at <http://www.acerwc.org/communications/table-of-communications/> (accessed 10 October 2017).

The first communication decided on its merits, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v Kenya*,¹⁰⁴ dealt with the question of the right of the child to acquire a nationality and not be discriminated against in accessing services on the basis of nationality.¹⁰⁵ The second communication, *Hansungule and others (on behalf of children in Northern Uganda) v Uganda*¹⁰⁶ revolved around the obligation of the Ugandan government to protect children in armed conflict, and in particular, not to recruit or use persons below the age of 18 in armed conflict in line with article 22 of the Charter. The third communication decided on its merits is *The Centre for Human Rights (University of Pretoria) and La Recontre Africaine sur la Defense des Droits de l'Homme (Senegal) v Senegal*,¹⁰⁷ finding the Senegalese government in violation of protecting children, in particular against enforced begging by religious teachers (*Marabouts*).

All these three cases evidence the argument that the individual complaints mechanism under the African Children's Rights Charter holds a very strong potential to protect children in Africa. All the communications involve an unidentified number of children, thereby highlighting the Committee's flexibility to entertain individual complaints even when the alleged victims are not individually identified. The African Children's Committee has also invoked the principle of the best interests of the child not only as a substantive right, but also as a principle that should inform procedure. For instance, in the *Children of Nubian descent in Kenya* case, the fact that the government of Kenya did not appear before the Committee on a number of occasions was perceived to go against the principle of children's best interests, and was used as a ground to continue with the proceedings in the absence of the State party. Where appropriate and possible, child participation has also informed the process for these communications. Also, all three communications have benefited from *in situ* investigation or implementation follow-up by the Committee. The cases against Kenya and Senegal were moreover made a subject of implementation hearings with government representatives during the Committee's 29th Ordinary Session in April/May 2017 in Maseru, Lesotho. Because of the 'precedent' setting nature of these cases, African countries that might have similar issues within their jurisdictions can learn more on their obligations to undertake legislative and other measures from these decisions.

¹⁰⁴ No. 1/Com/1/2005 (*Children of Nubian descent in Kenya*). Full text of decision available at <https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf> (accessed 30 October 2017).

¹⁰⁵ The children in the *Children of Nubian descent in Kenya* case are qualified to be Kenyan citizens and were found to be deprived of their rights in articles 3 (non discrimination), 6 (name and nationality), 11 (education), and 14 (health and health services) of the Charter.

¹⁰⁶ No. 2/Com/002/2009. Full text of decision available at <http://www.chr.up.ac.za/images/files/news/press/DSA-ACE-64-1038.15.pdf> (accessed 30 October 2017).

¹⁰⁷ No. 3/Com/001/2012. Full text of decision available at http://www.chr.up.ac.za/images/files/news/press/DSA-ACE-64-1047.15_2_3.pdf (accessed 30 October 2017).

Two more recent communications titled *Dalia Lofty on behalf of Ahmed Bassiouny v Arab Republic of Egypt*¹⁰⁸ as well as *Dalia Lofty on behalf of Emad v Arab Republic of Egypt* have also been finalised by the Committee. Both of these communications dealt with the right to liberty and protection from violence, and were declared inadmissible. As discussed above,¹⁰⁹ while Egypt has entered reservations on article 44 of the Charter, the Committee found such reservations as incompatible with the object and purpose of the Charter,¹¹⁰ thereby considering itself as having the mandate to consider the two communications.

As indicated in the Committee's website,¹¹¹ there are at least four more communications that are currently pending before the Committee, covering a wide range of child rights issues. The *African Centre of Justice and Peace Studies (ACJPS) and Peoples' Legal Aid Centre (PLACE) v Sudan*¹¹² deals with issues related to the right to acquire a nationality and non-discrimination. The *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*¹¹³ raises important questions related to contemporary forms of slavery, while the *Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*¹¹⁴ revolves around issues such as access to justice and right of appeal in a criminal case involving sexual abuse of a child. Another communication, *Etoungou Nko'o on behalf of Mr and Mrs Elogo Menye and Rev Daniel Ezo'o Ayo v Cameroon*,¹¹⁵ tests the limit of the scope of application of the Charter in relation to alleged violations of children's rights committed once the children have died.

The African Committee has also concluded its first amicable settlement. In October 2014, the Committee received a communication *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*.¹¹⁶ The complainant submitted that the Constitution of Malawi, which provides in section 23(5) that 'for the purposes of this section, children shall be persons under sixteen years of age' constituted a violation of article 2 of the African Children's Rights Charter that defines a child as a person below the age of 18.¹¹⁷ The African Children's Committee declared the communication admissible.

¹⁰⁸ No. 8/Com/001/2016.

¹⁰⁹ See sec 3 above.

¹¹⁰ Available at <http://www.acerwc.org/download/ruling-on-admissibility-of-communication-no-0080022016/?wpdmdl=10222> (accessed 30 October 2017).

¹¹¹ Available at <http://www.acerwc.org/communications/table-of-communications/> (accessed 13 October 2017).

¹¹² No. 5/Com/001/2015.

¹¹³ No. 7/Com/003/2015.

¹¹⁴ No. 6/Com/002/2015.

¹¹⁵ No. 10/Com/003/2016.

¹¹⁶ No. 4/Com/001/2014.

¹¹⁷ The Constitutional provision was also not aligned with other subsidiary legislation, such as the Marriage, Divorce and Family Relations Law that increased the minimum age of marriage from 15 to 18 years.

However, before proceeding on the merits, the Committee was approached by the two parties indicating that they would like to resort to an amicable settlement. Such a process is allowed by the Revised Communications Guidelines,¹¹⁸ provided that the request is made before the Committee makes a decision on the merits of a communication.¹¹⁹

As part of the amicable settlement, the government of Malawi agreed to undertake efforts to amend its constitutional provision with a view to comply with article 2 of the African Children's Rights Charter by 31 December 2018.¹²⁰ In the interim, and while the amendment of the constitutional provision is underway, the government also agreed to undertake all possible and administrative measures to ensure that all persons below the age of 18 in the State party enjoy the right in the Charter.¹²¹ With a view to ensure follow up, it was also agreed that the Government would submit periodic reports on the developments related to the implementation of the said agreement.

Fortunately, in February 2017, the government of Malawi amended its Constitution to raise the age for a definition of a child to 18 years.¹²² An overwhelming number of parliamentarians – reportedly 131-2 in favour – voted supporting such an amendment.¹²³ Indeed this amicable settlement sets a very positive precedent in that parties to a communication make use of the good offices of the Committee, and implement agreed upon settlement in good faith. While a number of advocacy efforts by stakeholders have contributed to the amendment of the Constitution of Malawi, it is not far-fetched to argue that the amicable settlement agreed upon within the framework of the African Children's Rights Charter has lend significant positive pressure, and urgency, to convince parliamentarians, and complete the amendment process within a reasonable period of time.

In terms of article 45(1) of the Charter, the Committee may use any appropriate method to investigate any matter covered by the Charter, and to investigate measures taken by State parties to implement the

¹¹⁸ Section XIII of the Revised Guidelines on the Consideration of Communications.

¹¹⁹ Therefore, during the 28th Ordinary Session in October 2016, the Committee offered its good offices to facilitate a discussion between the two parties on the terms for an amicable settlement. The amicable settlement was reached under the auspices of the African Children's Committee, as provided for in sec XIII (2) of the Revised Communication Guidelines.

¹²⁰ M Yadessa 'Malawi amends its constitution to comply with article 2 of the Charter' (April 2017) 1 *ACERWC Tribune* 11.

¹²¹ As above.

¹²² See, Human Rights Watch 'Malawi amends Constitution to remove child marriage loophole' (23 February 2017) available at <https://www.hrw.org/news/2017/02/23/malawi-amends-constitution-remove-child-marriage-loophole> (accessed 14 October 2017); UN Women 'Malawi parliament adopts amendment to end child marriage' (22 February 2017) available at <http://www.unwomen.org/en/news/stories/2017/2/news-malawi-parliament-adopts-amendment-to-end-child-marriage> (accessed 13 October 2017); The Nation 'Constitutional amendment on cards' (by F Namangale) 27 November 2016 available at <http://mw-nation.com/constitutional-amendment-on-cards/> (accessed 13 October 2017).

¹²³ Yadessa (n 120 above). Such an amendment of the Constitution is reported to be the second since 1995.

Charter. Investigative missions enable the Committee to directly gather information relevant for monitoring the implementation or violation of the Charter by States parties.¹²⁴

The experience of the Committee in relation to investigative missions, while limited, still holds a lot of potential. The investigative mission undertaken to Tanzania on the situation of children with albinism in temporary holding shelters, the opportunity to engage with stakeholders, in particular government officials, and the report emanating from the mission has been central for advocacy.¹²⁵ This investigative mission was requested by a civil society organisation, Under the Same Sun, and supported by other stakeholders in Tanzania and beyond, further underscoring the important role played by CSOs, UN agencies and national human rights institutions. Other promotional/investigative missions undertaken to South Sudan (2014) and Central African Republic (2014), two non-state parties to the Charter at the time of the mission, further consolidate the positive impact this mandate can contribute as well as the positive willingness of African countries to engage with the Committee.

6 CONCLUDING REMARKS

Even before it came into force, and as early as 1995, the African Children's Rights Charter has been called 'the most progressive of the treaties on the rights of the child'.¹²⁶ As the Charter transitions from 'childhood' to 'adulthood' and turns 18 in November 2017, there are indications that its theoretical added value also has had some positive impact on the lived realities of children on the African continent. Indeed, it is befitting that the African Committee has interpreted 'welfare' in the title of the African Children's Rights Charter to mean that, while the recognition of the rights contained in the Charter is an obligation of State parties, and a starting point, such recognitions should lead to the enjoyment of rights and the wellbeing of children.

An assessment of the Charter's 18 years of operation can be juxtaposed with that of the impact of the CRC which has been in existence for 27 years. In 2014, in the context of the 25th anniversary of the CRC, UNICEF posed the question 'Does a child born today have better prospects in life than one who was born in 1989?',¹²⁷ and provided a verdict by saying 'yes, but not every child'.¹²⁸ The same can be said of the Charter. While a number of children are thriving as a result of its implementation, there still remain those that continue to be

¹²⁴ Apart from article 45 of the Charter, investigative missions are governed by the Guidelines on the Conduct of Investigations by the ACERWC (the Investigation Guidelines).

¹²⁵ The report is available at <http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694> (accessed 15 October 2017).

¹²⁶ G Van Bueren *The international law of the rights of the child* (1995) 402.

¹²⁷ UNICEF (n 2 above) 7.

¹²⁸ As above.

left behind such as children living in poverty, children deprived of their family environments, children affected by armed conflict, children subjected to harmful practices, children with disabilities, and indigenous children.

Substantively speaking, there still remain a number of provisions of the Charter whose application to issues of great significance today needs to be clarified. Some of these issues have been around for years, while others are emerging issues. In relation to the latter, challenges created as a result of the advancement of technology, climate change, migration crisis, health emergencies (such as Ebola), terrorism (such as the so-called Islamic State and its effect on children's rights) and responses to it, privatisation and increased globalisation, as well as economic crisis (including the current fall on commodity prices) which often lead to austerity measures need to benefit from a robust interpretation of the provisions of the Charter. As shown above, there are also issues that need further guidance in relation to definition of a child, child marriage, and children and armed conflict.

The sustained success (or lack thereof) of the Charter also hinges on the extent to which its provisions are able to stimulate efforts for institutional reforms. This includes institutional reforms for improved data collection, coordination, budgeting, as well as concerted efforts by and engagement with national human rights institutions and CSOs. Ongoing work by the African Committee on a draft General Comment on general measures of implementation and systems strengthening holds potential to give States detailed guidance on some of these important institutional reforms.

Inevitably, the extent to which States manage to create synergy between the Charter and their efforts to achieve the 2030 Agenda for Sustainable Development will be critical. Indeed, breaking the silos between those working in human rights and those in development is apposite to make progress on issues such child protection, early childhood education and reducing inequality. The themes for the DAC in 2017 and 2018 that are focused on the SDGs are indeed a welcome platform to contribute to achieving this link, and positive synergy.

The core work of the Committee in relation to State party reporting, individual complaints and investigative missions is on a positive trajectory. Moreover, the activities around the DAC, issuing general comments, conducting studies, and the granting of observer status are important catalysts for the implementation of the Charter. Critically important, the prospect of the Committee having direct access to the African Court through an amendment of the Court Protocol, a process that has officially been triggered by the Court in 2017,¹²⁹ holds a lot of potential to improve the protective mandate of the Committee. Engagement with relevant AU organs, such as the Peace and Security Council needs to be strengthened. These notwithstanding, unless the budgetary allocations for the Committee significantly increase beyond

¹²⁹ Advisory Opinion, Request 2/2013, 5 December 2014, <http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf> (accessed 30 October 2017).

the current less than 1 per cent of the total AU budget, the Committee will continue to be seriously constrained to achieve its mandate in full.

Like any international human rights instrument, the Charter still faces some criticisms. So does the work of the African Committee. For instance, some might still argue that it is not adequately sensitive to the socio-cultural and religious contexts of some African countries. But as the Charter solidifies its impact, and the Committee makes its presence felt, most of the arguments of detractors will continue to fade into the background.

The ultimate judges of the added value of the Charter are children in Africa whose lives have been improved as a result of its implementation. However, as shown above, the 18th anniversary of the coming into force of the Charter indeed offers an opportunity to reflect and take stock of the limited progress so far, and the work that remains to be done, in our collective efforts to create an Africa fit for children. This notwithstanding, the Charter is not counting its days, but making its days count.