

# A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child

*Amanda Lloyd\**

Part-time lecturer and PhD candidate, University of the West of England, Bristol

## 1 Introduction

The African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted by the 26th ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia.<sup>1</sup> It entered into force on 29 November 1999, after 15 member states of the OAU had ratified it.<sup>2</sup>

The African Children's Charter is a 'self-standing' charter, which has evolved in distinct separation from the African Charter on Human and Peoples' Rights (African Charter). The African Children's Charter is not a supplement to the African Charter, neither is it institutionally linked to the African Charter. It is a document for the explicit protection of children

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\* LLB (Hons) (UWE, Bristol), LLM (UWE, Bristol); mandielloyd@hotmail.com

<sup>1</sup> CAB/LEG/153/Rev 2, reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

<sup>2</sup> Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Eritrea, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, South Africa, Togo, Uganda and Zimbabwe had all ratified the African Children's Charter. On the other hand, Algeria, Congo, Djibouti, Egypt, Gabon, Ghana, Liberia, Libya, Madagascar, Namibia, Rwanda, Sierra Leone, Somalia, Swaziland, Tanzania, Tunisia and Zambia had all signed the African Children's Charter, but were yet to ratify it. For a more detailed look at the status of ratification, see <[www.up.ac.za/chr/ahrd/b/statorat\\_14.html](http://www.up.ac.za/chr/ahrd/b/statorat_14.html)> (accessed 31 January 2002).

and their rights, of which the monitoring and enforcement lies in the hands of the African Committee of Experts on the Rights and Welfare of the Child (Committee).<sup>3</sup>

The Committee consists of 11 members of high moral standing, with competence in matters relating to the rights and welfare of the child,<sup>4</sup> who serve in their personal capacity.<sup>5</sup> The Committee is bound by its own Rules of Procedures,<sup>6</sup> and not those associated with the African Commission on Human and Peoples' Rights (African Commission). The Committee has a broad mandate. This mandate includes promotion and protection as well as monitoring the implementation of the rights enshrined in the African Children's Charter, the interpretation of the provisions of the Charter and, lastly, the performance of any other task entrusted to it by the OAU Assembly, the Secretary-General of the OAU or the United Nations (UN).<sup>7</sup> State parties to the African Children's Charter are required to submit their first reports on the measures they have adopted to implement the African Children's Charter to the Committee through the Secretary-General of the OAU by the end of 2001.<sup>8</sup> Thereafter, the state parties must submit a report every three years.

## 2 The need for an African Children's Charter

Children's rights are already protected in a number of international conventions.<sup>9</sup> However, these conventions only mention certain rights attributable to children and are primarily concerned with other areas of human rights. The UN Convention on the Rights of the Child (CRC) of 1990 is the first international instrument with a specific focus on the protection of the child as such, recognising children as human beings of equal value.<sup>10</sup> The rights prescribed therein are not collectively

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<sup>3</sup> The Committee was formally established in July 2001 during the Assembly of Heads of State and Government of the OAU 74th Summit in Lusaka, Zambia.

<sup>4</sup> Art 33(1) African Children's Charter.

<sup>5</sup> Art 33(2) African Children's Charter.

<sup>6</sup> The Rules of Procedure were to be determined during the Committee's first meeting. This was scheduled for 15 December 2001, yet did not take place. It was re-scheduled for January 2002, yet at the time of writing no meeting had taken place and no concrete date had been fixed.

<sup>7</sup> Art 42 African Children's Charter.

<sup>8</sup> Art 43 African Children's Charter: An initial report is due two years after entry into force of the African Children's Charter. No state reports had been submitted to the Committee by 11 February 2002.

<sup>9</sup> For example the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>10</sup> T Hammarberg 'The United Nations Convention on the Rights of the Child — And how to make it work' (1990) 12 *Human Rights Quarterly* 97-99.

contained in any other binding international instrument.<sup>11</sup> Prior to the CRC, the rights contained in general treaties applied in theory to both adults and children, but in practice children were often denied such rights.<sup>12</sup> The CRC is the most widely ratified international convention and is deemed to have become customary international law to which all states, whether they have ratified the CRC or not, will be required to adhere to by the international community.<sup>13</sup>

The African Charter provides that state parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions.<sup>14</sup> Thus, state parties to the African Charter have a duty to implement those conventions and declarations relating to the rights of the child.<sup>15</sup> Nevertheless, Africa has found it necessary to take the protection of children's rights further at the supra-national level, providing a voice for Africa's children. Africa has taken the lead in setting the standards for children's rights in a regional context.<sup>16</sup> The OAU is the first regional organisation to adopt a binding regional instrument concerned with children's rights,<sup>17</sup> offering human rights guarantees and safeguards for the child, thereby fulfilling its international obligations.

<sup>11</sup> Children's rights were contained in the Declaration on the Rights of the Child 1924 and 1959, but they were non-binding, and rarely incorporated into municipal law, thus the impact was rather limited and symbolic. The Declarations were aspirational and framed children's rights in broad terms. D Fottrell 'One step forward or two steps sideways? Assessing the first decade of the Children's Convention on the Rights of the Child' in D Fottrell (ed) *Revisiting children's rights. Ten years of the UN Convention on the Rights of the Child* (2000).

<sup>12</sup> *Handyside v UK* ECHR (7 December 1976) Ser A 24; *Nielson v Denmark* ECHR (28 November 1988) Ser A 144. But compare the approach taken in the USA: *Tinker v Des Moines* 393 US 503 (1969). Fottrell (n 11 above).

<sup>13</sup> This is contentious, yet through the application of the CRC at a domestic level and the jurisprudence that has emerged, the rights contained therein can now be considered norms of customary international law, such as those (comparable) rights in the Universal Declaration. See AS Wako 'Towards an African Charter on the Rights of the Child' in *The Rights of the child. Selected proceedings of a workshop on the draft convention on the rights of the child: An African perspective* Nairobi (1989) 41.

<sup>14</sup> Art 18(3) African Charter.

<sup>15</sup> Children's rights are different from adult rights, because they include protection, hence the need for a specific charter dealing with children's rights.

<sup>16</sup> On the African Children's Charter as an African 'supplement' to the CRC, see 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 *Comparative and International Law Journal of Southern Africa* 199.

<sup>17</sup> Despite an attempt to draft a 'European Convention for the Protection of the Rights of the Child.' This 'draft' was issued in January 1984 by the International Union for Child Welfare (IUCW). In 1979 the Assembly of the Council of Europe had proposed the creation of a European Convention on the Rights of the Child, but was not followed up by the Committee of Ministers. PE Veerman *The Rights of the Child and the Changing Image of Childhood* (1992) 270.

The UN General Assembly has affirmed the value of regional agreements to promote and protect human rights, as regional treaties are best placed to consider and resolve their own human rights situations, whilst upholding cultures, traditions and histories unique to the region.<sup>18</sup> The African Children's Charter was also necessary as each region has its own unique human rights problems or priorities that it wishes to address, often difficult to tackle in international agreements due to the background disparities of each state. For example, the right of children to know of their exact origins, if conceived through in vitro fertilisation, is of less importance in Africa than in Europe. Africa may be more concerned with a provision for the protection of the child against regimes practising discrimination and for the prohibition of negative and prejudicial regional cultural practices, and this is exactly what the African Children's Charter has achieved.<sup>19</sup>

A further justification for the development of a regional children's rights charter in Africa is the special difficulties of securing these rights in 'severely depressed economic situations'.<sup>20</sup> The African Children's Charter has made 'important progress by not including a provision similar to article 4 of the CRC, which jeopardises the implementation of all economic, social and cultural rights', by providing that '[s]tates shall take implementation measures "to the maximum extent of their available resources"'.<sup>21</sup>

The African Children's Charter offers a higher level of protection than that offered by the CRC, which is often criticised as having a Western

<sup>18</sup> Wako (n 13 above); Viljoen (n 16 above) 205. For example, see GA/SHC.362, <[www.un.org](http://www.un.org)> (accessed 31 January 2002).

<sup>19</sup> Art 26 African Children's Charter — Protection against Apartheid and Discrimination. The CRC does not include such a provision, as apartheid was a problem specific to Africa and of no concern to other regions. Art 21 African Children's Charter — Protection against Harmful and Social and Cultural Practices, which similarly is region specific and could not be agreed upon during the drafting process of the CRC. Although the significance of these provisions is somewhat marred by art 1(3): 'Any 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*' (my emphasis). States only have the obligation to discourage inconsistent cultural practices.

<sup>20</sup> As referred to by J Essombe, Legal Advisor for the African Commission at the African Contexts of Children's Rights Seminar in Harare in January 1998, Ngone Diop Tine & Judith Enew in 'The African Contexts of Children's Rights Seminar Report', at <[www.childwatch.uio.no/cwi/projects/indicators/contexts1.html](http://www.childwatch.uio.no/cwi/projects/indicators/contexts1.html)> (accessed 31 January 2002).

<sup>21</sup> There is still little debate amongst economists about the precise effects on children of economic policies, including structural adjustment and national development plans. It is insufficient to grant children rights with little means of implementation, states need to be prepared to effectively implement such rights. 'The Children's Budget' in South Africa examines the extent to which the government is prioritising children in policy planning and budget allocation. For a detailed discussion see 'The African Contexts of Children's Rights Seminar Report' (n 20 above).

bias.<sup>22</sup> The Preamble to the African Children's Charter not only outlines the background to the adoption of the Charter, but also refers to previous human rights instruments relevant to children adopted by the OAU and the UN. It stresses the cultural context in familiar African regional conventional language, reflecting the spirit of traditional cultural values. Further, the Preamble acknowledges the critical situation children find themselves in due to socio-economic, cultural and developmental circumstances, armed conflicts, and exploitation, among others. The Preamble further acknowledges the notion that the promotion and protection of rights and welfare of the child implies the performance of duties on the part of everyone, reiterating the significance of the group in Africa.

The African Children's Charter puts children's rights legally and culturally into perspective. In order for the African Children's Charter to have significance for children's rights in Africa and effectively change children's lives, people and the governments collectively need to believe in and accept children's rights as *legal* rights and recognise binding duties on them. Nevertheless, the African Children's Charter is a key source of inspiration for African member states and is a collective recognition of the rights and welfare of African children and establishes a legal framework for their protection.

The law appears to be neutral with regard to children. Yet, in reality, it embraces predominantly the language and thought processes of adults, highlighting children's lack of power under the law and contributing to their traditionally perceived vulnerability. There is a continuing need for children to be given a 'voice', by way of a constitutional order or legislative provision.<sup>23</sup> The way has been somewhat pathed by South Africa and the invocation of a 'children's charter', which was created predominantly by children, and which thus no longer can be criticised as solely the thought process of adults.<sup>24</sup> Children drafted the charter, sat at all the meetings of ministers and provided numerous resolutions. One of the demands was that children be represented within the government, by peers, not adults, as children have the right to participate in and be consulted with about government.<sup>25</sup> Other countries may wish

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<sup>22</sup> African involvement in the drafting process of the CRC was limited. Only three African states participated for five of the nine years that the working group took to draft the final proposal. See Viljoen (n 16 above) 200.

<sup>23</sup> For example 'The Declaration of the Rights of Mozambican Children' (1979).

<sup>24</sup> This was launched on 1 June 1992 at the Children's Summit of South Africa, as a follow-up to the Harare Conference on Children and contains 50 rights. See M King 'Against children's rights' (1996) *Acta Juridica* 28 and 'South African children speak out' (1993) 1 *The International Journal of Children's Rights* 71.

<sup>25</sup> The rights contained were taken into account when the 1996 Constitution was drafted, following the period of apartheid. 'South African children speak out' (n 24 above).

to follow in the footsteps of South Africa by giving children a voice in a similar fashion.

The African Children's Charter may be criticised in so far as it did not allow in its drafting process for children to make their opinions clear and voice what would be in their best interests. Yet by looking at the CRC and the time taken to adopt its provisions by adults, it could be held that a regional protection instrument would never have been enacted, let alone ratified, if children had been given a predominant role in its drafting process, particularly as there is a general cultural regard for children as their parents' 'property'.<sup>26</sup> Such an assertion runs counter to the Preamble, which states that a 'child occupies a unique and privileged position in African society'. The African Children's Charter discourages traditional or cultural views that may be inconsistent with the spirit and the provisions of the Charter. This is nevertheless a modernised view of Africa and an aspirational standard. At the time of drafting the treaty, many of the traditional and cultural views, such as the regard for children as property, were still valued. Thus, a treaty drafted mainly by minors would not have gained credibility, and may have prevented ratification.

What is yet to be seen is how individual states will implement the African Children's Charter. One of the most contentious areas of international children's rights is the issue of consent. The rights of children to consent or withhold their consent to issues concerning them have not been traditionally encompassed in the image of childhood. In some communities the right to consent distinguishes childhood from adulthood. The right to consent is a civil right derived in international law from at least two rights: the right to have respect for privacy<sup>27</sup> and the right to freedom of expression.<sup>28</sup> These rights are to be interpreted within the framework of the African Children's Charter's principles: the evolving capacity of the child, the best interests of the child<sup>29</sup> and the

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<sup>26</sup> 'Children should not be regarded as property. Traditionally, this has been the case. In most areas the economic value of bride betrothals varied according to the beauty, education and social status of the girl. Elsewhere, concepts of parental "rights" have been replaced by the notion of parental "responsibility". But in Malawi the child either belongs to the father's side or the mother's side according to tradition.' Kamchedzera, Garton & Sandifolo 'The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5 *International Journal of Law and the Family* 241-246. See also B Thompson 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432; 'The doctrine of parental authority over children is strongly present in contemporary Africa, and children are often perceived as the property of their parents or legal guardians.' KCJM Arts 'The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 *African Journal of International and Comparative Law* 139-158.

<sup>27</sup> Art 10 African Children's Charter.

<sup>28</sup> Art 7 African Children's Charter.

<sup>29</sup> Art 4 African Children's Charter.

principle of non-discrimination.<sup>30</sup> Given that the notion of consent by a child in Africa seems to run counter to the child's duties to 'respect his parents and elders at all times',<sup>31</sup> it would be interesting to see how African countries give effect to the provisions of the African Children's Charter as they relate to the issue of consent.

The most important element of human rights law relating to children is that children's best interests are given paramount consideration.<sup>32</sup> Article 4(1) of the African Children's Charter states that the best interests of the child are *the* primary consideration, providing for the higher standard<sup>33</sup> contained in the Declaration of the Rights of the Child 1959.<sup>34</sup> The difference in using the definite article instead of the indefinite may seem a pedantic assertion, yet it has significant practical ramifications. The lower standard in the CRC has been interpreted as a procedural fairness requirement; judges and others must 'consider' what is in the child's best interest, but the decision may not reflect these interests.<sup>35</sup> The principle of 'in the child's best interests', despite being a fundamental principle in international law,<sup>36</sup> is nonetheless vague and allows for primacy of whatever cultural norms on upbringing happen to be current.

The principle is worded in relative terms, enabling conflicting rules to be ranked. Some Africanists deem recruitment of child soldiers as a legitimate cultural tradition.<sup>37</sup> Yet, whenever the right to preserve a culture conflicts with a child's best interest, the latter must prevail. Article 21 of the African Children's Charter highlights this by prohibiting practices that might be prejudicial to a child's health or life. The well-being and safety of children are of overriding importance, and group rights to culture are relatively weaker and subordinate to other human rights.

<sup>30</sup> Art 3 African Children's Charter.

<sup>31</sup> Art 31 African Children's Charter.

<sup>32</sup> Art 3(1) CRC: 'The best interests of the child are to be given a primary consideration.'

<sup>33</sup> See Vijoen (n 16 above) 208; J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) 11 *South African Journal on Human Rights* 401-404.

<sup>34</sup> Fortunately, art 4(1) has a stricter definition than that contained in the CRC, namely 'a primary consideration'. For a more detailed discussion on the best interests principle, see G Van Bueren 'A new children's treaty' (1991) 8 Special Issue *International Children's Rights Monitor* 20-21.

<sup>35</sup> J Todres 'Emerging limitations on the rights of the child: The United Nations Convention on the Rights and Welfare of the Child and its early case law' (1998) 30 *Columbia Human Rights Law Review* 159-200 176. See *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALR 517 (Austl.); *Schier v Removal Review Authority* [1998] NZAR 230 (NZ) both at 177.

<sup>36</sup> G Van Bueren 'Children's rights: Balancing traditional values and cultural plurality' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (1998) 15.

<sup>37</sup> See TW Bennett *Using children in armed conflict: A legitimate African tradition?* Institute for Security Studies Monograph Series No 32 (1998) 1.

State parties to the African Children's Charter are obliged to consider what is in the child's best interests, and due caution must be asserted regarding the disparity of this principle in domestic law, and regard the assessment of this principle as the overriding consideration. The possible effects of this principle are far-reaching in Africa, the effectiveness of which may be hindered by domestic interpretation.<sup>38</sup> The area of family law tests how realistic the African Children's Charter's philosophy really is. The doctrine of parental autonomy and children as their parents' property can be regarded as a core value of Africa's cultural heritage.<sup>39</sup> Therefore, it is difficult to foresee how effect can be given to specific rights guaranteed by the Charter, while at the same time consider the best interests of the child of the primary importance.

Article 1(3) could, theoretically, be invoked and one could view the doctrine of parental autonomy as an inconsistent tradition or custom.<sup>40</sup> However, the general legal position in modern African states modifies the doctrine of absolute parental rights with the notion of the best interests of the child. At present it can be noted that the general legal position appears to be in harmony with the philosophy of the Charter, while the customary law practice is not and reflects a normative disparity both with the Charter and general law.<sup>41</sup> No matter how much emphasis is given to the importance of family law in traditional African systems, it would be insufficient. The family unit is crucial in traditional customary family law and is the best developed.<sup>42</sup>

<sup>38</sup> The nature of domestic interpretation of international obligations is discussed in detail in AO Adede 'Constitutionalism, culture and tradition: African experiences on the incorporation of treaties into domestic law' (1999) 7 *African Yearbook of International Law* 239; G Carpenter 'Constitutional interpretation in Bophutswana — Still no joy' (1990/1991) 16 *South African Yearbook of International Law* 143; AW Chanda 'Gaps in the law and policy in the implementation of the Convention on the Rights of the Child in Zambia' (2000) 32 *Zambia Law Journal* 1; EVO Dankwa 'Implementation of international human rights instruments: Ghana as an illustration' (1991) *African Society of Comparative and International Law Proceedings* 57; GM Erasmus 'The Namibian Constitution and the application of international law' (1989/90) 15 *South African Yearbook of International Law* 81; PF Gonidec 'The relationship of international law and national law in Africa' (1998) 10 *African Journal of International and Comparative Law* 244; JH Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86 *American Journal of International Law* 310; G Kasozi 'Domestic implementation of human rights standards in Lesotho' (1993–1994) *The Lesotho Law Reports and Legal Bulletin* 523; T Maluwa 'The incorporation of international law, and its interpretational role in municipal legal systems in Africa: An exploratory survey (1998) 23 *South African Yearbook of International Law* 45; OB Tshosa, 'Giving effect to treaties in the domestic law of Botswana: Modern judicial practice' (1997) 10 *Lesotho Law Journal* 205.

<sup>39</sup> Thompson (n 26 above).

<sup>40</sup> Nevertheless art 1(3) only 'discourages'; it does not prohibit such practices.

<sup>41</sup> Thompson (n 26 above).

<sup>42</sup> RT Nhlapo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of Law and Family* 1.

The basic principles of the best interests of the child are: All rights apply to all children without exception; every child has an inherent right to life and the state has the obligation to ensure the child's survival and development; all actions concerning the child should take full account of her best interests and the child has the right to express her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.<sup>43</sup> States' municipal legislation needs to be examined in order to see how far this principle is upheld domestically. The general answer is that states do not incorporate the requisite standard as provided for by the African Children's Charter. For example, the Zambian Bill of Rights guarantees to everyone, including children, the right to life and freedom from discrimination. These provisions do not go far enough, as they do not offer the level of protection nor the promotion of children's rights as envisaged under the Charter.<sup>44</sup>

The African Children's Charter prides itself on its African perspective on rights, yet was inspired by the trends evident in the UN system. The UN system bases itself on the 'rights of the child' and the 'best interests', with a brief mention of the community and the extended family in article 5 of the CRC. Although the African tradition predominantly bases itself on the welfare of the extended family, the strict standards applied in the African Children's Charter reflect the modernisation of Africa.<sup>45</sup> It can be asserted that the required number of African states have ratified the Charter in order for it to come into force. Thus, the best interests principle cannot be so far removed from African ideology, especially if Africa wants to keep progressing in the realm of human rights protection.<sup>46</sup> This principle is to be invoked as an interpretative aid when invoking other provisions of the African Children's Charter. The principle is also flexible, as shown by the interpretation of the principle in Zimbabwe. Different results can be produced, depending on the construction used. Whether this is legal, political, cultural or material, it will shape the resulting determination. For example, if a cultural construction is employed in Zimbabwe, the custody of the child rests with the family and not with the individual.<sup>47</sup>

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<sup>43</sup> Chanda (n 38 above).

<sup>44</sup> As above.

<sup>45</sup> As opposed to 'westernisation'.

<sup>46</sup> Despite the standard of the best interests being the primary consideration being in conformity with the general domestic law, customary law often does not. For example, in Sierra Leone, under customary law the father is entitled to custody of the child upon divorce. Neither fault nor welfare of the child is a decisive consideration. Many African countries still make a distinction between children born in and out of wedlock — which is contrary to art 3 the African Children's Charter on Non-Discrimination, and the prohibition on child betrothals will clash with both the best interests principle and art 21(2) of the African Children's Charter. See Arts (n 26 above) 158.

<sup>47</sup> Todres (n 35 above).

Article 2 of the African Children's Charter is one of the most important provisions, as a children's charter defining those who fall within its ambit is of fundamental importance.<sup>48</sup> Nevertheless, defining age has many cultural implications and the definition of childhood and of a child is culture-specific.<sup>49</sup> The African Children's Charter offers wider protection of young people than the global standard established in the CRC.<sup>50</sup> It states unequivocally that a child is every human being below the age of 18. There are no conditions such as the suspension of this right if the child participates in armed conflict. Thankfully, the drafters of the African Children's Charter have had the foresight to set a strict definition, without exceptions.

The African Children's Charter has established in clear and unambiguous terms when a child is a child. It is now in the hands of the member states to ensure that this clear definition is mirrored in domestic law, otherwise it will be impossible to enforce the right contained in the African Children's Charter. Nevertheless, there are grass root problems relating to birth registration, and due to the current socio-economic situation children are taking on roles and responsibilities previously assumed by adults. Thus, defining children by chronological age may not provide a realistic and practical solution to child abuse and exploitation. The African Children's Charter is silent on the need to implement effective birth registration across the continent. Articles 6(2) and (4) of the African Children's Charter state that every child shall be registered immediately after birth in order to acquire a name and nationality. It fails to accord importance to birth registration for the reason of denoting chronological age and the fundamental issue of childhood.

During the drafting process of the CRC, 'children and armed conflicts' was the most disputed issue.<sup>51</sup> Article 38 was the result, and has provoked much criticism, mainly due to the fact that it allows the recruitment of children as young as 15 into armed groupings. The Charter provides for a higher level of protection for child soldiers. In article 22, states are under the obligation to ensure no child participates directly in hostilities and to refrain from recruiting any child. This provision should be read in the light of article 2, resulting in no under 18 year-olds being recruited. The message is loud and clear — it is not in the best interests of the child to fight.<sup>52</sup>

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<sup>48</sup> Despite the importance of this provision, it has been defined in vague terms and only one sentence was used to define 'child'.

<sup>49</sup> With reference to age sets; chronological age amongst other ways of defining age and 'childhood'.

<sup>50</sup> The CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'.

<sup>51</sup> Arts (n 26 above).

<sup>52</sup> Van Bueren (n 34 above).

Article 22 also refers to international humanitarian law whereby it is asserted that obligations to protect the civilian population and the protection and care of children affected by armed conflicts shall also apply to internal conflicts.<sup>53</sup> Perhaps the most substantive omission in the Charter is the fact that, unlike the CRC,<sup>54</sup> it fails to promote<sup>55</sup> the physical and psychological recovery and social reintegration of a child victim. Article 23<sup>56</sup> is another innovative provision, furthering protection to not only refugees, but also including internally displaced persons, showing a great sense of realism about the intricacies of such a problem in Africa.

The African Children's Charter's definition of the child's right to life, the one fundamental right from which all others flow, goes further than the international standard.<sup>57</sup> Stating the obligation to provide the necessities for survival to those who lack the means of subsistence: 'State parties shall ensure to the maximum extent possible the survival and development of the child'<sup>58</sup> is a positive development.

It cannot be doubted that the African Children's Charter is a progressive development in the legal evolution of human rights protection within Africa. It stipulates a comprehensive set of children's rights and confirms or strengthens the global standards contained in the CRC. Article 1(2) states that the Charter shall not affect provisions of municipal law or any other international conventions in force in the state concerned if they are more conducive to the realisation of children's rights. Thus, the Charter is the bare minimum that will be tolerated and provisions in municipal law or international treaties that are not in conformity with standards in the African Children's Charter will only prevail if they are *more conclusive* to the realisation of children's rights, and obviously where the African Children's Charter contains stricter provisions, such as the recruitment of child soldiers,<sup>59</sup> child betrothals,<sup>60</sup> other harmful and cultural practices<sup>61</sup> and child refugees,<sup>62</sup> the stricter provisions prevail. The African Children's Charter could be seen as an overriding *lex specialis*.<sup>63</sup>

<sup>53</sup> As codified in Additional Protocol II to the Geneva Convention, regulating the protection of victims of non-international armed conflicts.

<sup>54</sup> Art 39 CRC.

<sup>55</sup> It should also be noted that the obligation to *promote* is a weak obligation in itself.

<sup>56</sup> Referring to refugee children.

<sup>57</sup> The right to life was the right not to have your life taken away except by due process of law.

<sup>58</sup> Art 5 African Children's Charter.

<sup>59</sup> Art 22 African Children's Charter.

<sup>60</sup> Art 21(2) African Children's Charter.

<sup>61</sup> Art 21(1) African Children's Charter.

<sup>62</sup> Art 23 African Children's Charter. Providing a more exhaustive right for African children, as it includes internally displaced children, unlike the CRC.

<sup>63</sup> Arts (n 26 above) 154.

The African Children's Charter protects children against harmful social and cultural practices in article 21, despite the recognised importance of cultural heritage and the values of African civilisation in the Preamble, albeit imposing only a rather weak obligation. Although the Charter has regard for the cultural context of Africa, it does in parts differ greatly from the standards recognised and applied in African countries. One of the areas the Charter could have a significant evolutionary impact on state practice is in the area of family law.

The rights of children born out of wedlock also have the potential to develop within the auspices of family law,<sup>64</sup> especially important as several African countries still make a distinction between legitimate and illegitimate children. However, the ban on child marriages will continue to clash with various cultural traditions. Thus, the practical implementation of the African Children's Charter could be marred by the disparities between customs and the African Children's Charter.

However, the African Children's Charter achieves the optimal situation for Africa, improving the status of children and furthering their rights, not merely restating their existing rights, nor maintaining that the cultural practices performed are all in the best interests. It has regard and respect for cultural practices, and those most likely to conflict with the Charter are contentious<sup>65</sup> and their validity highly disputed.<sup>66</sup> Thus, reform in this area of African culture and custom needs to be addressed, which is precisely why the African Children's Charter prevents cultural practices which may be harmful or prejudicial to a child's health and bans other practices such as child marriages.

It is hoped that, unlike the African Charter, the African Children's Charter will not be regarded as *lex imperfecta* and *lex simulata*.<sup>67</sup> Africa, and in particular the OAU and the OAU Assembly, genuinely wishes to enhance the African child's life, as opposed to merely responding to moral demands that something must be done about human rights violations in Africa, through the adoption of the African Children's Charter. This view contrasts with the assertion that it is a conscious enactment by politicians in response to 'an aggravated crisis of confidence in a way, which seeks to reinforce belief in the legal-political system, but with a built-in planned efficiency'.<sup>68</sup> The following discussion

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<sup>64</sup> Girls are often sexually abused in times of conflict, thus resulting in unwanted pregnancies and more to the point: children born out of wedlock.

<sup>65</sup> Both within Africa and globally.

<sup>66</sup> Such as female infibulation and child betrothals.

<sup>67</sup> P Takirambudde 'Six years of the African Charter on Human and Peoples' Rights: An assessment' (1991) 7 (2) *Lesotho Law Journal* 35-67.

<sup>68</sup> As above. It is asserted by Takirambudde that the ineffectiveness of the African Charter is not accidental. He expresses the view that given the origins, record and history of the OAU in general, the nature and character must have been conscious, deliberate and planned.

of the enforcement mechanisms will show that the African Children's Charter is not *lex imperfecta*, thus not taking the form of law backed by an inadequate enforcement system staffed with incompetents.

The success of the Charter now lies in the hands of the OAU member states and their commitment to ensure respect for children's rights in practice, and the efficiency and effectiveness of the Committee. The advancement of children's rights in Africa will depend to a large extent on state practice, the practice in particular of the Committee and of the OAU Assembly. Jurisprudence that suits best the needs of Africa and African children will emerge gradually within municipal courts.

### 3 The Committee on the Rights and Welfare of the Child

The African Committee has the potential to break new ground through its jurisdiction to receive and hear communications from state parties, from NGOs and from children<sup>69</sup> and adults within the jurisdiction of the OAU member states regarding any matter contained in the African Children's Charter, including violations of a child's economic, social and cultural rights.<sup>70</sup> This challenges the assumption held at the time of drafting the CRC, that a treaty on children's rights was not a suitable instrument for a complaints mechanism.<sup>71</sup> The reasons for this were that it would harm the co-operation for implementing the rights of the child and that economic, social and cultural rights are unsuitable for litigation.<sup>72</sup> Children under the African Children's Charter are not solely reliant on the legal infrastructure and political goodwill of states to act on their behalf.

Part Two of the African Children's Charter prescribes mechanisms for the protection and enforcement of children's rights. The mandate of the African Committee is defined more precisely than the mandate of the UN Committee on the Rights of the Child (CRC Committee). Article 42 of the Charter states the Committee has a 'promote and protect' function. The Committee is mandated to collect and document information, to commission interdisciplinary assessments of situations on African problems in the children's rights sphere, to organise meetings, to encourage

<sup>69</sup> 'Children within the jurisdiction of these mechanisms can litigate their rights before these regional bodies and those who are not can bring complaints under universal human rights treaties, such as the ICCPR, which allow for individual petition.' Fottrell (n 11 above) 8.

<sup>70</sup> By virtue of art 44 of the African Children's Charter. This is a huge step forward for a communication's procedure, thus enabling individual persons, NGOs recognised by the OAU, member states or the UN, to send communications relating to a violation of the rights protected in the Charter, this was not able to be achieved by the UN.

<sup>71</sup> Van Bueren (n 34 above) 22.

<sup>72</sup> Ideas taken from Van Bueren as above.

national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary.<sup>73</sup> Most of these powers are not conferred on the CRC Committee.<sup>74</sup> Thus, the African Children's Charter has provided a progressive and action-orientated enforcement mechanism. The African Committee also has authority to formulate and lay down principles aimed at protecting children's rights in Africa and on request from state parties, and institutions of the OAU, can interpret the Charter's provisions.<sup>75</sup> The Committee has further been charged with the task of monitoring the implementation of the Charter and of ensuring that the enshrined rights are protected. The CRC Committee can only examine progress made by state parties in implementing the CRC.

### 3.1 Monitoring mechanism

What monitoring is and how it will work provide an important test of the willingness of state parties to take seriously the issue of respect for children and their rights.<sup>76</sup> A monitoring mechanism should primarily be an authentic voice of the children, not merely a voice speaking up for children. This should be the guiding fundamental principle of any monitoring mechanism for the fulfilment of children's rights.<sup>77</sup> Children are a part of society as much as any other group, yet a child is almost always seen as someone who is 'on the way to' integration in society: the society of adults. This is no less true in Africa, where children are often regarded as inferior and as property. For the monitoring mechanism established by the Committee under the African Children's Charter to be effective, children need to be regarded as having valid views and certain 'powers'. Adults and children may have different social roles, therefore it is likely that they would still have different group views, even if the difference in power between them disappeared. Even though the concepts and views of children would be different from those of adults, they should no longer to be considered as subservient.<sup>78</sup>

The shorter reporting period of three years should lessen the risk of losing momentum and commitment to increasing the protection of the

<sup>73</sup> Art 42 African Children's Charter.

<sup>74</sup> For example, the UN Committee has not been given the separate task of collecting information and relies completely on the General Assembly for the undertaking of studies. Art 45(d) CRC.

<sup>75</sup> The UN Committee was not given this task, but can express its views as regards the interpretation of the CRC.

<sup>76</sup> E Verhellen 'The search for the Achilles heel: Monitoring of the UN Convention on the Rights of the Child and its implications for the states parties' in E Verhellen & F Speisschaert (eds) *Children's rights: Monitoring issues* (1994) 3.

<sup>77</sup> M Flekkoy 'Monitoring implementation of the UN Convention on the national level' (1993) 1 *International Journal of Children's Rights* 233.

<sup>78</sup> Such a line of reasoning is discussed in Verhellen (n 76 above).

rights of the child.<sup>79</sup> States bound by both the African Children's Charter and the CRC should not find the double reporting obligation to two different monitoring bodies an extra burden, as the reports to the African Children's Charter could be utilised as a basis for those to the CRC and the other way round.<sup>80</sup> The states' country reports allow the Committee to monitor how the state parties have implemented the provisions and spirit of the Charter into municipal law.<sup>81</sup> Yet how and by whom will the report be written? The problem of being both judge and jury arises. Both generations<sup>82</sup> of human rights are provided for in the African Children's Charter and there is a mixture of both roles, making monitoring more complex, highlighting the importance of identifying the judge and jury phenomenon, which is not immediately apparent.<sup>83</sup> It is not particularly difficult to imagine what would happen if states write their own reports.

The form and content of the reports should have to meet minimum quality requirements, which could be attained if the Charter provided for a committee in every state party, allowing the Committee to function independently.<sup>84</sup> However, there is no such provision and the independence of the Committee can be criticised. Any monitoring mechanism should be independent in relation to political administration, legislature and political organs, disallowing manipulation by governments or political parties. Governmental officials should not be able to intervene in its functioning and should be able to respond honestly to individuals seeking help. In short, the Committee should be able to observe and if necessary criticise government and the legislature without fear of reprisal. However, article 32 of the African Children's Charter expressly stipulates that 'the Committee shall be established within the OAU', leaving the power to make decisions with the OAU Assembly. As a result, the African Children's Charter not only leaves to its major political arm any possible implementation of steps, but also seems to prevent the Committee from taking steps that might be trenchant. This subordination of the Committee to the OAU generates scepticism about its impartiality and credibility. Also states' reports are

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<sup>79</sup> But is this realistic? The African Charter has encountered problems adhering to the submission of reports every two years.

<sup>80</sup> Van Bueren (n 34 above).

<sup>81</sup> See also Kasozi (n 38 above).

<sup>82</sup> Referring to civil and political rights, often considered as first generation rights and economic, social and political rights, often referred to as second generation rights.

<sup>83</sup> Verhellen (n 76 above).

<sup>84</sup> Lesotho should be regarded as a role model in this area. Lesotho has provided national machinery to oversee implementation of international human rights instruments. The Ministry of Justice and Human Rights (MJHR) ensures the effective promotion of and protection of human rights. However, it must be borne in mind that the MJHR is not completely independent of all political control, considering it is the line Ministry with prime responsibility as the operational arm of government in the Justice sector. See Kasozi (n 38 above) 527.

sent through the Secretary-General of the OAU to the Committee,<sup>85</sup> which could also affect its independence.

It is still to be seen if the Committee will effectively promote and protect children's rights in Africa. If it is to be successful this monitoring system should transmit information to children and make the needs of children publicly known. The Committee should also impart information to children,<sup>86</sup> making sure that children are aware of the African Children's Charter and its relevance to their daily lives.<sup>87</sup> The Committee should also be accessible to everyone, especially children.

The African Children's Charter does not make any provision for resources for the Committee. For the Committee to function properly it must be provided with the necessary tools, in terms of authority, and material and financial resources. With regards to authority, the Committee lacks power to impose any form of sanctions and its decisions are non-binding on the parties. The Committee can merely make recommendations, which are submitted to the OAU Assembly, but the African Children's Charter fails to state what the Assembly should do with them.<sup>88</sup> In theory, the Committee should be provided with an adequate budget to enable it to maintain an efficient secretariat and to finance its activities. Whether this will be the case is yet to be seen. Nevertheless, with reference to the African Commission, this is doubtful in practice. According to Kisanga, financial constraint is the most serious problem encountered by the Commission in carrying out its functions.<sup>89</sup>

Finally, the confidentiality afforded to communications under article 44(2) of the African Children's Charter has the negative effect of providing the Committee with a shield to hide behind when considering human rights violations, rather than exposing them.

### 3.2 Enforcement mechanism

The affirmation of rights should be accompanied with a clear, unambiguous mode of enforcement, otherwise the granted rights are valueless.<sup>90</sup> In short, a law without a mechanism for effective enforcement is not worth the paper it is written on.<sup>91</sup> Only time will tell if the 'aspirations'

<sup>85</sup> Art 43(1) African Children's Charter.

<sup>86</sup> Which should be available in all relevant languages.

<sup>87</sup> See Flekkoy (n 77 above).

<sup>88</sup> By analogy, see RH Kisanga 'Fundamental rights and freedoms in Africa: The work of the African Commission on Human and Peoples' Rights' in CM Peter & I Juma (eds) *Fundamental rights and freedoms in Tanzania* (1998) 225.

<sup>89</sup> As above.

<sup>90</sup> See CM Peter 'The enforcement of fundamental rights and freedoms in Tanzania: Matching theory and practice' & CM Peter 'Enforcement of fundamental rights and freedoms: The case of Tanzania' both in Peter & Juma (n 88 above) 47 & 81 respectively.

<sup>91</sup> In Tanzanian history throughout post independence indicates the existence of a government with no intention of promoting or protecting fundamental rights.

in the African Children's Charter will be effective, or merely a sign of good will, showing presumptive evidence of Africa's adherence to and promotion of children's rights. By referring to the African Charter's enforcement machinery, it may be possible to estimate how effective the enforcement of children's rights will be.

The African Children's Charter is a less restrictive and a more accessible instrument to the peoples of Africa, because the Committee is expressly mandated to receive and consider communications from state parties directed against other state parties, and uniquely, to consider individual petitions, communications from NGOs on behalf of individuals and other institutions or organisations recognised by the OAU and the UN members.<sup>92</sup> In this respect, the African Children's Charter goes further than the African Charter and the CRC. The African Children's Charter is very vague and somewhat ambiguous with regard to the right to individual petition. It does provide for an explicit right for individuals, but does not qualify a specific interest requirement.<sup>93</sup> It states that 'the Committee may receive communication, from any person, group . . . relating to any matter covered by this Charter'. Is this intended to make the Charter accessible to all or is it shrewd ambiguity, allowing for a 'colourful' interpretation?<sup>94</sup> The terminology 'may' is permissive and could be open to abuse. To employ the word 'must' would have been unambiguous, providing for all communications to be considered, regardless of content.<sup>95</sup> To prevent this from being over-burdensome, a filter mechanism is required, as with all legal mechanisms for the redress of grievances.

Despite the explicit, if somewhat ambiguous right of individuals to lodge communications under the African Children's Charter, it is primarily a paper right and one that is largely unenforceable given the socio-economic conditions of Africa. The majority of Africans, particularly those in the rural areas, are largely ignorant of the existence of the Charter.<sup>96</sup> This is not a fault of the Charter, but significantly due to the high percentage of illiteracy that exists among the populace.<sup>97</sup> In practice, granted rights are often violated with impunity because unaware of such

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<sup>92</sup> Art 44(1) African Children's Charter.

<sup>93</sup> The requirement to be a victim or have an interest in the matter forms an integral part of the right of individuals to lodge communications under other regional and international systems, such as art 25 of the European Convention and art 44 of the American Convention.

<sup>94</sup> However, the Committee is likely to favour a purposive interpretation.

<sup>95</sup> On the negative side, allowing all communications could in effect provide so much work as to result in backlog and communications never or at least not promptly being considered.

<sup>96</sup> This could be due to the fact that the instrument is so new, yet such ignorance and unawareness still exists with the African Charter. See Kisanga (n 88 above).

<sup>97</sup> For example in Malawi, literacy is at 41%. See Kamachedzera (n 26 above).

rights, people are unable to take steps to demand them. Thus, communications do not reach the Committee and in return the effectiveness of the Committee is reduced. The peoples of Africa also do not generally possess the financial capability to institute proceedings to enforce their rights. It could be argued that children's rights are irrelevant in poor countries, as they depend on material conditions for their realisation. Nevertheless, it would be erroneous to suppose that children's rights can only be realised in favourable material conditions. Some rights can be achieved irrespective of wealth.<sup>98</sup> It would seem that in this regard the enforcement mechanism is forward-thinking only in writing. If its intentions were genuine, why does the Charter fail to make any provision for legal aid to poor litigants? Such a provision would have made the rights 'real and effective'.<sup>99</sup> With reference to the African Charter, the complaints procedure is further weakened by the potential delay of processing a communication. The African Charter is the mother-charter to the African Children's Charter, therefore it is likely that the precedents laid by the African Charter will be followed by the African Children's Charter and such delays will be part of the procedure.<sup>100</sup>

Solace may be found when remembering that the implementation provisions in the African Children's Charter are much stronger than those contained in the African Charter. The Committee may feel obliged to act promptly and make their own precedents when dealing with communications, particularly as they will regard children. The Committee must do all in its power to protect children's rights and their vulnerability. Despite the fact that these communications are to be treated in confidence and only lead to a biannual report to the Assembly, the African Children's Charter represents a significant advance in the potential enforcement of children's rights, utilising the far reaching mandate to 'resort to any appropriate method of investigation'.<sup>101</sup>

Another problem with the individual's right to enforce rights through the Committee is due to the fact that it is 'so embryonic that we are basically looking at a blank slate'.<sup>102</sup> Whether this enforcement mechanism is *lex imperfecta* or *simulata* or indeed intended to be effective in practice, can only be adequately assessed when the African Children's Charter and the Committee have had time to find their feet, make the provisions publicly known and apply the provisions. Loopholes in any

<sup>98</sup> For a more detailed discussion, see Kamachedzera (n 26 above) 245.

<sup>99</sup> For example, the European Convention of Human Rights provides in art 6 (fair trial) for a claimant to receive legal aid, particularly in relation to civil claims, in order to make the rights contained 'real and effective'. See *Human rights: Children's hearing system: Legal Aid* (2001) *Public Law* 613.

<sup>100</sup> From 1987 to 1998 the Commission has only heard and concluded nine complaints out of over 100 complaints sent to it.

<sup>101</sup> Art 45(1) African Children's Charter.

<sup>102</sup> According to Posner in Takirambudde (n 67 above) 59.

law are difficult to detect without the application of the law in practice over a fairly lengthy period.

In theory, the African Children's Charter is a stronger instrument than its mother-charter and has the prospect to enhance children's rights in Africa and provide effective monitoring and enforcement mechanisms. As stated previously, it is too early to detail the effects in practice but it is hoped it will have a more influential and successful impact than the African Charter. However, if the practice of the African Charter is anything to go by, the enforcement mechanisms will be problematic and the Committee is likely to have a slow start in terms of having a significant impact on the promotion and protection of children's rights.<sup>103</sup> The regime dedicated to children will be weak, growth will be slow and the Committee, in the absence of a court with compulsory jurisdiction, is a body for weaker monitoring procedures, policy co-ordination and rudimentary forms of information exchange.<sup>104</sup>

A common problem encountered in the implementation of international law in a municipal state is the fact that treaties, even though they have been ratified, could not be applied domestically, because they had not been integrated into the national legal systems.<sup>105</sup> Such a failure to incorporate treaties into municipal legislation could be due to the dualist approach taken by the state, or due to an absence of clear constitutional provisions. Such *lacunae* in constitutional norms can be highlighted with reference to Zambia,<sup>106</sup> Kenya<sup>107</sup> and Ethiopia.<sup>108</sup> Kenya and Zambia and those states with similar constitutions are completely silent about the implementation of treaties and their relation to

<sup>103</sup> See F Viljoen and C Heyns 'An overview of international human rights protection in Africa' (1999) 15 *South African Journal on Human Rights* 421. By the end of 1996, the African Commission had only finalised 72 cases. Of these, 50 were declared inadmissible, five were withdrawn and five were settled amicably.

<sup>104</sup> See Takirambudde (n 67 above).

<sup>105</sup> A series of workshops on the problem of 'Implementation of treaty-based rights of women and children in Eastern and Southern Africa', May–September 1999, were carried out and principally focused on CEDAW and CRC. Adede (n 38 above) 239.

<sup>106</sup> 'This Constitution is the Supreme Law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void' (art 1(3) of the Constitution).

<sup>107</sup> 'This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void' (sec 3 of the Constitution).

<sup>108</sup> '1. The Constitution is the Supreme Law of the Land. Any law, customary practice, an act of an agency of government or official that contravenes the Constitution is invalid. 2. All citizens, governmental bodies, political parties and other associations and their officials are bound by this Constitution. They also have the duty to ensure its observance. 3. No one can assume or exercise the powers of government except in accordance with the provisions of this Constitution. 4. All international agreements ratified by Ethiopia are an integral part of the country' (art 9 of the Constitution).

the supreme law of the land and other municipal laws. Kenya does not even refer to the supremacy of the Constitution itself. Ethiopia, as a minimum, attempts to inform citizens that ratified treaties form an integral part of the municipal law.<sup>109</sup> Yet the question of how treaties can be incorporated into municipal law is not addressed.

Constitutional clauses ensure certainty, uniformity and predictability between international law and municipal law. It also gives courts a tool to enrich national law with international standards.<sup>110</sup> Article 1 of the African Children's Charter sets out the basic obligations of the state parties to 'recognise' and take 'necessary steps, in accordance with their constitutional processes' and to 'adopt legislative and other measures'<sup>111</sup> to give effect' to the rights, freedoms and duties enshrined in the African Children's Charter. The judicial application of the African Children's Charter depends greatly on the status that international human rights norms enjoy in a local legal system. It is most unlikely that municipal courts will make findings based on the provisions of the African Children's Charter, if it is not regarded as part of the municipal law. The courts are more likely to use the African Children's Charter as an interpretative or a navigational aid to give guidance, thereby providing for a non-legislative measure to 'give effect' to the Charter. It is unfortunate that the African Children's Charter fails to contain a provision guaranteeing the right of appeal to competent national organs to redress the violation of rights recognised by international law. The African Charter does by virtue of article 7(1) explicitly provide that state parties guarantee the right of individuals to bring cases on the basis of the Charter, even before municipal courts.<sup>112</sup>

#### 4 Conclusion

The African Children's Charter can be criticised as having a Western bias, due to the fact that it prescribes rights for children, which historically is alien to African culture, as the degree of respect varied according to age, ability and sex. Moreover, the African Children's Charter was also largely modelled on the CRC. Thus, the provisions of the African Children's Charter may not be effectively implemented or adhered to if they are regarded as so far removed from Africa's cultural and traditional

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<sup>109</sup> Adede (n 38 above).

<sup>110</sup> See Tshosa (n 38 above). International standards provide the minimum, thus if international standards are less than domestic standards, the domestic standards prevail.

<sup>111</sup> The meaning of 'by other measures' is ambiguous and is in need of definition as to what it incorporates.

<sup>112</sup> See F Viljoen 'Application of the African Charter on Human and Peoples' rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

perspective.<sup>113</sup> This assertion can be rebutted by reference to the Preamble, which emphasises historical tradition and the values of African civilisation. The emphasis on traditional African values represents a significant departure from other international human rights documents, especially the perception that the enjoyment of human rights entails duties. Most international human rights instruments are concerned with duties owed by the state to the individual. The African Children's Charter articulates duties owed by the individual to the state.<sup>114</sup> This concept of children's responsibilities helps educate others in the potential value of children's contributions to society. The African Children's Charter does not impose Western conceptions of human rights on Africa; it promotes a modernised Africa, departing from the traditional perception of children as property. Children now have the right to a certain degree of self-determination; children can no longer be regarded as mere 'property'. The key provisions supporting this message are articles 4(2) and 7 of the African Children's Charter, as they grant children a right to have a say in matters affecting their lives.<sup>115</sup> The African Children's Charter is the advancement of society in general, not an attempt to westernise Africa.

The adoption of the African Children's Charter is a regional response to human rights concerns and reflects the realities of Africa. Children are exploited and abused. Prior to the African Children's Charter, the plight of children was analysed only through the eyes of adults on behalf of children. Children did not have easily identifiable rights targeted directly at them, and contained in a legal framework, especially formulated to incorporate the intricate issues of childhood,<sup>116</sup> consent<sup>117</sup> and the child's best interests.<sup>118</sup> Basically, before the adoption of the African Children's Charter, children had no voice, no specific rights or protection. Children were unable to act for themselves, consistently relying on the will of the state or their parents/legal guardians/community (who

<sup>113</sup> Children's rights are problematic, because not all African societies believe that children deserve special status.

<sup>114</sup> The dominant African conception of human rights combines a system of rights and obligations. Thus, the African Children's Charter relates to this concept.

<sup>115</sup> The provisions are impaired by the insertion of 'if capable . . .' (art 4(1)) and 'who is capable . . .' (art 7). What test will be applied to the condition that children need to be *capable*? How are *capable* children to be assessed? Surely, this has the result of rendering the right valueless as authorities can merely contend that the child cannot have his say as he is not *capable*.

<sup>116</sup> Art 2 Africa Children's Charter

<sup>117</sup> Prior to the African Children's Charter, the issue of children volunteering for combat was used as a shield for the exploitation; C Hamilton 'Children in armed conflict — New moves for an old problem' (1995) 7 *Journal of Conflict Law* 38; but since the adoption of the Charter the legal entitlements granted to children, no longer impinge on whether a child was forced or volunteered, whether consensual or not — all forms of exploitation are strictly prohibited.

<sup>118</sup> Art 4(1) African Children's Charter.

are often the perpetrators of the violations) to redress children's human rights violations. The framework of the African Children's Charter provides children with a viable mechanism to express themselves in judicial and administrative proceedings and are able to express their opinions freely in all matters affecting them, and if occasion requires, they can lodge a communication about human rights violations perpetrated against them, in exchange for the discharge of their responsibilities enshrined in article 31. To this extent the African Children's Charter is a positive achievement. It encompasses a holistic view of rights and duties: economic, social, civil, cultural and moral, and the need for development consistent with the holistic view of people as reflected in the African tradition of human dignity.

The African Children's Charter has limitations. Most African governments, due to the socio-economic conditions prevalent in Africa, cannot solve the specific problem of children's human rights violations.<sup>119</sup> Socio-economic conditions make it impossible for many countries to fully achieve the rights contained in the African Children's Charter, and these problems are perpetuated by the political and economic systems which are in need of restructuring. The enforcement mechanisms appear to be weak and the Committee has no binding authority but is mandated to promote and protect children's rights.

At present, it is fair to assert that there is no general culture of children's rights in Africa, particularly due to the embryonic nature of the African Children's Charter. For some Africans the very idea of children having rights is threatening, and there is much misunderstanding about what children's rights actually mean. There is, however, eager willingness to promote the fulfilment of children's *needs*. There needs to be a better understanding of the societal views of children, the idea that children have rights should no longer be deemed as 'un-African'.<sup>120</sup> There is a lack of awareness of the African Children's Charter, and a notable lack of academic debate. Better understanding of what children's rights mean in the rich variety of African cultures has the objective of providing tools for implementing children's rights instruments and ultimately monitoring the effects of policy and programme interventions.

<sup>119</sup> There is the basic contradiction between African problems such as poverty, the lack of national unity, and underdevelopment, which impede the implementation of human rights and the measures required to solve the problems. See Z Motala 'Human rights in Africa: A cultural, ideological, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 373-392.

<sup>120</sup> With regard to the so called 'participation rights' — arts 12–15 African Children's Charter. The above propositions were made at the African Contexts of Children's Rights Seminar, Harare 12–14 January 1998. This seminar was hosted by Redd Barna Zimbabwe and organised by ANPPCAN Zimbabwe, Childwatch International and CODESRIA (n 20 above).