

**INTERNATIONAL PROTECTION OF CHILDREN'S RIGHTS: AN ANALYSIS
OF AFRICAN ATTRIBUTES IN THE AFRICAN CHARTER ON THE RIGHTS
AND WELFARE OF THE CHILD**

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Abstract

In November 1989, the United Nations adopted the Convention on the Rights of the Child (CRC) and this treaty came into force less than a year later in September 1990. Rather than strictly enforce the provisions of the CRC, African leaders decided to adopt their own version of the CRC, the African Charter on the Rights and Welfare of the Child (African Children's Charter), which was adopted in July 1990 but only came into force nine years later in November 1999. The question is – if the specific protection of African children was so urgent that it necessitated a separate treaty, why did it take so long for African leaders to ratify their own treaty? This article scrutinise the African Children's Charter with a view of bringing out aspects peculiar to Africa that prompted a separate treaty for African children. In this regard, other international human rights instruments are important. This paper will therefore examine the international protection of children's rights prior to the African Children's Charter both under the United Nations (UN) and the African regional human rights systems.

Keywords: Children's rights, child protection, regional protection, international standards, human rights, African Children's Charter.

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1. Introduction

There is a general consensus that children are in many respects more susceptible to human rights violations than adults.¹ However, the point must be emphasised that causes of human rights violations such as poverty and warfare do have a disproportionate impact on children in Africa than their counterparts on other continents. Related to these are other aspects of harmful cultural practices such as female genital mutilation and forced marriages, which have impacted negatively on the African child. It is against the background of this vulnerability that the Assembly of Heads of States and Governments of the Organisation of African Unity (OAU), now the African Union (AU) adopted in 1990, the African Charter on the Rights and Welfare of the Child (African Children's Charter).²

2. International Protection of Children's Rights before the African Children's Charter

International concern for the rights of the child dates far back as the General Declaration of the Rights of the Child of 1924, which was followed by the Declaration of the Rights of the Child of 1959 proclaimed by the UN General Assembly resolution 1386 (XIV).³ However, both declarations were not legally binding on states. It was not until 1989 that the first legally binding instrument on the protection of children was adopted.

2.1. The Convention on the Rights of the Child

Before the adoption of the African Children Charter, the only instrument meticulously protecting children's rights, and legally binding on African states

¹ Frans Viljoen "The African Charter on the Rights and Welfare of the Child" in CJ Davel (ed) (2000), *Introduction to Child Law in South Africa*, pp. 241-215; Julia Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" *South African Journal on Human Rights*, Vol. II Part 3, (1995), p. 401; Geraldine Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in CJ Davel (ed) (2000), *Introduction to Child Law in South Africa*, p. 202.

² Adopted by the OAU Assembly of Heads of States and Governments on 11 July 1990, and it entered into force on 29 Nov. 1999.

³ AL Muthoga "Introducing the African Charter on the Rights and Welfare of the Child"- paper presented at the *International Conference on the Rights of the Child*, organised by the Community Law Centre at the University of the Western Cape (1992), p. 123.

was the Convention on the Rights of the Child (CRC).⁴ The CRC was the first international human rights treaty to adopt a comprehensive approach on the protection of children, and has in fact been hailed as a watershed in the history of children.⁵ The Convention covers a wide range of issues and establishes legally binding obligations by laying down international standards, which states must meet both within their domestic legislations and policies affecting children. The CRC defines a child as every human being below the age of 18 years.⁶

The Convention covers civil, political, economic, social and cultural rights.⁷ It contains a broad non-discrimination clause;⁸ provides that the best interest of the child shall be a primary consideration in all actions affecting children;⁹ protects the right and responsibilities of parents and legal guardians over the child;¹⁰ guarantees the right to life;¹¹ and the child's right to a name, nationality and identity.¹² It also protects the child's right to the family and when deprived of his or her family environment;¹³ his right to expression, thought, conscience, religion and association;¹⁴ protects the child from illicit transfer, right to privacy, child labour, drug abuse, sexual exploitation, traffic in children, and all forms of exploitation.¹⁵ It further guarantees child adoption, protects refugee children, the disabled, children of minority groups or indigenous origin and children in armed conflicts.¹⁶ It protects the child against torture, cruel and inhuman treatment; protects the child from capital punishment or even life imprisonment without the possibility of release; and requires the observance of due process in the

⁴ U.N. G.A. RES. 44/25 of 20 Nov. 1989 and it entered into force on 2 Sept. 1990; 28 I.L.M. 1456 (1989).

⁵ Julia Sloth-Nielsen (note 1 above), p. 401.

⁶ CRC, article 1. This definition is however subjected to national legislations which may determine an early age for majority.

⁷ Geraldine Van Bueren (note 1 above), p. 202.

⁸ Article 2.

⁹ Article 3.

¹⁰ Articles 5 & 18.

¹¹ Article 6.

¹² Articles 7 & 8.

¹³ Articles 9 & 20.

¹⁴ Articles 12, 13, 14 & 15.

¹⁵ Articles 11, 16, 32, 33, 34, 35 & 36.

¹⁶ Articles 21, 22, 23, 30 & 38.

administration of justice.¹⁷ The Convention also guarantees socio-economic rights of children, such as the right to health, social security, adequate standard of living, education, rest and leisure.¹⁸

The CRC is the most widely ratified of international human rights treaties¹⁹ with all UN members, except for the US, being States Parties. The body charged with overseeing the implementation of the CRC is the Committee on the Right of the Child²⁰ which has the authority to examine States periodic reports;²¹ work hand in hand with other UN agencies involved in the area of children's rights;²² and make suggestions and recommendations both to the UN General Assembly and States parties with respect to the improvement of issues relating to children's rights.²³

2.2. Children's Rights in other UN Conventions

Before the adoption of the CRC, other international human rights treaties existed amongst which is the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁴ and the International Covenant on Civil and Political Rights (ICCPR).²⁵ Both instruments did not deal exclusively with children's rights. However, their guarantee of the rights of "all peoples", "all persons", "every human being", "any person", "anyone", and "everyone" does not in any way exclude children. In other words it is logical to say that the rights provided for in these covenants effectively apply to children as well. Besides protecting children under these general clauses, both covenants at certain instances refer to children particularly.

¹⁷ Articles 37, 39 & 40.

¹⁸ Articles 24, 25, 26 & 27.

¹⁹ Julia Sloth-Nielsen (n 1 above) 402. See also Frans Viljoen (n 1 above), 217.

²⁰ Was established in 1991.

²¹ CRC, article 44(1).

²² Article 45(a) & (b).

²³ Article 45(c) & (d).

²⁴ U.N G.A. RES. 2200A (XXI) of 16 Dec. 1966 and entered into force on 3 Jan. 1976; 993. UNTS 3.

²⁵ U.N. G.A. RES. 2200A (XXI) of 16 Dec. 1966 and entered into force on 23 March 1976; 999 UNTS 171.

For instance, the ICESCR guarantees the protection and assistance to the family for its responsibility and care over dependent children.²⁶ It requires that special measures be taken on behalf of children, that they should be protected from economic and social exploitation,²⁷ and that children be protected against child labour.²⁸ It also obliges States to take steps to reduce stillbirth rate, infant mortality and improve on the healthy development of the child.²⁹ Further, the right to education is protected. It guarantees free and compulsory primary education and the progressive introduction of free secondary education. The ICCPR on the other hand call on States parties to ensure that in criminal proceedings involving juveniles the procedures should take into account their age and the desirability of promoting their rehabilitation.³⁰ It also guarantees the child's right to protection by the family, society and the State,³¹ the right to be registered after birth and be given a name,³² and the right to acquire a nationality.³³

3. Children's Rights in Africa prior to the African Children's Charter

Before the adoption of the African Children's Charter, the rights of the child were regionally protected under two OAU documents – the Declaration on the Rights and Welfare of the African Child,³⁴ and the African Charter on Human and Peoples' Rights.³⁵

3.1. The Declaration on the Rights and Welfare of the Child

The work on the rights of children in African extends far back as 1979, the International Year of the Child,³⁶ in which the OAU passed the Declaration on the

²⁶ ICSECR, art 10(1).

²⁷ Article 10(3).

²⁸ Ibid.

²⁹ Article 12(2)(a).

³⁰ ICCPR, article 14(4).

³¹ Article 24(1).

³² Article 24(2).

³³ Article 24(3).

³⁴ Adopted by the OAU Assembly of Heads of State and Government on 20 July 1979.

³⁵ Adopted by the OAU Assembly of Heads of State and Government on 27 June 1981. It entered into force on 21 Oct. 1986; 21 I.L.M. 59 (1982).

³⁶ As proclaimed by U.N. G.A. RES. 31/169 of 21 Dec. 1976.

Rights and Welfare of the African Child (the Declaration).³⁷ This Declaration recognised the need to take all appropriate steps to protect the rights and welfare of the African child.

The Declaration brought out many concerns peculiar to Africa. It raised awareness of the deep concern of African States about the future of African Children as inheritors and keepers of the African cultural heritage.³⁸ This provision illustrates the respect Africans have for their culture and the important role children are supposed to play in a traditional African society.

The Declaration also made it clear that the welfare of the African child is inextricably bound up with that of his or her parents and other members of the family, especially the mother.³⁹ This does not only show how significant the family unit is in an African society, but also exemplifies the traditional role of the African mother whose main task has in the past been tied up to child rearing. Whether child welfare can nowadays be exclusively linked to mothers rather than fathers is debatable. This is true if we take into account the realisation that women are important role-players and must engage in more than just child rearing for the full development of society - responsibilities which are now guaranteed in a plethora of international human rights instruments.⁴⁰

The Declaration also called on all African states to review provisions relating to children in their legal codes paying particular attention to the unequal status of female children in some parts of Africa.⁴¹ This provision depicts the various machinations feminism has undergone and continues to undergo in most of

³⁷ Garton S Kamchedzera "The Complementarity of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, in Eugeen Verhellen (ed) (1998), *Understanding Children's Rights*, p. 550.

³⁸ Preamble, para 6.

³⁹ Preamble, para 7.

⁴⁰ See the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), U.N. G.A. RES. 34/180 of 18 Dec. 1979 and entered into force on 3 Sept. 1981; 1249 UNTS 13; See also non-discrimination clauses in all human rights instruments.

⁴¹ Principle 2 of the Declaration.

Africa. Examples of these are discrimination against the girl child in education and inheritance. Due to the numerous cultural and traditional practices impacting negatively on children on the continent, the Declaration further urged African states to thoroughly examine cultural legacies and practices that are harmful to normal growth and development of the child such as child marriages and female circumcision. It recommended that legal and educational measures be adopted to abolish them.⁴²

Finally, it requisitioned states to preserve and develop African arts, languages, and cultures, and to stimulate the interest and appreciation of African children in the cultural heritage of their own countries and of Africa as a whole.⁴³ Again, this reiterates the love, respect, and the prestige with which the African culture is upheld; but more so, it depicts the extreme need to retain African cultural values in the face of Western influence. As a declaration however, this document had no binding force in the like of a convention, and could only be regarded as a policy statement for African States.

3.2. The African Charter on Human and Peoples' Rights

The present African regional human rights regime is built on the African Charter on Human and Peoples' Rights (African Charter),⁴⁴ and functions within the institutional framework of the AU. The African Charter makes only one mention of the child in its provisions.⁴⁵ It provides that States Parties should ensure the protection of the rights of the child as stipulated in international Declaration and Covenants. By this therefore, the African Charter effectively endorses internationally adopted principles on children's rights.

Besides, the African Charter in itself does not exclude children in the protection of rights therein guaranteed. It deals with the rights of "every individual", "human

⁴² Principle 3.

⁴³ Principle 10.

⁴⁴ See note 35 above.

⁴⁵ Article 18 (3).

beings”, “every citizen”, and “all peoples” under the jurisdiction of States. A plain language interpretation of these phrases would support the logical conclusion that children are also protected, both as individuals, as human beings, as citizens and as members of a group (peoples).⁴⁶

4. The African Charter on the Rights and Welfare of the Child

Barely a year after the adoption of the CRC, the OAU adopted the African Children’s Charter as an African embellishment to the global protection of children’s rights.⁴⁷ It is obviously not an issue that Africa readily took a regional dimension to the protection of children, for the move was adequately motivated by informed and rational arguments.⁴⁸ The African Children’s Charter was adopted against the background that the situation of most African children remained critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and also on account that the child’s physical and mental immaturity necessitated special safeguard and care.⁴⁹ Political and legal reasons have thus far been canvassed for the OAU reaction.

Politically, African patriotism and perceived Eurocentrism in the CRC’s drafting process was of great impetus.⁵⁰ African states resented their low level of involvement in the drafting process of the CRC. The OAU reaction therefore stemmed from a perception of marginalisation and exclusion in the drafting of the

⁴⁶ Frans Viljoen (note 1 above), p. 216.

⁴⁷ Africa is at the forefront of standard setting on children’s rights at a regional level. This is praiseworthy for the continent as it represents a major and excellent contribution to the development of international law on the rights of children.

⁴⁸ Opposition to the process of the CRC in Africa was first raised at a conference titled ‘*Children in Situations of Armed Conflict in Africa*’, organised by the African Network for the Protection Against Child Abuse and Neglect (ANPACAN) and UNICEF, held from 9 to 11 May 1988 in Nairobi, Kenya. A significant outcome of the conference was that the OAU in collaboration with ANPACAN and UNICEF set up a working group of African experts who produced a draft charter that formed the basis of the eventual African Children’s Charter. (See Frans Viljoen (note 1 above), p. 218).

⁴⁹ Preamble to the African Children’s Charter, para; 3. Also highlighted in the preamble is the virtue of the cultural heritage, historical background and values of African civilisation, which should inspire the concept of child welfare in Africa (para.6); and also the African notion of a correlation between rights and duties (para; 7).

⁵⁰ Garton S Kamchedzera (note 37 above), p. 550.

CRC.⁵¹ Both at the Governmental and non-Governmental levels, Africa was under-represented, and its viewpoints not sufficiently incorporated in the drafting process.⁵² Hence the exclusion was not only regarded as unfair, but also perceived to have given African states a limited opportunity to air their views on the contents of the convention.

Legally, although African states later welcomed the outcome of the UN process on the protection of children's rights,⁵³ they did not regard the CRC as the utmost insofar as Africa is concerned. As a global instrument, the CRC was perceived to be the result of numerous compromises. African critics of the CRC and supporters of the African move argued strongly that, regional specificities were sacrificed in the drafting of the CRC at the altar of consensus.⁵⁴ Accordingly, there was the need for a more protective regional human rights treaty that would identify and prioritise issues specifically affecting children in Africa in addition to globally recognised and generally applicable principles.

The African Children's Charter defines a child as "every human being below the age of 18 years",⁵⁵ and unlike the CRC, this definition is not subjected to alternative prescriptions at the domestic level. It outlaws any majority earlier than 18 years. Consequently, states parties are under an obligation to ensure that their legislations square with that provided for in the Charter,⁵⁶ unless national legislation provides for a more conducive mechanism for the realisation of children's rights.⁵⁷ What this means is that, in relation to national legislation, the provisions of the Africa Children's Charter can be regarded as minimum

⁵¹ With the exception of Algeria, Morocco, Senegal and Egypt, Africa's participation in the drafting of the CRC was minimal; see K Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child", *African Journal of International and Comparative Law*, Vol. 5 (1993), p. 141.

⁵² Muthoga (note 3 above), p. 123.

⁵³ Evidenced in the fact that all African States have ratified the CRC.

⁵⁴ Muthoga (note 3 above), p. 124; Frans Viljoen (note 1 above), p. 218.

⁵⁵ African Children's Charter, article 2.

⁵⁶ Article 1(1).

⁵⁷ Article 1(2).

standards. Deviation from it by national legislation will therefore only be permissible to the extent that national laws afford a better protection to children.

The African Children's Charter basically guarantees, with a few exceptions,⁵⁸ all the rights recognised and protected in the CRC. This ranges from civil and political rights to economic, social and cultural rights.⁵⁹ In addition to these, the African Children's Charter has taken positive measures to justify its very existence. This is reflected in its incorporation of aspects pertinent to the protection of children on the African continent.

The African Children's Charter creates a Committee to oversee the implementation of the rights guaranteed.⁶⁰ This Committee does perform this role through recommendations to Governments, laying down principles, co-operating with Organisations in the field of children's rights, monitoring the implementation of the Charter provisions, and interpreting the provisions of the Charter.⁶¹ The Committee is also empowered to consider periodic states reports,⁶² and complaints alleging states violations of the Charter provisions.⁶³

5. The African Children's Charter as an African Instrument

The African Children's Charter was adopted as an African adornment to the CRC and until date remains the only legally binding human rights treaty providing a

⁵⁸ The African Children's Charter fails to shield the African child from the imposition of life imprisonment; see CRC, article 37(a).

⁵⁹ Rights guaranteed under the African Children's Charter include non-discrimination; best interest of the child; right to life, survival and development; right to a name and nationality; freedom of expression; association; thought, conscience and religion; the right to privacy; education; leisure, recreation and cultural activities; right to health; right of handicapped children; children in armed conflicts; and refugee children. It protects the child against child labour; against torture and abuse; against harmful social and cultural practices; against apartheid; sexual exploitation; drug abuse; sale, trafficking and abduction. It also guarantees due process in the administration of justice; protects the family; parental care and protection; parental responsibilities; adoption; the child's rights when separated from parents; and the rights of children of imprisoned mothers. Above all, the charter provides the child with some responsibilities.

⁶⁰ African Children's Charter, see generally articles 32 to 45.

⁶¹ See the mandate of the African Children's Committee (article 42).

⁶² Article 43.

⁶³ Article 44.

comprehensive guarantee on children's rights on the continent. Although the Charter efficiently protects issues specific to Africa, it also provide for aspects of general concern. It should be emphasised however that the African Children's Charter is an African document, written by Africans, to work for Africans. It incorporates all the policy principles of the Africa Children's Declaration, hence elevating them to binding principles in a different guise.

Meanwhile, it should be noted that some of the aspects considered to be of critical African apprehension are in some instances generally applicable. For example, poverty, culture and tradition, armed conflict, and discrimination against women are not a monopoly of the African continent. These aspects can easily be identified in Asia, Eastern Europe, and Latin America, if not all over the world. Nevertheless, Africa's perception of these features will be examined. The Africa Children's Charter should also be viewed as part of the dedicated effort by the drafters to develop an African approach to human rights.⁶⁴ This is mirrored in some of its provisions.

5.1. Discouraging customs and traditions inconsistent with the Charter Provisions

Any African custom, tradition, cultural or religious practice that is inconsistent with the rights, duties, and obligations contained in the African Children's Charter is to be discouraged to the extent of its inconsistency.⁶⁵ This is an obligation upon states parties and they are required to take all appropriate steps necessary to realise this responsibility. What is more instructive in this provision is its severity and sincerity. It openly admits that insofar as the African custom, tradition, and culture are hailed, there are aspects of these, which do not lead in

⁶⁴ Note that aspects of specific relevance to Africa had earlier been incorporated in the Declaration on the Rights and Welfare of the Africa Child and the African Charter on Human and Peoples' rights.

⁶⁵ African Children's Charter, article 1(1).

any way to the development and advancement of the African child.⁶⁶ In reality though, the Charter merely calls for a sieving of these practices. As such, those practices in conflict with the Charter provisions do not necessarily need to be rejected in their entirety, but rather, to the extent of their inconsistency. Hence, in most cases, only those specific elements in particular practices that do not support the intent and spirit of the Charter need to be struck down.

5.2. The Right to Privacy of the African Child

Another provision postulating an African perception of children's rights is the provision on the right of the child to privacy. The Charter guarantees the child's right to privacy, but subjects it to the right of parents or legal guardians to exercise reasonable supervision over the conduct of their children.⁶⁷ This approach sharply contrasts that adopted in the CRC. The CRC effectively guarantees the child's right to privacy without the intervention of parental supervision.⁶⁸ It is debatable which of the two approaches works out well for the best interest of the child.

Suffice to say however that the African approach is embedded in the principle that the child's physical and mental immaturity necessitates special safeguards.⁶⁹ The point should also be emphasised that in most African countries, childhood corresponds to a psychological and mental state of mind, the duration of which depends on the family environment.⁷⁰ In most African societies therefore, an individual remains a "child" even after 18 years, so long as he/she remains under his parents' shelter and guidance.⁷¹

⁶⁶ Principle 3 of the 1979 OAU Declaration of the Rights and Welfare of the African Child specifically calls upon States to abolish harmful cultural practices, such as child marriages and female circumcision.

⁶⁷ African Children's Charter, article 10.

⁶⁸ CRC, article 16.

⁶⁹ African Children's Charter, preamble, para 3.

⁷⁰ D Fall-Sow, "The Rights of Children in the African Judicial Systems" in Eugene Verhellen (ed) *Understanding Children's Rights* (1996), p. 493.

⁷¹ Ibid.

5.3. Preservation of African Values, National Independence, and the Promotion of African Unity

In guaranteeing the child's right to education, the Charter envisages an educational system directed at achieving amongst other things, the preservation and strengthening of positive African morals, traditional values, and cultures; the preservation of national independence and territorial integrity; and the promotion and achievement of African Unity and solidarity.⁷² These three aspects are interrelated.

The call for the preservation of national independence readily draws to our mind colonialism, which until the second half of the 20th century persisted across Africa. Colonialism is an icon in the specific history of Africa that will never be forgotten. Its impact on Africa is grave and far-reaching, and should be regarded as inextricably linked to Africa's present day difficulties and underdevelopment. Colonialism was full of repression and clearly exploitative.⁷³ It is therefore not surprising that the OAU took a determined approach aimed at ensuring that independent African States preserved their independence and integrity.⁷⁴ On the other hand, the colonial vilification of African culture and tradition is the backdrop to the continuous determination to preserve and strengthen positive African morals, culture and traditional values, especially with the threatening influence of Western values over the African continent.⁷⁵

Equally, the call for an educational system that would promote the achievement of African Unity and solidarity represents the move adopted in post-colonial Africa. The idea of African Unity occupied the minds of many nationalist African

⁷² African Children's Charter, arts 11(2) (c), (e), (f). See also preamble, para 5.

⁷³ UO Umozurike, *The African Charter on Human and Peoples' Rights* (1997), pp. 21 & 55.

⁷⁴ The preservation of African independence and eradication of colonialism is also protected under the OAU Charter; preamble, paras 1 & 6, and arts 2(1) (c) & (d); The African Charter, preamble para 8 and arts 20 & 29(5). Art 20(3) even goes further to guarantee "all peoples", the assistance of States parties in their liberation struggle against foreign domination.

⁷⁵ African culture and traditional values are also protected in the Declaration on the Rights and Welfare of the African Child, preamble, para; 6 and principle 10; and the African Charter, preamble, para 4 & article 29(5).

leaders,⁷⁶ and finds place in almost all OAU treaties.⁷⁷ The idea was finally consecrated with the adoption of the Constitutive Act of the African Union, by the Assembly of Heads of States and Government of the OAU in Lome, Togo on 11 July 2000.

5.4. Protection of the Family

The African Children's Charter regards the African child as occupying a unique and privileged position in the African society and that he deserves to grow up in a family environment providing an atmosphere of happiness, love, and understanding, so as to harmoniously develop his personality.⁷⁸ It is against this background that the Charter regards the family as the natural unit and basis of society, and obliges states to protect and support it.⁷⁹ It should be pointed out that the perception of family within the African context is not limited to the spouses and their children. It extends beyond that to include the extended family such as cousins, nephews, aunts, uncles, and grand parents.

In Africa, children do not only have the right to a family support, but to be taken charge of by the whole community.⁸⁰ This stresses the importance of the communal elements in African societies.⁸¹ In African traditional societies, the human being could not survive independently of his people, the community.⁸² Living in African traditional societies means "abandoning the aggressive, conquering being, in order to be with others in peace and harmony with the living

⁷⁶ In 1965, President Nyerere showed deep concern over the secession movement of Biafra from Nigeria and regarded it as a setback for African Unity. Similarly, Emperor Selassie as the head of the Consultative on the Nigerian Crisis opined that national unity of individual African States is essential for African Unity, and therefore the territorial integrity of OAU member States was not negotiable. (See E Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996), p. 163.

⁷⁷ See the OAU Charter, preamble, paras 4 & 8 and article 2(1) (a); Also, article 29(8) of the African Charter imposes a duty on individuals to contribute to the best of their abilities, at all times, and at all levels, to the promotion and achievement of African Unity.

⁷⁸ African Children's Charter, preamble, para 4.

⁷⁹ Article 18(1).

⁸⁰ D Fall-Sow (note 70 above).

⁸¹ P Kunig, W Benedek & C Mahalu, *Regional Protection of Human Rights By International Law: The Emerging African System* (1985), p. 63.

⁸² Ibid.

and the death..."⁸³ In traditional Africa, an individual is considered to be "part and parcel" of a group and depends on his group which is obliged to assist him.⁸⁴

The African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity.⁸⁵

The philosophy of the individual and the community is summed up in the following phrase; "I am because we are, and because we are, therefore I am".⁸⁶

At all times however, we have the primacy of the family, the clan or the community over the individual.⁸⁷ This was not of subordination, but of complementarity.⁸⁸ Whatever the rationale, it is possible to assert that inasmuch as different family structures exist in Africa, the duty upon States to protect families cannot be dissociated from its protection of the community at large.

5.5. Harmful Social and Cultural Practices

The African Children's Charter urges states parties to eliminate harmful social and cultural practices, especially those prejudicial to the child's health or life, and those discriminatory of the child on any grounds.⁸⁹ In this respect, it bars child marriages and the betrothal of girls and boys, and also calls upon states to legislate the minimum age of marriage to be 18 years.⁹⁰

The issue of harmful cultural practices is very crucial within the African context. Most African societies have held steadfast to their customs despite their negative impacts on children. Besides child marriages and child betrothal, there are other harsh practices like female genital mutilation, killing of baby twins, parents-

⁸³ Quoted from Ankumah (note 76 above), p. 163.

⁸⁴ Ibid.

⁸⁵ Quoted from M Matua "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", *Review of the African Commission on Human and Peoples' Rights*, Vol. 6 (1996-97) Parts 1 & 2, 32.

⁸⁶ Ibid, quoting J Mbiti, *African Religion and Philosophy*, (1970), p. 141.

⁸⁷ Mutombo Nkulu, "The African Charter on Human and Peoples' Rights: An African Contribution to the project of global ethic"

<<http://astro.temple.edu/~dialogue/Center/mutombo.htm>> accessed on 20-09-2001.

⁸⁸ Kunig et al (note 81 above).

⁸⁹ African Children's Charter, article 21.

⁹⁰ Ibid.

arranged marriages, male primogeniture, and female inferiority, all protected in the name of custom, tradition, culture, and religion. Some African traditions go as far as supporting discrimination against women in such areas as inheritance, property ownership, and consent for marriage.⁹¹ It is therefore not surprising that the African Children's Charter calls on states to abolish such negative practices.

5.6. Armed Conflicts and Refugees

Another area in which the African Children's Charter carries forward the protection of the African child is in the situation of armed conflicts. It prohibits both the recruitment of children into the armed forces and protects refugee children. On this point the African Children's Charter departs slightly from the guarantee under the CRC. The Charter requires states to refrain from recruiting children into the armed forces.⁹² In line with article 2 of the Charter, this means a watertight prohibition on the recruitment of persons below 18 years of age. Conversely, the CRC only prohibit the recruitment of youths below 15 years.⁹³ Hence while the Charter prohibits persons under 18 from taking part in hostilities,⁹⁴ the CRC allows children between 15 and 18 years to be used directly in hostilities.⁹⁵ An attempt to partially redress this situation is found in the Optional Protocol to the CRC.⁹⁶

The African Children's Charter also broadens the scope of protection of refugee children allowing internally displaced children to be given adequate protection whether such displacement results from natural disaster, internal armed conflicts,

⁹¹ Umozurike (n 73 above), 57. The situations in Nigeria, Lesotho, Zambia and Kenya has been illustrated in Ankumah (note 76 above), pp. 153-154; see also K Arts (note 51 above), p. 151.

⁹² African Children's Charter, article 22(2).

⁹³ CRC, article 38(3).

⁹⁴ African Children's Charter, article 22(2).

⁹⁵ CRC article 38(2).

⁹⁶ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts (UN General Assembly resolution A/RES/54/263 of 25 May 2000). Article 1 provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities". On its part, art; 2 urges states parties to "ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces".

civil strife, the breakdown of economic and social order or any other cause.⁹⁷ These aspects resound the precarious situation in which children find themselves in Africa.⁹⁸ Although not restricted to Africa, child soldiers and child refugees are common tribulations on the African continent.⁹⁹ Africa makes headlines with events related arm conflicts¹⁰⁰ with all its accompanying consequences amongst which is the proliferation of refugees. Consequently, by providing that the standard applicable to internationally displaced children shall apply equally to internally displaced, the Charter brilliantly exhibits an insight and realism to the nature of refugee problems on the continent. The relevance of this provision is echoed in the fact that the number of internally displaced people in Africa most often surpass the internationally displaced; most of them being women and children.

5.7. Protecting Children under Apartheid

The African Children's Charter takes a positive step in protecting children under apartheid regimes. It specifically urges states parties to individually or collectively accord highest priority to the special needs of children living under apartheid and states subjected to the military destabilisation of the apartheid regime.¹⁰¹ To this end, they shall direct their efforts towards the elimination of all forms of discrimination and apartheid on the African Continent.¹⁰² It is by now not a secret that until the early 1990s, Apartheid continued to be the worst tribulation and the major stumbling bloc to the full development of humanity in Africa. In no other continent have the adversities of apartheid been felt like in Africa. The term itself was invented on the African continent for the selfish and heartless interests of the minority Whites of South Africa.

⁹⁷ African Children's Charter, article 23(4).

⁹⁸ Frans Viljoen (2001) 'Africa's contribution to the development of international human rights and humanitarian law', *1 Africa Human Rights Law Journal*, p. 23.

⁹⁹ Ibid.

¹⁰⁰ D Torou <<http://www.peace.ac/afstrugglehumanrights.htm>> accessed on 17-08-2001.

¹⁰¹ African Children's Charter, article 26 (1).

¹⁰² Article 26 (3).

When the Afrikaner-dominated National Party won the 1948 general election, it immediately began to implement the policy known as apartheid, which in Afrikaans means "apartness."¹⁰³ Racial discrimination was institutionalised and although initially aimed at maintaining 'White' supremacy over 'Black', it developed in the 60's, to a full plan of "Grand Apartheid" which emphasised territorial separation and police repression, as non-compliance with race laws were dealt with harshly.¹⁰⁴

The notorious system of apartheid did not only exclude blacks from accessing social and economic opportunities in their own country, but also deprived them of their political rights only on the grounds that they were black.¹⁰⁵ This policy ensured that blacks were settled separate from whites and had to carry "passes" or identification documents to come to towns, regarded as non-black areas.¹⁰⁶ Worst still, the Apartheid Regime exported its activities to other countries like Namibia. The cruelty and barbaric nature of this system provoked much agitation and movements in the international arena.¹⁰⁷ The protection of children under such a regime was therefore an indispensable priority for the OAU, and despite its loyalty to its principle of "non-interference";¹⁰⁸ the OAU never yielded its constant attack on South Africa.¹⁰⁹ Today however, the issue of apartheid may

¹⁰³ *Apartheid: The Beginning* <<http://www.learner.org/exhibits/southafrica/apartheid.html>> accessed on 22-09-2001.

¹⁰⁴ *The History of Apartheid in South Africa* <<http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html>> accessed on 22-09-2001.

¹⁰⁵ M Hansungule, '*Domestic Implementation of Human Rights in African Constitutions*' (2001), (on file with author). See also Umozurike (note 73 above), p. 54.

¹⁰⁶ *The History of Apartheid in South Africa* (note 104 above).

¹⁰⁷ Apartheid led to the conclusion of several treaties including, the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. G.A. RES. 2106 (XX) of 21 Dec. 1965, and entered into force on 4 Jan. 1969, 660 UNTS 195; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, U.N. G.A. RES. 3068 (XXVIII) of 30 Nov. 1973, and entered into force on 18 July 1976, U.N. Doc. A/9030 (1973); and the International Convention against *Apartheid* in Sports, U.N. G.A. RES. 40/64 of 10 Dec. 1985, and entered into force on 3 April 1988.

¹⁰⁸ Article III (2) of the OAU Charter. The OAU emphasised the principle of non-interference in "internal affairs" in an effort to avoid conflict between member states.

¹⁰⁹ Ankumah (note 76 above), p. 4; Umozurike (n 73 above), p. 24; Mutombo (note 87 above).

not be a major issue in Africa, particularly with the ongoing democratisation process in South Africa and Namibia.

5.8. Responsibilities of the Child

The African Children's Charter does not fail to reiterate the defended African position taken up earlier in the African Charter whereby individuals do not just claim rights and freedoms without bearing some responsibilities.¹¹⁰ Until date, these African instruments remain the most comprehensive provisions on individual's duties guaranteed in international treaties.¹¹¹ The Children's charter replicates the principle that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone.¹¹² In line with this, it imposes duties on the child towards the family, society, and the State.¹¹³ These include the duties of obedience and respect to his family, parents and elders; to serve his national community; to preserve and strengthen social and national solidarity; to preserve African cultural values; to preserve the independence and integrity of his country; and to promote African Unity.¹¹⁴

To preserve African values have always been the intention of the drafters of the African human rights instruments.¹¹⁵ In African traditional communities, rights go hand in hand with duties and the individual is specifically prepared to assume his

¹¹⁰ Para 6 of the preamble to the African Charter provides clearly that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". Article 29 then goes on to provide the individual with duties towards the family, the State and the community.

¹¹¹ Note however that imposing duties on individuals have also been provided for in other international conventions. For instance, art 29(1) of the Universal Declaration of Human Rights provides that "everyone has duties to the community in which alone the free and full development of his personality is possible". Paras 5 of the preamble to both the ICESCR and the ICCPR provides also that the individual has duties to other individuals and to the community to which he belongs, and is under a responsibility to strive for the promotion and observance of the rights recognised therein; see also The Inter-American human rights system which provides for duties under the American Declaration of the Rights and Duties of Man.

¹¹² Preamble, para 6.

¹¹³ African Children's Charter, article 31.

¹¹⁴ Ibid.

¹¹⁵ Kunig et al (note 81 above), p. 89.

social responsibilities.¹¹⁶ The obligation to care for family members remains one of the features that lie at the heart of the African social system.¹¹⁷

The conception of the individual who is utterly free and utterly irresponsible and opposed to society is not consonant with African philosophy.¹¹⁸

Individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individual.¹¹⁹ This appears to be truer of Africa than any other place.¹²⁰ It is therefore not by accident that African children were also given responsibilities alongside the guarantee of their rights and freedoms in the Children's Charter. Nonetheless, the Children's Charter does not expect all children to have the same responsibilities and as such recommends that these duties should take into account the age and ability of children.¹²¹

6. Conclusion

What can be discerned from the above is that the African Children's Charter is a document which adequately showcases the priorities of the African continent without undermining the relevance and status of the CRC. But in spite of its effort at complementing the global protection of children, the African Children Charter has constantly maintained a low profile in the international human rights arena. It is not known to most Africans and has been rarely used relative to the CRC, both at the international and national levels. Non-governmental organisations (NGOs) have not taken up the initiative required to give the Children's Charter the full publicity it deserves. One of the reasons for this slow move is that the Charter took long to come into force.

The reaction of African States shows a seemingly low acceptability of the luminous endeavour by African experts on the protection of children on the

¹¹⁶ Ibid.

¹¹⁷ T W Bennett, *Human Rights and African Customary Law* (1995), p. 6.

¹¹⁸ Quoted from Kunig et al (note 81 above), p. 89.

¹¹⁹ Matua (note 85 above), p. 17.

¹²⁰ Ibid.

¹²¹ African Children's Charter, article 31.

continent. The Charter needed just 15 instruments of ratification (less than one third of OAU members States) for it to come into force,¹²² but it took almost a decade to get the required ratifications causing it to come into force on 29 November 1999. This is absurd when compared to the CRC that took ten months to enter into force.¹²³ As of now (15 December 2001), more than ten years after its adoption, the African Children's Charter counts only 21 States Parties (less than half of OAU member States).¹²⁴ This bleak experience is crucial and African States should take up the initiative to ratify the continent's foremost children's instrument.¹²⁵

The African Committee on the Rights of the Child (Africa Children's Committee) consequently has a major role to play with respect to the protection of children on the continent. To this end, it would be wise for the Committee to give the widest possible publicity to the Children's Charter, and also encourage NGOs to join its efforts in this regard. Further, the African Children's Committee should extend the initiative of the African Commission by properly scrutinizing States reports under the Children's Charter.¹²⁶ It should enter into constructive dialogue with States, and design programmes aimed at helping States fulfil their obligations under the Charter. More so, since the provision on the content of states reports remain vague, it is hope that the African Children's Committee will easily deal with this aspect in its reporting guidelines. In this regard, it would be important to avoid unnecessary broad requirements that may hamper the quality of reports.

¹²² African Children's Charter, article 47(3).

¹²³ See note 4 above.

¹²⁴ Centre for Human Rights, University of Pretoria, <<http://www.up.ac.za/chr/ahrd/ahrd.html>> accessed on 15-12-2001.

¹²⁵ States that have **not ratified** the African Children's Charter include, Algeria, Botswana, Burundi, Central African Republic, Comoros, Congo, Ivory Coast, DRC, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Liberia, Libya, Madagascar, Mauritania, Mauritius, Namibia, Nigeria, Sahrawi Arab Democratic Republic, Sao Tome & Principe, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Tunisia, Zambia.

¹²⁶ The African Commission had included a paragraph on the protection of children and young persons in the "Guidelines for National Periodic reports" in an effort to examine states conduct towards children; Annex XII to the African Commission's *Second Activity Report*, para; 30. (See Frans Viljoen (note 1 above), p. 217.

In addition, it is worth of mention that a long time has elapsed since the OAU thought of the plight of African Children, and when constructive action is to be taken through the African Children's Committee. It is indisputable that between the adoption of the African Children's Charter and the coming into existence of the Committee¹²⁷ the situation of most Africa children have worsened. As such there is the need for urgent action, but also commitment on the part of the members of the Committee to see that the situation of children in Africa is properly redressed. Consequently, it should consider appointing Special Rapporteurs especially in areas where children are more affected like armed conflict situations, children with HIV/AIDS,¹²⁸ etc. Therefore, improvements in the situation of children in territory of states parties will not only be indicative of the Committee's success, but also an encouragement to non-states parties to reconsider their positions. As such, it will be a major achievement for the Committee to convince states parties to take their obligations under the African Children's Charter serious.

Above all, states should also encourage and support the activities of the Committee by observing the rights guaranteed in the African Children's Charter and adhere to their obligations therein. They must understand that the survival and effectiveness of the Committee will depend much on the moral and financial support they give it. The OAU/AU¹²⁹ as such should also prioritise issues on human rights and allocate sufficient financial resources in this regard. This will be a positive move towards the triumph of respect for human rights in Africa.

¹²⁷ Delayed because of the fact that the African Children's Charter just came into force.

¹²⁸ This can be covered by the right to adequate healthcare, and should aim at scrutinizing the governments' policies towards children affected by the virus.

¹²⁹ Should in case the African Union replaces the OAU (as it is expected to be the situation), then the responsibility of fully supporting and encouraging respect for human rights on the continent should accordingly shift over to it.