

The African Charter on the Rights and Welfare of the Child, an Instrument Based on African Socio-Cultural Realities: Truth or Utopia?

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Abstract

African states rushed to adopt the International Convention on the Rights of the Child in 1989, and at the same time set up an African Charter on the Rights and Welfare of the Child in 1990, after justifying the need for an instrument that took account of the social and cultural realities of African children's rights. Using documentary techniques, the results of our research show that the African Charter is based on the general principles of children's rights, namely the right to non-discrimination, the right to the best interests of the child, the right to life, survival and development, the right to protection against all forms of exploitation, and the right to participation or the right to be heard. In application of these general principles, the African States wanted a response that kept in mind the historical context of the social realities of children's rights, especially children under the apartheid regime, but also the situation of children whose mothers are imprisoned, the situation of child begging, the exploitation of children, and so on. In spite of this initiative, African states are reluctant to implement their demands to the African Committee of Experts on the Rights and Welfare of the Child, in addition to the delay in ratifying or acceding to the African Charter on the Rights and Welfare of the Child, which has not been the case with ratification of the International Convention on the Rights of the Child and the production of reports to its protection body.

Keywords

African Charter on the Rights and Welfare of the Child, Children's Rights, African Realities, African Culture, The African Child

1. Introduction

1989 was a landmark year in the protection and promotion of children's rights,

with the adoption by the United Nations General Assembly of the International Convention on the Rights of the Child (UNICEF, n.d.). The latter created the Committee on the Rights of the Child as a body to monitor the implementation of the rights contained in the provisions of this Convention (Sindayigaya, 2023a, 2023b; Sloth-Nelson, 2016, 2017). This Convention has been ratified by many countries around the world, including African countries.

Despite the favorable response of African countries to children's rights, manifested in their adoption of the Convention, the African member states of the Organization of African Unity (now the African Union) felt that they needed an African instrument to protect children's rights and welfare (Mezmur, 2020; Sindayigaya, 2023a; Sloth-Nelson, 2017; Sloth-Nielsen, 2014). Thus, one year after the adoption of the UN instrument, in 1990, the African States adopted at their General Assembly the African Charter on the Rights and Welfare of the Child (African Union, n.d.). However, the question is whether what was intended at the time of its adoption has remained so at the time of its implementation (Charrière, 2014).

By the time the African countries decided to adopt the African Charter on the Rights and Welfare of the Child, they have already noted with concern that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed special safeguards and care (African Union, n.d.: app. §4).

2. Methodology

This article is the result of research using the documentary technique. This technique was used to document the treaties and conventions relating to children's rights in the UN system. These instruments were compared with the African Charter on the Rights and Welfare of the Child. This documentary technique with a comparative approach was applied to apprehend how African countries are fulfilling their obligation to the African Committee of Experts on the Rights and Welfare of the Child and their dedication to reporting to the UN Committee on the Rights of the Child. This documentary technique has also been applied in the face of existing reports and doctrine on children's rights, especially those critical of the African Convention on the Rights and Welfare of the Child and its protective body, the African Committee of Experts on the Rights and Welfare of the Child, to ascertain whether the Charter was really intended or necessary in practice, or whether it is just one element too many alongside the International Convention on the Rights of the Child and its body, the Committee on the Rights of the Child. With the two instruments to which the African States are, for the most part, parties, they are required to apply them simultaneously and produce reports for two bodies, which appears to be a duplication of reports with almost similar content, except for a few provisions of the Convention not taken up by the Charter, and too few innovations of the Charter which were not

provided for by the Convention.

3. Results

After the preamble, which sets out the reasons for the drafting of the African Charter on the Rights and Welfare of the Child, the Charter's specificity is reflected in the way it is presented and structured. Its structure consists of four chapters, including the rights and duties set out in the African Charter on the Rights and Welfare of the Child, the creation and organization of a Committee on the Rights and Welfare of the Child, the mandate and procedure before the African Committee of Experts on the Rights and Welfare of the Child and miscellaneous provisions. This African Charter is based on the five general principles of children's rights, namely the right to non-discrimination, the right to the best interests of the child, the right to life, survival and development, the right to protection against all forms of exploitation, and the right to participation or the right to be heard.

This article reviews the reasons behind the creation of the African Charter on the Rights and Welfare of the Child. The African Charter on the Rights and Welfare of the Child declares itself to be a way of taking into account African social and cultural realities. This can be seen in the inclusion of traditional African socio-economic and cultural factors in the African Charter on the Rights and Welfare of the Child, the inclusion of demographic weight and the predominance of armed conflict in the African Charter on the Rights and Welfare of the Child, and the measures taken against exploitation, hunger and disability that are conveyed by the provisions of the African Charter on the Rights and Welfare of the Child.

However, although the African Charter on the Rights and Welfare of the Child provides for the creation of an African Committee of Experts on the Rights and Welfare of the Child as a body to protect and monitor its implementation, the Committee faces a number of obstacles, including the fact that it requires the indispensable intervention of States to disseminate the Committee's reports, and the reluctance of African States to produce reports for the African Committee of Experts on the Rights and Welfare of the Child. This is evidenced by the rate of ratification of the African Charter on the Rights and Welfare of the Child by the African States that participated in its adoption in 1990, and the production of reports to the African Committee of Experts on the Rights and Welfare of the Child by the countries party to the African Children's Charter.

4. Discussion

The results showed that the analysis of the African Charter on the Rights and Welfare of the Child is done through the presentation of the structure of the African Charter on the Rights and Welfare of the Child, the rationale of the African Charter on the Rights and Welfare of the Child, the general principles of children's rights in the African Charter on the Rights and Welfare of the Child and the pro-

tective body of the African Charter on the Rights and Welfare of the Child.

4.1. Presentation and Structure of the African Charter on the Rights and Welfare of the Child

This section separates the presentation and structure of the African Charter on the Rights and Welfare of the Child.

4.1.1. Presentation of the African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, adopted on July 11, 1990, is the instrument for protecting and promoting children's rights and welfare at regional level in Africa. It is a mark of recognition by African states that "the child, taking into account the needs linked to his or her physical and mental development, requires special care for his or her bodily, physical, mental, moral and social development, and that he or she needs legal protection in conditions of freedom, dignity and security" (African Charter on the Rights and Welfare of the Child, app. Section 6). It represents a pioneering legislative instrument, the only one to regulate children's rights at a regional level and containing provisions that are stricter than those of the International Convention on the Rights of the Child (Charrière, 2014: p. 2) in certain matters relating to the rights of the African child, including protection against the use of children in armed conflict (African Charter on the Rights and Welfare of the Child, art. 22; UNICEF, n.d.: art. 38) and early marriage (African Charter on the Rights and Welfare of the Child, art. 21 al. 3).

The African Charter on the Rights and Welfare of the Child differs from the African Charter on Human and Peoples' Rights, which has been criticized as not constituting a solemn consecration of African human rights, but rather an imperative safeguard of the States set up as a system (Ait-Ahmed, 1985: p. 195; Gherari, 1991: p. 735). For the African Charter on the Rights and Welfare of the Child, it is not the guarantee of the existence of sovereign and independent States in Africa that is at stake, but rather the specific rights of the child in the African context.

4.1.2. Structure of the African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, apart from the nine-paragraph preamble, which in a way summarizes the explanatory statement of the African Charter on the Rights and Welfare of the Child, consists of two four chapters. For the analysis of this thesis, we refer to the chapters, the first of which sets out the rights and duties, the creation of the African Committee of Experts on the Rights and Welfare of the Child, the procedure before the Committee and finally the miscellaneous provisions.

1) Chapter 1: Rights and duties set out in the African Charter on the Rights and Welfare of the Child

In addition to summarizing the obligations of States set out in Article 1 and

defining the child (Art. 2), the African Charter on the Rights and Welfare of the Child sets out the various rights of the child in Articles 3 to 31. It proclaims, from birth, the right to registration, name and nationality (Art. 6), the right to best interests [implying the right to participation] (Art. 4) and the right to survival and development (Art. 5). It announces the protection of children against discrimination (Art. 3 and 26 al. 2) and guarantees their right to freedom of expression (Art. 7), freedom of association (Art. 8) and freedom of thought, conscience and religion (Art. 9). The Charter recognizes the child's right to privacy (Art. 10), to education (Art. 11) and to leisure, recreation and cultural activities (Art. 12). Under the Charter, the child has the right to health and access to health services (Art. 14) and, in the event of disability, to the protection required by his or her condition (Art. 13), as well as protection against the use of drugs (Art. 28). The Charter prohibits child labor and protects children against abuse and ill-treatment (Art. 17), while providing for a special juvenile justice procedure in the event of a child infringing criminal law (Art. 17). Considering that the family is a basic unit (Art. 18), this Charter declares that the child has the right to care and protection by parents (Art. 19), while specifying the parents' responsibility and participation or assistance in implementing the child's social rights (Art. 20). In addition, the Charter proclaims the protection of children against negative social and cultural practices, including early marriage (Art. 21), the prohibition of the participation and recruitment of children in armed conflicts (Art. 22), their protection when they become refugees (Art. 23) and the possibility and procedure for adoption (Art. 24). The Charter provides special protection for children separated from their parents (Art. 25). The prohibition of apartheid (Art. 26) and sexual exploitation (Art. 27) are given special emphasis by the Charter. The same applies to the State's obligation to put in place measures to prohibit the sale, trafficking, abduction and use of children in begging (Art. 29), as well as the protection of children of imprisoned mothers (Art. 30). The exception is the Charter's provision for children's responsibilities (Art. 31), which is different from other children's rights instruments.

2) Creation and organization of a Committee on the Rights and Welfare of the Child (second chapter)

African countries felt that during the drafting of the International Convention on the Rights of the Child, Africa was under-represented (by only four countries, including Algeria, Morocco, Senegal and Egypt), and African specificities (children in armed conflicts, children under apartheid, child marriages, female genital mutilation...) (Sebaa-Delladj, 2019: pp. 2-3). Thus, the Organization of the African Union (now the African Union) set up this Charter, which created its own Committee. In its second chapter (art. 32 to 41), the Charter creates and organizes a body responsible for daily monitoring of the pace of its implementation (Art. 32) and determines its composition, comprising eleven members (Art. 33) elected by ballot organized in accordance with the procedures established by the Charter (Art. 34) from candidatures received in accordance with its rules

(Art. 35) from the list drawn up by the Secretary General of the African Union (Art. 36). Committee members have a five-year mandate, with the exception of the first team, four of whom have a two-year mandate, and the others four years (Art. 37). The Committee establishes its rules of procedure and elects its officers by a quorum of seven of its members (Art. 38), and the absence of any of its members is filled by his or her co-national after approval by the Conference of Heads of State and Government (Art. 39). The Committee has a secretariat headed by a Secretary of the Committee appointed by the Secretary General of the African Union (Art. 40). Finally, it should be noted that the members of the Committee enjoy the privileges and immunities determined by a related Convention (Art. 41).

3) Mandate and procedure before the African Committee of Experts on the Rights and Welfare of the Child (Chapter Three)

With the benefits of the individual communications procedure targeted by Florence CHARRIERE (Charrière, 2014: pp. 27-28), articles 42 to 45 of the Charter speak of the missions and procedures before the Committee. Thus, the Committee's mission is to promote and protect the rights of the child proclaimed in the Charter, and to monitor their application and interpret them where necessary (Art. 42). Each State party to the Charter undertakes to produce reports on the state of implementation of the Charter within two years of ratification or accession, and three years since the first report (Art. 43). The Charter recognizes the possibility for individuals, groups or civil society organizations to submit communications to the African Committee of Experts on the Rights and Welfare of the Child (Art. 44). The Committee shall use any appropriate method to investigate any matter falling within the scope of the present Charter, and shall request from States Parties any relevant information on the application of the present Charter (Art. 45). Thus, the Committee has the power to invent or reinvent its working method in order to continue to safeguard its substance as a body monitoring the application of children's rights (Kotrane, 2014: p. 42).

4) Miscellaneous provisions (Chapter Four)

The last chapter of the African Charter on the Rights and Welfare of the Child deals with the sources of the Charter (Art. 46). The content of this article, which complements the last paragraph of the preamble to the Charter, opens the door to the concomitant application of the Charter with other children's rights instruments. The African Children's Charter describes the procedure for its signature, ratification or accession and entry into force (Art. 47). Finally, the Charter determines how it may be amended or revised (Art. 48).

4.2. General Principles (Key Features) of Children's Rights in the African Charter on the Rights and Welfare of the Child

Thoko KAIME and Jean-Didier BOUKONGOU mention the four general principles of children's rights found in all international and regional children's rights instruments out of the five, namely the right to non-discrimination, the right to the best interests of the child, the right to life, survival and development, and the

right to participation, also known as the right to be heard (Boukongou, 2006: p. 102; Kaime, 2010: pp. 122-123). In describing the African Charter on the Rights and Welfare of the Child, Niguel CANTWELL, on the point of the general principles of children's rights retained by the African Charter on the Rights and Welfare of the Child, retains the four and adds the fifth, which is specific to the African Charter. This is the right of the child to be protected against all forms of exploitation (Buhendwa et al., 2023; Cantwell, 2011: pp. 22-23). On the occasion of this thesis, we address the general principles in line with Niguel CANTWELL, namely the right to non-discrimination (Section 1), the right to the best interests of the child (Section 2), the right to life, survival and development (Section 3), the right to protection from all forms of exploitation (Section 4) and the right to participation (Section 5).

4.2.1. General Principle 1: The Right to Non-Discrimination

Article 3 of the African Charter on the Rights and Welfare of the Child sets out the principle that every child has the right to enjoy all the rights and freedoms recognized and guaranteed by this Charter, without distinction of any kind as to race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, property, birth or other status, and without distinction of the same kind as to his or her parents or legal guardian (African Charter on the Rights and Welfare of the Child, art. 3; Mpabansi, 2023; Sindayigaya, 2023b; Sindayigaya and Hitimana, 2016). The primary idea militating for the non-discrimination of children is the quest for equal enjoyment of rights for all children. The reason is that "children of all ages, regardless of their race, gender, religion, disability, sexual orientation, social or cultural level can be victims of abuse. Some children, for example disabled children, are particularly vulnerable. Prejudice and discrimination can prevent some children from getting the help they need, and agencies must take steps to ensure that all children are protected and receive the support they need" (Pinheiro and Clark, 2006: p. 10). Child protection is for the benefit of all children, and the only condition to check is that they are children, and that alone. Every child deserves protection that takes account of his or her status as a child. This protection helps children, wherever they are and whatever their citizenship, to enjoy the privilege of having their freedom, autonomy, responsibility and capacity for judgment taken into account (Gal, 2008: pp. 10-11).

4.2.2. General Principle 2: The Right to the Best Interests of the Child

The best interests of the child form the general principle of children's rights set out in the African Charter on the Rights and Welfare of the Child, article 4, paragraph 1, which states that "in any action concerning a child, undertaken by any person or authority, the best interests of the child shall be the primary consideration" (African Charter on the Rights and Welfare of the Child, art. 4, para. 1). According to Miguel CANTWELL, the best interests of the child have been and remain the driving principle of children's rights, on the basis of which all texts relating to children's rights (all legislation, treaties, declarations, etc.) must

be taken into consideration and all actors (state actors and parents) must apply them in their day-to-day activities (Cantwell, 2011: pp. 22-23). He insists that the meaning of the best interests of the child to be taken up again is the one now given by the Declaration of the Rights of the Child. We must remember that the best interests of the child must be the determining consideration in the adoption of laws, as well as the guide for those who have responsibility for his or her education and guidance” (Hammarberg, 2011: p. 10). The clarification to be made is that “the child’s views, identity, preservation of the family environment and maintenance of relationships, the child’s care, protection and safety, vulnerable situation, and right to health and education are fundamental elements in assessing and determining the best interests of the child” (BICE, 2013). Miguel CANTWELL adds that “the child must benefit from special protection and be granted opportunities and facilities through the law and other means, in order to be able to develop in a healthy and normal way physically, intellectually, morally, spiritually and socially, in conditions of freedom and dignity. In enacting legislation to this end, the best interests of the child shall be the paramount consideration” (Cantwell, 2011: p. 22).

4.2.3. General Principle 3: The Right to Life, Survival and Development

The African Charter on the Rights and Welfare of the Child lays down the principle that every child has the right to life, and that this right is imprescriptible and must be protected by law (African Charter on the Rights and Welfare of the Child, art. 5, para. 1). The African Charter on the Rights and Welfare of the Child, like most other international instruments relating to the rights of the child, is silent on the subject of abortion, even though it defines the child by specifying an upper age limit with no trace of conception or birth (Bennouna, 1989: pp. 436-437). Nevertheless, proponents and opponents of abortion recognize that the child’s survival must be protected from the moment of conception. It is for this reason that humanity, via UNICEF, believes that the effects of undernutrition on child survival should be taken into account and prevented from the mother’s pregnancy and during the first years of childhood, hence the mandatory adoption of measures to promote child nutrition and food assistance for the children of poor parents (UNICEF, 2009: p. 7).

In this respect, we would like to point out that this Charter creates obligations for States to ensure, as far as possible, the survival, protection and development of the child (African Charter on the Rights and Welfare of the Child, art. 5 al. 2). In 2006, the World Health Organization’s Regional Committee for Africa produced an alarming report on child survival. This report stated that 4.6 million children were dying in the African Region, with almost a quarter of these deaths occurring in the first month of life, and over two-thirds in the first seven days. The majority of under-five deaths are due to a small number of common, preventable and treatable conditions. In situations of epidemics such as COVID-19 or other disasters, child survival is endangered, especially in less industrialized countries (Migan, 2022: p. 2), of course, including most African countries. The

same UNICEF report confirms that “children are the future of Africa. It is therefore imperative to invest in children’s health and to ensure that future generations, who will guide the continent’s socio-economic development, enjoy better health and are more productive” (UNICEF, 2009: para. 37). On this point, African countries must take all measures that contribute to the search for the attention required by childhood, i.e. all protection required to address the vulnerability of the child (Gacuko, 2012; Woodhead, 2008: p. 140), which is likely to hinder his or her development.

The other obligation is for all countries, even those which have not yet abolished the death penalty, to ensure that their courts do not impose the death penalty for crimes committed by children (African Charter on the Rights and Welfare of the Child, art. 5, para. 3). Long before the African Charter on the Rights and Welfare of the Child or the International Convention on the Rights of the Child, writers had written against the death penalty. Victor HUGO (Hugo, 1854), Knut OLIVECRONA (Olivecrona, 1893), Jean THEAU (Theau, 1982) and others all agreed that the death penalty is a violation of the right to life. The death penalty has been progressively abolished under the consideration that death is a “mysterious, inescapable, universal phenomenon, the source of all fears, of multiple fantasies” (Bersay, 2012: p. 25; Fierens, 2019; Sindyigaya, 2023b) and it would be too stupid to manipulate it, diss it, inflict it or dismiss it according to human will. Maria Abdelnour BOUTROS, quoting Eugène-François VIDOCQ, believes that Africa has long considered that “the death penalty is an immoral punishment, or at least useless, because it accustoms the people to the spectacle of torments, and because it repairs nothing; for unfortunately the death of the murderer does not restore life to the victim” (Boutros, 2012: p. 1). The most useful conclusion, not only for children but for all humans, is that the death penalty is neither useful nor necessary, as Luigi DELIA has observed (Delia, 2018: pp. 87, 94-95).

4.2.4. General Principle 4: The Right to Protection against All Forms of Exploitation

The Charter establishes the principle that States Parties to the African Charter on the Rights and Welfare of the Child undertake to protect children from all forms of sexual exploitation and abuse, and to take measures to prevent:

- 1) inciting, coercing or encouraging a child to engage in any sexual activity;
- 2) the use of children in prostitution or any other sexual practice;
- 3) the use of children in pornographic activities, scenes or publications (African Charter on the Rights and Welfare of the Child, art. 27).

This provision complements article 21 of the Charter, which calls on States to protect children from negative social and cultural practices. According to this provision, States Parties shall take appropriate measures to abolish negative social and cultural customs and practices prejudicial to the welfare, dignity, growth and normal development of the child, in particular:

- 1) customs and practices detrimental to a child’s health or life;

2) customs and practices that discriminate against certain children on the basis of sex or other grounds (African Charter on the Rights and Welfare of the Child, art. 21, para. 1).

Through this Charter, African states are demonstrating their commitment to protecting children against all forms of exploitation, however tolerated or accepted by cultural practices, as long as they are harmful to the child's health.

And yet, in some African countries, sexual exploitation is a fact of life. This is the case, for example, in Senegal, where research has uncovered it in:

- Prostitution of minors, including solicitation at beaches, hotel bars, night-clubs, tourist areas, etc.;
- Paedophilia or sexual relations with children;
- Recruiting young girls to shoot pornographic films;
- Children's use of Internet cafés where they log on to pornographic sites;
- Etc. (Fall, 2003: p. 21; Sunzu, 2022b).

This is part of the incitement to early marriage and/or sexual relations, which are banned in Africa. This is why child marriages and the promise of young girls and boys in marriage are forbidden, and legislative measures are in place to specify that the minimum age for marriage cannot be lower than 18, and that all marriages must be recorded in an official register (African Charter on the Rights and Welfare of the Child, art. 21 al. 2). In addition to sexual exploitation, Africa is full of child victims of exploitation in the workplace before the age of employment (Gnanou, 2017: pp. 140-141; Sunzu, 2022a), despite the appeal of civil society associations and the intervention of the international community.

4.2.5. General Principle 5: The Right to Participation

The second paragraph of article 4 of the African Charter sets out the general principle of children's rights: "In any judicial or administrative proceedings affecting a child who is capable of communicating, the views of the child shall be heard either directly or through an impartial representative who shall take part in the proceedings, and his or her views shall be taken into consideration by the competent authority, in accordance with the provisions of the laws applicable in the matter" (African Charter on the Rights and Welfare of the Child, art. 4 para. 2). The ideal is to build an Africa that respects and protects children's opinions. In this Africa, according to the meaning of this Charter, the child cannot be subjected to the decisions of adults concerning him or her, be they parents or a judge, without at least being consulted (Gouttenoire, 2006: p. 59; Mperejimana and Sindyigaya, 2023; Ndericimpaye and Sindyigaya, 2023). In this respect, we agree with Mona PARE that "for rights to have meaning, it is necessary to have effective means of redress in the event of violation [...]. Children's special status and dependence make it very difficult for them to avail themselves of the remedies available in the event of a violation of their rights. Consequently, States must pay particular attention to ensuring that children and their representatives have access to effective mechanisms adapted to the needs of the child. In particular, care should be taken to ensure that children [...] have access to independent

complaints mechanisms and the courts with all the assistance they require” (Ciza and Sindyigaya, 2023; Niyongabo and Sindyigaya, 2023; Paré, 2014: pp. 92-93; Sindyigaya and Nyabenda, 2022). Adeline GOUTTENOIRE’s ideal is that the hearing of the child in court should be made systematic in legislative texts, so as to be mandatory for judges everywhere in Africa, with no possibility of change (Gouttenoire, 2006: pp. 60-61). This would meet the concerns of Mona PARE and Diane BE on the one hand, and Élodie FAISCA on the other, in their respective research on how to inform children of their right to participate in judicial and administrative matters, and who should play this role (Faisca, 2021: para. 7; Paré & Bé, 2020: pp. 248-250; Sindyigaya, 2020; Sunzu, 2022c).

In addition to this provision, article 7 of the African Charter on the Rights and Welfare of the Child emphasizes this principle, stating that “every child who is able to communicate shall be guaranteed the right to express his or her views freely in all matters and to make those views known, subject to the restrictions provided by law” (African Charter on the Rights and Welfare of the Child, art. 7). It is with this in mind that we adopt Elodie FAISCA’s sense of the Charter that “while consideration of the child’s expression should take into account his or her level of maturity, the possibility of expressing his or her opinion should not be conditioned by age” (Faisca, 2021: para. 14). In the practice of child protection services, meaningful child participation implies an interaction between a professional and the child, in which the child feels able and free to express his or her needs and wishes (Faisca, 2021: para. 10).

4.3. The Reasons behind the Creation of the African Charter on the Rights and Welfare of the Child

According to the considerations of African states, it was necessary to take into account on the children’s side “the virtues of their cultural heritage, their historical past and the values of African civilization, which should inspire and guide their thinking in matters of children’s rights and protection” (African Charter on the Rights and Welfare of the Child, app. Section 7). The starting point is that at international level, consideration has been given to, and an International Convention on the Rights of the Child has been put in place in an attempt to resolve the problems of children’s rights, but this does not seem to take account of the African regional dimension. In other words, the African Charter on the Rights and Welfare of the Child has come to resolve the conflict between universalism and regional appropriation of rights. On the other hand, the African Charter on Human and Peoples’ Rights, adopted by the OAU in 1981, does not contain detailed provisions on children’s rights, so the African Charter on the Rights and Welfare of the Child is a response. The African Charter on the Rights and Welfare of the Child is therefore an expression of Africa’s understanding of children’s rights.

4.3.1. The African Charter on the Rights and Welfare of the Child: A Way of Taking Account of African Social and Cultural Realities

Despite the existence of the International Convention on the Rights of the Child,

African states were still thirsty when it came to children's rights. With Alioune BADARA FALL, we have the opportunity to consider that "African doctrine regularly renews the idea that Africa is still very much marked by its traditions and history. Better still, African society maintains its distinctive communitarianism, which fundamentally distinguishes it from Western societies, where individualism remains the salient and dominant feature, reflecting the place that the individual occupies in society and the rights that are recognized within it" (Badara Fall, 2009: p. 84). In the fourth paragraph of the preamble, African states express their concern on this subject. In particular, they are concerned that "the situation of many African children due solely to socio-economic, cultural, traditional factors, natural disasters, demographic weight, armed conflicts, as well as to circumstances of development, exploitation, hunger, disabilities, remains critical and that the child, because of his physical and mental immaturity, needs special protection and care" (African Charter on the Rights and Welfare of the Child, app. Section 4). The African Charter on the Rights and Welfare of the Child agrees with Jo BOYDEN, quoted by Florence CHARRIERE, that the African Charter is a sign that Africans considered the Convention to be a continuation of cultural imperialism, and that the North's vision of the child has been exported to the countries of the South (Charrière, 2014: p. 41). It was therefore necessary to set up an African Charter on the Rights and Welfare of the Child.

1) Taking into account the socio-economic and cultural factors of traditional Africa in the African Charter on the Rights and Welfare of the Child

In the chapter on the history of children's rights, we had time to review the concerns of African states to put in place common measures for all of Africa to protect against the evils of apartheid and discrimination (African Charter on the Rights and Welfare of the Child, art. 26), social and cultural practices harmful to children's lives (early marriage, genital mutilation, etc.) (African Charter on the Rights and Welfare of the Child, art. 21), as well as consideration of children's responsibility towards parents and society (African Charter on the Rights and Welfare of the Child, art. 31). The same applies to the implementation of measures to protect and safeguard the rights of children whose mothers are imprisoned (African Charter on the Rights and Welfare of the Child, art. 30).

2) Taking account of demographic weight and the predominance of armed conflict in the African Charter on the Rights and Welfare of the Child

In view of Africa's growing population, the child's right to a name, birth registration and nationality (African Charter on the Rights and Welfare of the Child, art. 6) is the subject of article 6 of the Charter, supplemented by article 24 on measures and procedures relating to internal and international adoption (African Charter on the Rights and Welfare of the Child, art. 24). From another angle, the African States have kept in mind the situation of armed conflict. They are therefore committed to respecting and ensuring respect for the rules of international humanitarian law applicable to armed conflicts that particularly affect children. (African Charter on the Rights and Welfare of the Child, art. 22). Ultimately, under article 24 of the African Charter on the Rights and Welfare of the Child, States

shall take all necessary measures to ensure that no child takes a direct part in hostilities and, in particular, that no child is conscripted into the armed forces.

3) Measures taken against exploitation, hunger and disability in the African Charter on the Rights and Welfare of the Child

Believing that children in Africa are subject to exploitation, but wishing to protect them from it, have taken a stand on this subject. Thus, the States undertake to protect the child against all forms of sexual exploitation or abuse, and in particular to take measures to prevent:

- a) inciting, coercing or encouraging a child to engage in any sexual activity;
- b) the use of children in prostitution or any other sexual practice;
- c) the use of children in pornographic activities, scenes or publications (African Charter on the Rights and Welfare of the Child, art. 27).

Believing that the situation of poverty and famine on the African continent must not be the cause of misfortune for children, African states have chosen to clearly and firmly prohibit “the use of children in begging” (African Charter on the Rights and Welfare of the Child, art. 29 lit. b; [Sindayigaya, 2020, 2022](#); [Sindayigaya and Nyabenda, 2022](#)).

4) Protecting the children of imprisoned mothers

The African Charter on the Rights and Welfare of the Child is an expression of the determination of African states to protect children from the hardship caused when their mothers are sentenced to penal servitude. This is the meaning of Article 30 of the African Charter on the Rights and Welfare of the Child, through which States undertake to provide special treatment for pregnant women and mothers of infants and young children who have been charged with or found guilty of offenses under criminal law, and in particular undertake to:

- a) ensure that a sentence other than imprisonment is first considered in all cases where a sentence is passed against these mothers;
- b) establish and promote measures to change institutional confinement for the treatment of these mothers;
- c) create special institutions to ensure the detention of these mothers;
- d) ensure that no mother is imprisoned with her child;
- e) ensure that no death sentence is passed on these mothers;
- f) ensure that the penitentiary system is essentially aimed at reform and reintegration (African Charter on the Rights and Welfare of the Child, art. 30).

4.3.2. The African Charter on the Rights and Welfare of the Child: A Response to the Specific Needs of Children

The coexistence of the African Charter on the Rights and Welfare of the Child and the African Charter on Human and Peoples’ Rights justifies the importance and place of Africa. This is justified by paragraph five of the preamble to the African Charter on the Rights and Welfare of the Child. In this passage, the African States consider that “the child occupies a unique and privileged place in African society and that, to ensure the full and harmonious development of his or her personality, the child should grow up in a family environment, in an atmosphere of happiness,

love and understanding” (African Charter on the Rights and Welfare of the Child, app. Section 5). The African Charter on the Rights and Welfare of the Child thus complements the African Charter on Human and Peoples’ Rights, which did not place much emphasis on children’s rights. Furthermore, it is noted that African States have taken “into consideration the virtues of their cultural heritage, their historical past and the values of African civilization, which should inspire and guide their thinking in matters of children’s rights and protection” (African Charter on the Rights and Welfare of the Child, app. Section 7).

4.4. The Establishment of the African Committee of Experts on the Rights and Welfare of the Child: Protective Body of the African Charter on the Rights and Welfare of the Child

Prior to the introduction of the African Charter on the Rights and Welfare of the Child, children’s rights and welfare in Africa were governed by the 1979 African Declaration on the Rights and Welfare of the Child. Although this Declaration took care to detail the rights of the child in specific terms, it had no binding force and made no provision for a body to protect them. This is why the African Charter on the Rights and Welfare of the Child established the African Committee of Experts on the Rights and Welfare of the Child as a body to safeguard and monitor its implementation (Sloth-Nielsen & Kruuse, 2013). However, this body began with the challenges of lacking functional independence from Heads of State, implying their solidarity, and the reluctance of States to produce reports to the Committee.

4.4.1. Lack of Functional Independence of the African Committee of Experts on the Rights and Welfare of the Child from Heads of State and Government

The Committee’s dependence on the Conference of Heads of State and Government can be analyzed from three angles: its accountability, its obligation to submit the report to the Conference for consideration before publication, and the role of the State concerned by the report in disseminating it.

1) The Committee’s accountability to the Conference of Heads of State and Government

Under article 45 paragraph 2 of the African Charter on the Rights and Welfare of the Child, “the Committee shall submit every two years to the ordinary session of the Assembly of Heads of State and Government, a report on its activities and on any communication made [...]” (African Charter on the Rights and Welfare of the Child, art. 45 para. 2; Ndericimpaye and Sindayigaya, 2023; Sindayigaya and Toyi, 2023b). In the hypothesis that these States party to the Charter are themselves subject to the enforcement of the Charter’s provisions, in the event of violation of the Charter’s provisions, these States become both judge and party, comparing the monitoring of the Charter’s application to judicial proceedings. In addition to this consideration, doubt arises as to the hierarchical relationship between the Committee and the Conference of Heads of State and Government, in what Claude FLAMENT has called experimental purification

(Flament, 1971: pp. 118-119; Nduwimana and Sindyigaya, 2023a, 2023b), in order to deny the existence of a hierarchical relationship between the one who must produce the report and the one to whom the report is produced. However, we do admit that there is a hierarchical relationship, as Robert HOLCMAN puts it: “The hierarchical relationship, based on the obedience required in organizations, is not limited to organizational charts. It also depends on the level of responsibility of the actors taking part in it, and on their ability to implement the means of retaliation in the event of non-obedience” (Holcman, 2009: pp. 67-68; Jonya et al., 2023; Ndayisenga and Sindyigaya, 2024a, 2024b; Sindyigaya and Toyi, 2023a; Toyi and Sindyigaya, 2023). The fact that the African Committee of Experts on the Rights and Welfare of the Child is required to produce an activity report for the Conference of Heads of State and Government confirms the subordinate relationship between the two institutions.

2) Obligation to submit the report for consideration by the Conference of Heads of State and Government before publication

Under article 45 paragraph 3 of the African Charter on the Rights and Welfare of the Child, the Committee is not authorized to publish its report before submitting it for consideration by the Conference of Heads of State and Government (African Charter on the Rights and Welfare of the Child, art. 45 paragraph 3). There is a risk here of confirming the view expressed by Remy Bernard NGOMBE in his doctoral thesis that human rights in Africa present an original paradox materialized by their explicit formal proclamation and a real absence of effectiveness on the practical ground, in other words, the distortion between theory and practice (Ngombe, 2019: pp. 160-161). As mentioned above, this provision makes the Committee highly dependent on the Conference of Heads of State and Government, which has the latitude to alter or modify the content of the report. Since the years of independence, Africa has been characterized by a dual desire for independence and unity in political life, reflected in the grouping of States (Borella, 1961: pp. 787-788) and the solidarity of Heads of State and Government (Borella, 1968: p. 167, 172, 176; Mappa, 1998: pp. 7-8).

3) Role of States in disseminating the Committee’s reports

Under article 45, paragraph 4 of the African Charter on the Rights and Welfare of the Child, States parties to the African Charter on the Rights and Welfare of the Child shall ensure that the Committee’s reports are widely disseminated in their own countries (African Charter on the Rights and Welfare of the Child, art. 45, para. 4). This appears to be a positive development, and makes up for the fact that the Committee does not have its own means of doing so. However, the negative aspect is to hope that a State that has been considered by the Committee’s report as a violator of the Charter’s provisions will participate in the dissemination of the report.

4.4.2. African States’ Reluctance to Report to the African Committee of Experts on the Rights and Welfare of the Child

This reluctance is reflected in the pace of ratification or accession by African

states and the production of reports to the Committee.

1) The rate of ratification of the African Charter on the Rights and Welfare of the Child by the African states that took part in its adoption in 1990

The African Charter on the Rights and Welfare of the Child was adopted at the 26th Conference of Heads of State and Government of the Organization of African Unity in July 1990. It took nine years for the Charter to enter into force on November 29, 1999, having been ratified by 15 States, as stipulated in Article 47 of the Charter. The ratification of the African Charter on the Rights and Welfare of the Child was as follows:

1. Somalia: 01/06/1991;
2. Seychelles: 13/02/1992;
3. Gabon: 02/27/1992;
4. Maurice: 02/14/1992;
5. Madagascar: 02/27/1992;
6. Republic of the Congo: 28/02/1992;
7. Djibouti: 28/02/1992;
8. Zambia: 28/02/1992;
9. Angola: 11/04/1992;
10. Liberia: 14/05/1992;
11. Burkina Faso: 08/06/1992,
12. Swaziland: 29/06/1992;
13. Sahraoui Arab Democratic Republic: 23/10/1992;
- 14 Cape Verde: 07/20/1993;
15. Uganda: 17/08/1994;
16. Zimbabwe: 19/01/1995;
17. Tunisia: 16/06/1995;
18. Benin: 17/04/1997;
19. Cameroon: 05/09/1997;
20. Ghana: 18/08/1997;
21. Togo: 05/05/1998;
22. Mali: 03/06/1998;
23. Mozambique: 07/15/1998;
24. Guinea: 05/27/1999;
25. Malawi: 16/09/1999;
26. Lesotho: 27/09/1999;
27. Senegal: 29/09/1998;
28. Eritrea: 22/12/1999;
29. Niger: 12/11/1999;
30. South Africa: 07/01/2000;
31. Chad: 30/03/2000;
32. Kenya: 07/25/2000;
33. Burundi: 11/08/2000 (membership);

34. Libya: 23/09/2000;
35. Gambia: 14/12/2000;
36. Egypt: 09/05/2001;
37. Rwanda: 11/05/2001;
38. Botswana: 10/07/2001;
39. Nigeria: 23/07/2001;
40. Sierra Leone: 13/05/2002;
41. Ethiopia: 02/10/2002;
42. Equatorial Guinea: 20/12/2002;
43. Central African Republic: 04/02/2003;
44. Tanzania: 2003/03/16;
45. Algeria: 08/07/2003;
46. Ivory Coast: 2004/02/27;
47. Union des Comores: 18/03/2004;
48. Namibia: 07/23/2004;
49. Guinea-Bissau: 08/03/2005;
50. Mauritania: April 2005;
51. DR-Congo: 8/12/2020.

This is despite the fact that most of these states were present at the OAU when the African Charter on the Rights and Welfare of the Child was adopted.

2) Reporting to the African Committee of Experts on the Rights and Welfare of the Child by countries party to the African Children's Charter

As a reminder, under the terms of article 43 paragraph 1 of the African Charter on the Rights and Welfare of the Child, States parties to the Charter undertake to produce reports on its implementation within two years of the entry into force (through accession or ratification) of the Charter for the State party concerned, and then every three years after the first report (African Charter on the Rights and Welfare of the Child, art. 43 al.1 er lit.a and b; [Ciza and Sindayigaya, 2023](#); [Niyongabo and Sindayigaya, 2023](#); [Sabiraguha et al., 2023](#)). In his address to the 41st session of the African Committee of Experts on the Rights and Welfare of the Child, held from April 26 to May 6, 2023, the Chairman of the Committee expressed the exaggerated slowness of African States in drawing up their reports, in addition to the proliferation of reservations formulated by States, which hindered the effective enjoyment of children's rights ([CAEDBE, 2023: para. 30](#); [Nyabenda and Sindayigaya, 2023](#); [Sindayigaya, 2022](#); [Sindayigaya and Nyabenda, 2022](#)). With regard to reporting, the initial reports from the Republic of Botswana and the Republic of Djibouti will be analyzed in 2023 ([CAEDBE, 2023: para. 28](#)). Djibouti, a party to the Charter since 1992, should have produced its initial report in 1994 (a delay of 29 years), while Botswana, a party to the Charter since 2001, should have produced its initial report in 2003, a delay of 20 years ([Sloth-Nielsen, 2016](#)). Burundi, a party to the Charter since 2000, only produced its first report in 2017 ([Burundi Government, 2017](#); [Sindayigaya, 2023a, 2023b](#)) after a 15-year delay, and has not yet produced any others.

5. Conclusion

The African Charter on the Rights and Welfare of the Child has the merit of being the first regional instrument for the protection of children's rights, given that, apart from Africa, no other region has such a pact. Apart from the preamble and the summary of obligations towards States set out in article 1, and the definition of the child in article 2, the African Charter on the Rights and Welfare of the Child comprises four chapters, including the rights and duties of the child in articles 3 to 31 (chapter 1), the creation and organization of a Committee on the Rights and Welfare of the Child in articles 32 to 41 (chapter two), the mandate and procedure before the African Committee of Experts on the Rights and Welfare of the Child in articles 42 to 45 (chapter three) and miscellaneous provisions in article 46 (chapter four). The Charter is based on the general principles of children's rights: the right to non-discrimination, the right to the best interests of the child, the right to life, survival and development, the right to protection against all forms of exploitation, and the right to participation or the right to be heard. The African Charter on the Rights and Welfare of the Child is a domestication of the rights of the child evoked by other instruments of children's rights and welfare in a context that responds to African social and cultural realities, and a response to the specific needs of the child. Establishing its monitoring body, the African Committee of Experts on the Rights and Welfare of the Child. However, this body, despite having the possibility of using all means of information, faces two obstacles: the absence of functional independence from the Conference of Heads of State and Government through the obligation to report, the obligation to submit its report for examination by the Conference of Heads of State and Government before publication, and the lack of its own resources to disseminate its reports, implying the intervention of States to do so, but also the reluctance of States to ratify or accede to the Charter, as manifested by the multiplicity of reservations and the delay in producing reports.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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