

Chapter 2

Article 1

Obligation of state parties

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1. Member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a state party or in any other international convention or agreement in force in that state.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

1	Introduction	10
2	Links to other Charter articles	14
3	Links to other human rights treaties	15
4	Legal interpretation	15
4.1	'Recognising the rights, freedoms and duties' enshrined in the African Children's Charter	15
4.2	'Undertake necessary steps in accordance with constitutional processes'	16
4.3	'Legislative measures'	16
4.4	'Other measures'	17
4.5	Coordination	17
4.6	Budgeting, efficient resource use and domestic revenue mobilisation	18
4.7	Data collection	18
4.8	Training awareness and capacity building	18
4.9	Policy development	19
4.10	Collaboration with CSOs, CBOs and the private sector	19
4.11	Independent monitoring	20
4.12	Dissemination of the African Children's Charter and the Concluding Observations of the African Children's Committee, and publicising this General Comment	20
5	African Children's Committee jurisprudence	20
6	Conclusion	22

1 Introduction

The implementation article, contained in the first article of the African Charter on the Rights and Welfare of the Child (African Children's Charter), specifies the scope of ratifying state parties' obligations. It forms the basis of General Comment 5 on General Measures of Implementation and

Systems Strengthening for Child Protection¹ of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), which outlines in more detail precisely what the expectations are. The Guidelines for Periodic Reports to be submitted by state parties also contain detailed requirements regarding information to be submitted under this article,² which are elaborated further in the General Comment. As per the guidance of the African Children's Committee, this General Comment does not deal in depth with article 1(3) which deals with harmful cultural practices, a decision that was taken on the basis that harmful cultural practices were likely to be dealt with in a dedicated General Comment.³ There are two General Comments now related to harmful cultural practices – one on child marriage and a recent one on female genital mutilation (both developed jointly with the African Commission on Human and Peoples' Rights (African Commission)). These are discussed further in chapter 22 of this volume. However, the present chapter does explain the link between article 1(3) and article 21, in part 2 below.

The interpretation of article 1 of the African Children's Charter in the General Comment is undertaken against the backdrop of other policy frameworks. Principal amongst these are the Children's Committee's Africa's Agenda for Children 2040, which recognises the need for effective implementation of the Children's Charter in order for its aspirations to be realised; the African Union (AU) Agenda 2063; and the United Nations (UN) General Assembly's Sustainable Development

1 https://www.acerwc.africa/sites/default/files/2022-09/GENERAL_COMMENT_ON_STATE_PARTY_OBLIGATIONS_UNDER_ACRWC_%28ARTICLE%201%29_%26_SYSTEMS_STRENGTHENING_FOR_CHILD_PROTECTION_0.pdf (2018). (Accessed 31 August 2024). The CRC Committee issued two related General Comments, General Comment 5 (General measures of implementation of the CRC (CRC/C/GC/5)) and General Comment 19 (Public budgeting for the realisation of children's rights (art 4 CRC) (CRC/C/GC/19)).

2 Under the cluster, the state party should provide relevant and updated information regarding the measures it has taken or those anticipated to be taken to implement art 1(1) of the Charter, concerning the measures taken to recognise and give effect to the rights, freedoms and duties enshrined in the Charter. In particular, the state party should provide updated information on (a) constitutional, legislative and policy framework for the promotion and protection of the rights and welfare of the child ... The State party should also provide information on whether or not the Charter can be invoked in its courts of law, and if so, to what extent; the nature and extent of legal remedies available for violations of children rights; and customary laws and regulations which impact on the enjoyment of child rights within its jurisdiction. (b) institutional framework for the promotion and protection of the rights and welfare of the child ... the state party should also provide information on whether or not it has established a national human rights institution (NHRI), and if so, the role played by the NHRI in promoting and protecting child rights; (c) budgetary allocation and actual expenditure: The State party should indicate the amount of resources allocated to programmes and activities that are relevant to child rights and the actual expenditures incurred in that regard; (d) cooperation with non-state actors: The state party should provide information on its cooperation with non-state actors, including non-governmental organisations, children's and youth groups, UN agencies, faith-based organisations, business and private sector, and traditional systems of governance (eg village councils) and the extent to which they are involved in the planning and monitoring of the implementation of the Charter; (e) implementation of the decisions of the Committee and other relevant regional bodies; (f) implementation of relevant programmes, action plans and policies of the African Union including but not limited to the Campaign on Accelerated Reduction of Maternal, Newborn and Child Mortality in Africa (CARMA); the Call for Accelerated Action on the Implementation of the Plan of Action Towards an Africa Fit for Children; and the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa; (h) dissemination of the Charter and previous Concluding Observations of the Committee. 16. The state party should provide data on the following: (a) allocation of resources and actual expenditures during the reporting period for social services for family and/or child allowances; health services, in particular primary health services; early childhood development; education, in particular primary and secondary education; and child protection measures, including prevention of violence, child labour, sexual exploitation, and rehabilitating programmes; (b) training for professionals working with and for children, including judicial personnel, law enforcement personnel, teachers, healthcare personnel and social work.

3 General Comment 5 para 52. The General Comment requires only that 'in order to fulfil the obligation to "discourage" customs, traditions, cultural or religious practices which are inconsistent with the rights contained in the Charter, it is necessary to identify those practices which are potentially inconsistent with the African Children's Charter. A mapping exercise, in collaboration with local stakeholders, at grassroots level, including children themselves, needs to be undertaken. At the same time, practices that are not inconsistent with the Charter, which foster a child's enjoyment of his or her culture and heritage, should be identified and their continuance, consistent with evolving norms and societal developments, promoted. The state party is advocated to adopt a proactive stance towards discouraging practices which are inconsistent with the rights enshrined in the Charter; the legislative and policy framework must be congruent in all respects with the state's intention to discourage the relevant practices, including where necessary penal measures.'

Goals (SDGs), consisting of 17 targets and 169 indicators. This is because many of these have a direct bearing on African Children's Charter rights, including empowerment, access to equal opportunities and non-discrimination.

General Comment 5 notes that the concept of 'implementation' is embedded in all human rights laws, declarations and resolutions, and that implementation covers the process whereby governments take the necessary legal, policy, budgetary, administrative and other appropriate measures to ensure the full realisation of all children's rights. The overarching state party obligation is to respect Charter rights and to ensure the fulfilment of all Charter rights to all children in their territory.⁴

The General Comment endorses the position that article 1(1) simply refers generally to the 'provisions of this Charter' without any distinction as to civil and political or social and economic rights. Moreover, the Committee endorses the interdependence, indivisibility and mutually-reinforcing nature of all rights, and stresses that the enjoyment of economic, social and cultural rights is inextricably intertwined with the enjoyment of civil and political rights. General Comment 5 urges state parties, whatever their economic resource base, to comply at least with previously-agreed targets relating to social spending (for instance, 15 per cent of gross domestic product (GDP) on health according to the Abuja Declaration; 9 per cent of GDP on education according to the Dakar Declaration; and 20 per cent of overseas development assistance must go to basic social services), and to include such information in their state party report.⁵

The core and universally-accepted obligation to respect, protect, promote and fulfil children's rights applies equally in respect of the implementation of the African Children's Charter as a whole, according to the General Comment. For example, it notes that, as part and parcel of a rights-based approach, state parties must see their duty as fulfilling applicable legal obligations to each and every child. The implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children. The clear meaning of 'shall recognise' as contained in article (1) is peremptory. Furthermore, there is no hierarchy of rights within the African Children's Charter – all rights are equally important and must be implemented immediately; progressive realisation must be understood in the context of the urgency required to fulfil children's rights.⁶ The implementation of the Children's Charter rights requires dedicated additional resources, and state parties should strive consciously to identify such resources, to the maximum extent feasible, that can be devoted to implementation.⁷

The General Comment notes that the African Children's Committee is mindful that resources for the fulfilment of children's rights are frequently diluted or even diverted. It recalls that the Children's Committee has commented, in relation to state party reports received, on large sums accorded the military spending; on the prevalence of corruption which dissipates resources that could be available for the fulfilment of children's rights; and on inefficient and wasteful expenditure which suffers from a lack of proper monitoring and accountability.⁸

4 General Comment 5 para 5.

5 General Comment 5 para 7.

6 General Comment 5 paras 7-8.

7 General Comment 5 para 11.

8 General Comment 5 para 8. 'State Parties are further reminded that any retrogressive measures, which dilute or cut back on rights already enjoyed, are regarded as being contrary to international law, unless, during times of significant recession or emergency, sound justification can be provided and the status quo ante re-established as soon as circumstances permit' (para 9).

The four general principles are thereafter adduced. These are the definition of the child;⁹ the child rights-based four principles of non-discrimination;¹⁰ the best interests of the child;¹¹ the right to life, survival and development;¹² and participation.¹³ These four general principles mirror exactly the four underpinning principles adopted by the Convention on the Rights of the Child (CRC) Committee in its first set of reporting guidelines developed in 1991.¹⁴ So, too, they are reflected as general principles in the African Children's Committee's Guidelines for the form and content of initial and periodic reports¹⁵ and, as far as can be recalled, were identified in the initial Guidelines produced by the African Children's Committee.

The non-discrimination obligation requires state parties to actively identify individual children and groups of children in respect of whom the recognition and realisation of their rights may demand special measures.¹⁶

The application of the non-discrimination principle of equal access to all rights does not mean identical treatment. It may require taking special measures in order to diminish or eliminate conditions that cause discrimination, whether it is discrimination in the context of civil or political rights, in relation to the fulfilment of social, economic and cultural rights, or in relation to specific measures of protection.

The particular needs of the girl child must be addressed in light of all Charter rights in order to achieve gender equality for sustainable development.

Regarding the second general principle relating to the best interests of the child, article 4(1) (discussed in chapter 5 of this volume) requires that in all actions undertaken by any person or authority, the best interests of the child shall be the primary consideration. There are no conditions attached to this principle that could dilute its scope, reach or standard of application. Moreover, it applies to both private and public institutions, and it therefore is the responsibility of the state party to ensure to the maximum extent possible that private actors, including parents, institutions, business entities and various non-state actors engaged with children's rights and services, are aware of and apply the best interests of the child in all their endeavours.¹⁷ Its application can extend to every conceivable domain of public and private life, including – to cite three examples – spatial planning and development, environmental husbandry and fiscal policy. The child's best interests include short-term, medium-term

9 African Children's Charter art 2.

10 African Children's Charter art 3.

11 African Children's Charter art 4(1). Concluding Recommendations by the African Children's Committee on the Republic of South Africa initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child (2016) para 24. See Lesotho Child Protection and Welfare Act 7 of 2011 sec 4.

12 African Children's Charter art 5.

13 African Children's Charter arts 4(2), 7, 9 & 31.

14 For a discussion of these, see K Hanson & L Lundy 'Does exactly what it says on the tin? A critical analysis and alternative conceptualisation of the so-called "general principles" of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 285-306, arguing that these four articles are not necessarily 'general' nor 'principles' and suggesting how the concept of a set of cross-cutting standards might evolve and perhaps be reformulated in ways that are faithful to both the text of the Convention and subsequent understanding and practice.

15 See 'Section IV: GENERAL PRINCIPLES' requiring reports to contain relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen; factors and difficulties encountered and progress achieved in implementing the provisions of the Children's Charter, and implementation priorities and specific goals for the future should be provided in respect of (a) non-discrimination (arts 3 and 26); (b) best interests of the child (art 4); (c) the right to life, survival and development (art 5); (d) respect for the views of the child (art 7); (e) provision of information to children and promotion of their participation (arts 4, 7 & 12) (par 11). In addition, para 12 requires states parties to provide relevant information on the application of these principles in the implementation of articles listed elsewhere in the Guidelines.

16 General Comment 5 paras 9-10.

17 General Comment 5 para 11.

and long-term best interests. For this reason, state actions that imperil the enjoyment of the rights of future generations of children (for instance, allowing environmental degradation to take place, or inappropriate exploitation of natural resources) are regarded as violating the best interests of the child standard.¹⁸

The third general principle, the right to life survival and development, requires implementation measures that are aimed at achieving the optimal development for all children, including the child's physical, mental, spiritual, moral, psychological and social development.¹⁹

Regarding child participation, the principles contained in article 4(2) and article 7 (discussed in chapter 8 of this volume) highlight the role of the child as an active participant in the promotion, protection and monitoring of their rights, and applies equally to all measures adopted by state parties in their overall efforts to implement the African Children's Charter. Respect for the views of the child should be enshrined in all national legislation.²⁰ The General Comment suggests that in order for child participation to be more effective,

there is an urgent need to integrate the principle systematically into many more official and government processes, as well as to integrate monitoring mechanisms into these governance processes to ensure the accountability of duty-bearers such as policy makers, parents and educators, and public officials.²¹

Child participation efforts should comply with the nine basic principles of child participation: processes should be transparent and informative; be voluntary; be respectful; be relevant; be child friendly; be inclusive; be supported by training for adults; be safe and sensitive to risk; and be accountable.²² When children do exercise their right to participate, their views should be given due weight and not be merely formalistically considered. Government departments must be mandated to produce key documents in child and disability-friendly formats so that all boys and girls have access to a wide range of information from various sources: radio, television, libraries, books, press, the internet and helplines.

Further aspects of the General Comment are dealt with below under legal interpretation.

2 Links to other Charter articles

The provisions of article 1 necessarily link to all other treaty articles. However, for the purposes of this discussion, the most important allied provision is article 21 (protection against harmful social and cultural practices, discussed in chapter 22 of this *Commentary*). Article 21 builds on article 1(3), which discourages any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter to the extent of such inconsistency.²³ More directly, article 21 requires the elimination of harmful social and cultural practices, affecting the welfare, dignity, normal growth and development of the child and, in particular, those that are prejudicial to the health of life of the child and those that discriminate on the basis of sex or other status. This article also prohibits child marriage.

18 General Comment 5 para 4.2.

19 General Comment 5 para 12.

20 General Comment 5 para 13.

21 As above.

22 General Comment 5 para 14.

23 The CRC obligation is that 'traditional practices prejudicial to the health of the child' be abolished (art 24(3)).

Johnson²⁴ is of the view that the Charter's reference to harmful practices being 'discouraged' rather than 'abolished' needs to be understood within the wider provisions of article 21 and to the stronger 'best interests' principle. More importantly, he notes that the Charter also extends beyond solely 'traditional' practices and beyond only health-related harm.

3 Links to other human rights treaties

The African Charter on Human and Peoples' Rights (African Charter) provides for implementation in article 1, referring to legislative and other measures. There is little material difference between the provision of the African Charter and that of the African Children's Charter, save that the latter refers to constitutional processes in addition to legislative and other measures, which is not evident in the former. The African Children's Committee has endorsed²⁵ the African Commission's views regarding state party obligations under article 1 of the African Charter, insofar as the Commission held that 'a violation of any provisions of the Charter automatically means a violation of article 1'.

The implementation provision of the African Children's Charter finds an equivalent in article 4 of CRC, albeit that the wording differs measurably. The CRC provision omits to refer to constitutional processes, and includes neither article 1(2)²⁶ or 1(3). In article 4 of CRC the text adds that 'with regard to economic social and cultural rights, state parties shall undertake such measures [of implementation] to the maximum extent of their available resources, and where needed, within the framework of international cooperation'.

As Chirwa has noted, the obligations under article 1 apply equally to economic, social and cultural rights (second generation rights) and third generation rights as they do to civil and political rights.²⁷ He is of the view that 'the Charter therefore has an edge over the CRC by avoiding any ideological differences between the two categories of rights'.

4 Legal interpretation

The legal interpretation discussed next relies heavily on the express provisions of the African Children's Committee's General Comment 5.

4.1 'Recognising the rights, freedoms and duties' enshrined in the African Children's Charter

According to the General Comment, 'recognising' implies a level of formal recognition of the rights, by law or in constitutions. The Charter rights, freedoms and duties referred to in this part of article 1 are those that follow throughout the remainder of the Charter. The General Comment notes that the Children's Committee has previously articulated the requirement of 'due diligence' applicable to human rights obligations under the African Children's Charter,²⁸ creating an obligation of result,²⁹

24 R Johnson 'Strengthening the monitoring of and compliance with the rights of the African child' (2015) 23 *International Journal of Children's Rights* 365, 372.

25 In *African Centre for Justice and Peace Studies on behalf of Ms Umjumah Osman Mohamed v Sudan* No 16/Com/004/2020 (*Sudanese Rape/Adultery*) para 55.

26 Although the meaning of art 1(2) is reflected in art 41 of CRC. M Gose 'The African Charter on the Rights and Welfare of the Child' (Community Law Centre, 1992) is of the view that the prominent placement of the clause requiring more conducive measures to be implemented emphasises its complementarity with other human rights instruments (31).

27 D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

28 Citing the decision on the communication submitted by *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No 7/Com/003/2015 (*Mauritanian Enslaved Brothers*) paras 52, 53 & 54.

29 *Mauritanian Enslaved Brothers* (n 28).

meaning that the compliance of a state party is assessed against the backdrop of the efficacy and adequacy of the implementation measures it has undertaken to enforce laws and administrative and other measures.

4.2 ‘Undertake necessary steps in accordance with constitutional processes’

State parties are encouraged to harmonise their constitutional rights and protections with the African Children’s Charter, wherever possible.³⁰ The African Children’s Committee has been of the view that enshrining a detailed array of rights for children in national constitutions has become a continental best practice.

Constitutional incorporation of children’s rights is not a hard and fast rule, nor could it be, given the array of constitutional systems (for instance, national, federal, and so forth) that exist across the continent. The African Children’s Charter does not privilege any one constitutional system (national or devolved, that is, federal) over another but, in accordance with the national system prevailing, the relevant authority, at the relevant level, must take the appropriate steps set out in the General Comment to ensure the implementation of Charter rights. State parties may not defer responsibility for one or another aspect of implementation to another organ or sphere of government.³¹

The principle of a unitary state with responsibility for implementation must be stressed. The Committee has in the past criticised States Parties for failing to institute overarching coordination mechanisms in federal systems which can ensure equal implementation of the rights contained in the Charter across all parts of a territory, without discrimination. Similarly, it is the responsibility of the State Party to ensure that children in one region are not awarded less protection of their rights than in another, for example, due to different religious systems operating in different parts of a country.

The General Comment emphasises that enabling the private sector to provide services, run institutions, provide education, and so forth, does not in any way lessen the state’s obligation to ensure for all children within its jurisdiction the full recognition and realisation of all rights in the African Children’s Charter.³²

Constitutional amendment was a signal feature of *Malawian Amicable Settlement*.³³ Section 23(5) of the Malawian Constitution, which at the time had defined ‘children’ as ‘persons under 16 years of age’, was in 2017 amended after a friendly settlement to raise the age in the constitutional definition of a ‘child’ to 18 years, and abolish the exceptions that existed in other laws for those under 18 years to marry.

4.3 ‘Legislative measures’

The direct reference to legislative measures in article 1 requires the timely enactment and continuous review of national legislation and related administrative guidance to ensure their compatibility with relevant international norms and related standards on the rights of the child. Other human rights

30 ‘Including rights for children at the constitutional level is of limited value, however, if these and other legal rights are not justiciable before the courts, and children do not have access to effective legal remedies (of whatever kind available) for rights violations or to secure fulfilment of their rights. There are now numerous examples of constitutional litigation to secure children’s rights, such as by declaring unconstitutional corporal punishment, child marriage, and denial of access to education. The Committee does not, however, demand constitutional expression of children’s rights as an absolute requirement, although it is recommended’ (General Comment 5 para 18).

31 General Comment 5 paras 16-17.

32 General Comment 5 paras 17-18.

33 *Institute for Human Rights and Development in Africa (IHRDA) v Malawi* No 4/Com/001/2014 (*Malawian Amicable Settlement*), discussed in more depth in chs 3 and 45 of this volume.

conventions, standards and principles that also impact on the rights of the child require legislative enactment (for example, the Organisation of African Unity (OAU) Convention relating to the Status of Refugees and its Protocol, the UN Convention on the Rights of Persons with Disabilities, and the UN Convention against Torture, to name a select few).

4.4 ‘Other measures’

The African Children’s Committee has stated that ‘other measures’ constitute an overarching obligation, and they should have a legislative basis for their implementation. Numerous measures could be contemplated to give effect to Charter rights. They also include the array of policies, regulations, directives, subsidiary legislation and implementing tools (such as protocols) necessary to breathe life into principal legal sources.³⁴

They include administrative and judicial measures, the latter meaning that states should provide for judicially-enforceable children’s rights with a view to securing that children have access to the judicial system and can enforce their rights.³⁵

Worthy of mention as a general measure of implementation is the exhortation to state parties to ratify other AU treaties, as well as UN treaties and their Optional Protocols.³⁶ In particular, state parties have been urged to consider ratification of the Hague Convention on Inter-country Adoption (1993), the Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996).³⁷

State parties that have entered reservations to any Charter provision are encouraged as a general measure of implementation to withdraw these reservations.³⁸

4.5 Coordination

According to the General Comment, effective implementation of the African Children’s Charter requires visible cross-sectoral coordination between government departments to recognise and realise the rights of the child. Vertical coordination between central and other levels of government is also a necessity, as is coordination between government and other actors. Implementation is not the obligation only of large departments with a substantial impact on children – education, health, welfare, and so forth – but runs right across the entire government, including, for example, departments concerned with finance, planning, employment, youth, gender, defence, migration and asylum, security, infrastructure, and agriculture.³⁹ The suggestion is made that the possibility of decentralised, multi-sectoral national coordinating councils for the implementation of children’s rights and with thematic sub-councils should be considered. At the time that the General Comment was prepared, the African Children’s

34 ‘The Committee has noted considerable delays in implementation of legislation due to the non-enactment of subsidiary rules. Where required, these should be adopted without delay’ (General Comment 5 para 32).

35 *Mauritanian Enslaved Brothers* (n 28) para 51.

36 General Comment 5 para 31.

37 As above.

38 Currently reservations are recorded for Sudan (reservations entered to art 10 – Protection of privacy; art 11(6) – Education of children who become pregnant before completing their education; art 21(2) – Child marriage and betrothal of girls and boys); Mauritania (reservations entered to art 9 – Freedom of conscience and religion); and Egypt (reservation entered to art 24 – Adoption; arts 30(a)-(e) – Children of imprisoned mothers; art 44 – Communications; and decisions of the Committee; art 45(1) – Investigations by the Committee), www.acerwc.africa (accessed 28 April 2024).

39 General Comment 5 para 37.

Committee had found a paucity of good practice regarding coordination in state party reports, and urged state parties to pay particular attention to remedying this deficit.

4.6 Budgeting, efficient resource use and domestic revenue mobilisation

Legislation, policies and programmes cannot be implemented without sufficient financial resources being mobilised, allocated and spent in an accountable, effective, equitable, transparent and sustainable manner. The adoption of national public budgets is part and parcel of the fulfilment of both legislative measures and other measures, according to the General Comment.⁴⁰

The Committee has noted in its interaction with State Parties that allocation and spending of resources for the implementation of African Child's Charter rights remains a matter of serious concern with respect to a great number of State Parties (if not all), and has identified budgeting, efficient resource use and domestic revenue mobilisation as key aspects of the implementation obligation envisaged in Article 1(1) of the Charter.'

Measures that the General Comment advocates concerning budgeting include enhancing an equity focus⁴¹ in budgeting; ensuring that the budget classification systems allow for the allocations to child-focused programmes to be identified; creating opportunities for citizens, including children, to actively participate in fiscal and public finance management processes and to hold governments to account for their decisions and actions; ensuring that children's rights are deliberately reflected and adequately catered for in all donor aid agreements, including with global finance institutions;⁴² and adopting measures in their taxation systems to mitigate against base erosion and profit shifting, which result in missed opportunities for tax collection, as well as curbing any leakage of potential tax revenues through aggressive tax planning schemes and mispricing.

4.7 Data collection

The collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is regarded as an essential part of implementation.⁴³ Data collection needs to be coordinated throughout the jurisdiction, ensuring nationally-applicable indicators. Examples of information that support this obligation includes, but is not limited to, facts and figures relating to violations of the rights of the child, or gaps in implementation; numbers and characteristics of the children concerned (disaggregated according to gender, age, income, disability and other factors); and facts and figures on marginalised, vulnerable and hard-to-reach groups.⁴⁴

4.8 Training awareness and capacity building

The General Comment notes that building the capacity of government officials, parliamentarians, members of the judiciary, community and religious leaders, teachers, social workers, health workers, the police, peacekeeping forces, religious and traditional leaders, organs of civil society, communities

40 General Comment 5 para 38-39.

41 General Comment 5 para 40: 'In line with the principle of non-discrimination in the Charter states should ensure that public investment in children creates equal opportunities for all children to realise their rights. To achieve equity in public spending, states should develop fiscal policies that will ensure that poorest and most excluded children are reached with essential services for their survival, learning and protection.'

42 General Comment 5 para 41.

43 General Comment 5 paras 42-43.

44 'The Committee takes note of countries which have established dedicated Observatories for the Rights of the Child as focal points for the collection and analysis of child-specific data, and commends this as a good practice. States Parties which have introduced the annual publication of comprehensive reports on the state of children's rights throughout their jurisdiction can also be commended' (General Comment 5 para 44).

and parents, and all other functionaries working with and for children, including through training, and capacity building is a crucial part of implementing the African Children's Charter.⁴⁵

4.9 Policy development

The General Comment records that the African Children's Committee has generally commended state parties that have drafted comprehensive national child policies, which are in place for a set period and which have been adopted via a consultative process, including a consultative process with children themselves. National action plans serve as overarching frameworks for the coordination of national interventions. National child policies should set specific targets and estimated costs for achieving these, and seek to further the SDGs and the African Children's Agenda 2040 to the greatest extent possible. From this it may be deduced that a national action plan or policy framework is part and parcel of the implementation obligation.

Sectoral policies frequently target children (as well as adults). Examples cited in the General Comment include crime prevention policies, gender-based violence strategies, policies concerning mothers with babies in prisons, strategies to curb the involvement of children in gangs and armed groups, and anti-trafficking measures.

4.10 Collaboration with CSOs, CBOs and the private sector

The African Children's Committee is cognisant of the major role in the delivery of services to children that is played by civil society organisations (CSOs), community-based organisations (CBOs) and the private sector in the fulfilment of Charter rights. The Children's Committee has encouraged state parties to collaborate with CSOs, CBOs and the private sector in the formulation of policies, and has strongly suggested that state parties devise a more inclusive and participatory process to involve them in the development and implementation of policies, laws, budgets and programmes that affect the realisation of children's rights. Further, the General Comment urges state parties to review the legislation governing the registration and operation of CSOs to ensure that it does not provide any impediment to their optimal functioning.⁴⁶ However, the existence and operation of civil society in this sphere does not alleviate the state party from the obligations it incurs under the African Children's Charter, which it is under a duty to fulfil.

The General Comment is unique insofar as it requires state parties to ensure that CSOs and international organisations that work directly with children adopt child-safeguarding policies.⁴⁷ Whether this has had any impact on the ground is not known. The concept of safeguarding does not appear to feature in the African Children's Committee's Concluding Observations.

The General Comment urges that businesses must be brought into the fold in furtherance of children's rights. This includes state parties' monitoring of businesses to ensure that they do not use child labour, do not cause environmental degradation to the prejudice of children's rights, that any

⁴⁵ Para 44. The Committee also expects to see the provisions of the Charter reflected in professional training curricula, codes of conduct and educational curricula at all levels, including schools. State parties are also advised to maximally utilise the Day of the African Child theme for events, promotions, lectures, media engagement, and to involve children in the planning and execution of the various activities.

⁴⁶ General Comment 5 paras 46-47.

⁴⁷ General Comment 5 para 47.

negative impact of business activities upon children is mitigated, and that businesses are encouraged to invest in community programmes that benefit children.⁴⁸

4.11 Independent monitoring

Self-monitoring and evaluation are an obligation on governments. However, also essential is the independent monitoring of progress towards implementation by, for example, parliamentary committees, civil society organisations, academic institutions, professional associations, youth groups, independent human rights institutions and child rights ombudsmen.

The General Comment appears to require the inauguration of a national human rights institution (NHRI) in conformity with the Paris Principles, which institutions should have their legislative mandate in the constitution, and be sufficiently resourced and capacitated and able independently and effectively to monitor, promote and protect children's rights.⁴⁹ One commissioner, or a desk, should be designated with responsibility for children's rights.

4.12 Dissemination of the African Children's Charter and the Concluding Observations of the African Children's Committee, and publicising this General Comment

State parties incur the overarching obligation to ensure the wide dissemination of the provisions of the African Children's Charter within its territory, as well as Concluding Observations, findings on communications, and General Comments.⁵⁰

5 African Children's Committee jurisprudence

The Concluding Observations of the African Children's Committee generally follow the scheme laid down in the reporting guidelines, either commending or recommending improvements in the identified measures of implementation (legislative measures, budgeting, data collection, and so forth).

A further observation that appears from time to time relates to the child friendliness index produced by the African Child Policy Forum. In relation to Zambia in 2019, it was noted that Zambia's ranking had dropped since 2016, due to a lack of progress (at the time) with legislative processes, and to inadequate budgetary allocations for children.⁵¹

With regard to South Africa, an interesting observation was that the state party has not withdrawn its reservation to the International Covenant on Economic, Social and Cultural rights (ICESCR), and has not yet ratified the Third Optional Protocol to the CRC on the Communication Procedure. The African Children's Committee, therefore, urged the state party to consider withdrawing its reservation under ICESCR and to ratify the Third Optional Protocol to CRC on the Communication Procedure.⁵²

Malawi was urged to take immediate measures to combat corruption and prosecute perpetrators and to take appropriate steps to ensure the effective and efficient use of resources allocated to children's rights.⁵³

48 General Comment 5 para 48.

49 General Comment 5 para 50.

50 General Comment 5 para 54.

51 Concluding Observations Zambia (2013) para 13. See, also, Concluding Observations Rwanda (2019) para 10.

52 Concluding Observations South Africa (2023) para 5.

53 Concluding Observations Malawi (2018) para 9. See, also, concluding Observations Angola (2017) para 7.

As a general measure of implementation, Kenya was commended for planning to establish a universal child grant which will cover all vulnerable children. In this regard, the African Children's Committee recommended that the state party finalises the planning of, and to fully implement, the universal child grant to enhance the protection of children's rights in Kenya.⁵⁴ Enhanced child rights-oriented measures to deal with COVID-19 also formed part of these Concluding Observations.⁵⁵

Regarding Ethiopia, the Children's Committee reiterated its recommendation for the state party to adopt a comprehensive child rights law that will domesticate the Charter and other child rights instruments ratified by the state party. The Committee also noted that children's matters are regional matters and, hence, proposed that the state party adopts a federal child law and encourage regions to also adopt their own child law in line with its experience regarding laws on other issues that fall on the regional jurisdiction.⁵⁶

These are but some examples of more unusual contents of Concluding Observations relating to general measures of implementation. Ordinarily, the Concluding Observations in relation to the implementation article cover the main areas of legislative reform, coordination and budgeting.

However, violations of the article appear prominently in the findings on communications issued by the African Children's Committee. In fact, as Viljoen (chapter 45 in this *Commentary*) details, violations of article 1 rank top among the range of articles found to have been violated, with such findings occurring in eight communications.

By way of example, the finding in *Sudanese Rape / Adultery*⁵⁷ confirmed that it is also the position of the Children's Committee that

as part and parcel of the legislative obligation drawn from article 1 of the Charter, legislative provisions concerning child protection are required. As such, in order to fulfil the obligations under article 1 of the Charter, it is essential for State parties to have in place legislation that emphasises children's right to be protected from all forms of abuse, neglect, maltreatment and degradation.⁵⁸

It is the African Children's Committee's stance that article 1 of the African Children's Charter gives the Charter a legally-binding character and that a violation of any of the rights provided in the Charter is a violation of article 1.⁵⁹ The Children's Committee found that the provisions of article 3 of the Criminal Act of the respondent state, which defines an adult as a person whose puberty has been established by definite natural features and has completed 15 years of age and the decision of the Constitutional Court that these provisions are consistent with the Constitution of Sudan, restricted the enjoyment of the rights guaranteed to children under the Criminal Act and other Sudanese laws and, by implication, the rights enshrined in the African Children's Charter.⁶⁰

54 Concluding Observations Kenya (2020) para 9.

55 Concluding Observations Kenya (2020) para 11.

56 Concluding Observations Ethiopia (2022) para 4.

57 *Sudanese Rape / Adultery* (n 25).

58 Para 54.

59 Para 55.

60 'The Committee draws inspiration from the African Commission on Human and Peoples' Rights in the case of *Lawyers for Human Rights v Swaziland* where the Commission held that by ratifying the African Charter on Human and Peoples' Rights without at the same time taking appropriate measures to bring domestic laws in conformity with it, the respondent's action defeated the very object and spirit of the Charter' (para 58).

Further, in *Mauritanian Enslaved Brothers*⁶¹ the African Children's Committee noted that the obligation to undertake legislative measures includes the need to provide for the full array of protective measures,

which shall include effective procedures for the establishment of special monitoring units to provide support for the child and for those who have care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up in instances of child abuse and neglect.⁶²

It also noted that the implementation of obligations in the context of article 1 includes the requirement of 'due diligence'. This in turn translates to prevention of human rights violations, investigations of violations, prosecution of perpetrators and ensuring punishment of perpetrators.⁶³ It entails that an objective and government-driven investigation of the violation must occur.⁶⁴ Despite legislation being in place to prohibit slavery, the state had not acted with due diligence in pursuing the perpetrators and sentencing them to appropriate sanctions.

A final example of a finding of a violation of article 1 is to be found in *Tanzanian Girls*.⁶⁵ The African Children's Committee, dealing with this violation at the end of the finding, and last amongst Charter articles found to have been violated, stated:⁶⁶

The Respondent State, in this case, has taken legislative measures on the issues alleged, however, the measures are alleged to be regressive. The Respondent State has failed to harmonise its age of marriage and also has failed to prevent child marriage as already discussed above. In addition, the Respondent State has adopted the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 GN No 295 of 2002 which expels pregnant and married girls from schools. This policy does not discourage practices that hinder the realisation of the provisions of the Charter. The Committee is of the view that the policy protects perpetrators as it outcasts and stigmatises victims of sexual violence including child marriage. The result of the policy is a clear violation of the provisions of the Charter as pregnant and married girls are deprived of their numerous rights in the Charter including their right to education and health services.

6 Conclusion

The African Children's Committee has, through the revised reporting guidelines and the adoption of General Comment 5, laid a sound framework for consideration of the various elements that constitute general measures (also evident at the international level under CRC). Possibly a strong common element is the ongoing law reform efforts on the continent in relation to children's rights, not only through dedicated children's laws, but also through other legislation (for instance, on domestic violence and trafficking) as well as directives and regulations. What is weak, though, are good models of coordination between government departments and also between central and regional or devolved entities. Budgeting for children's rights is, as ever, an area where all state parties must improve.

⁶¹ *Mauritanian Enslaved Brothers* (n 28).

⁶² Para 48.

⁶³ Para 52.

⁶⁴ Para 54.

⁶⁵ *Legal and Human Rights Centre and Centre for Reproductive Health (on behalf of Tanzanian Girls) v Tanzania* No 12/Com/001/2019 (*Tanzanian Girls*).

⁶⁶ Para 101.