

Chapter 11

Article 10

Protection of privacy

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No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or the attacks upon his honour, or reputation provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

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1 Introduction

Article 10 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) holds significant importance in safeguarding the fundamental rights of children in Africa. The article affirms children's rights to privacy and emphasises a right to protection against arbitrary or unlawful interference with the child's family, home or correspondence, and the right to protect the child from attacks upon their honour and reputation. Moreover, it emphasises the crucial role of parents or legal guardians in providing supervision over their children's conduct, albeit within reasonable bounds. Finally, state parties are required to legally protect children from interference in or attacks on their privacy.

The article raises issues regarding the physical environment in which the child lives, the privacy of their relationships and communications with others, including rights to confidential advice and counselling, and control of access to information stored about the child in records or files, among others.¹ Children are particularly vulnerable to breaches of their privacy because of the range of situations in which adults have power over them. Children's privacy can be at risk within their

1 UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2007) 203.

parental home, within alternative care settings and within institutional settings, including schools and hospitals,² and in juvenile justice, child protection and other proceedings. Originally, the right to privacy focused on protections against arbitrary or unlawful interference with privacy, family home or correspondence, or attacks upon honour or reputation.³ However, privacy now has a much wider remit as the digital sphere has innovated privacy norms.⁴ With the increasing use of the internet, children's online presence heightens their vulnerability to interference with their right to privacy. Most children upload their personal information, photos and videos online, which will possibly be on the internet for a long time. Further, children's privacy can be compromised by the processing of personal data; online surveillance; the building and maintaining of records of children's entire digital existence; the use of biometrics and pre-existing risks such as online stalking and harassment, as well as exposure to unwanted inappropriate content.⁵ Parents or other individuals may share information concerning children, thereby violating children's privacy. This may include malicious sharing of children's images that may portray pornography and ridicule.⁶

The right to privacy is both important as a right in itself, and as an enabler of several other children's fundamental rights enshrined in the African Children's Charter, such as freedom of expression, freedom of association, and freedom of thought, conscience and religion, also analysed in this *Commentary*. Crucially, it enables the child to fully self-actualise and self-identify according to their own preferences, without unwarranted interference or influences aimed at directing them towards specific social or cultural paths.⁷ Therefore, ensuring the effective implementation of article 10 is vital in upholding the rights and welfare of children amidst evolving societal and technological landscapes.

This chapter provides a commentary on article 10 considering international, regional and national normative standards, including comparative perspectives and implementation practices. The chapter is divided into six parts. Part 2 begins by highlighting the interlinkages of article 10 with other articles in the African Children's Charter, followed by part 3 which highlights the interlinkages with other human rights treaties. Part 4 discusses the nature of states obligations created under article 10 and explicates the scope and content of these obligations. Part 5 elaborates on state practice through a review of domestic legislation, case law and state reports submitted to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). Part 6 concludes by highlighting the challenges arising in implementing article 10 and provides entry points for advancing the realisation of children's right to privacy.

2 Links to other Charter articles

There are other provisions in the African Children's Charter relevant to the right to privacy. The African Children's Charter is grounded by four general principles that inform the realisation of all other rights. These principles have been fully discussed in chapters 4, 5, 6 and 8 in this *Commentary* (non-discrimination, best interests of the child, survival and development, and the respect of the views of the child 'freedom of expression'). These principles have relevance to the violations of privacy

2 C Whalen 'Article 16: The right to protection of privacy' in Z Vaghri and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child: An analysis of attributes* (2022) 94.

3 O Sibanda 'Towards a more effective and coordinated response by the African Union on children's privacy online in Africa' (2022) 6 *African Human Rights Yearbook* 158.

4 Centre for Human Rights 'A study on children's right to privacy in the digital sphere in the African region' (2022) 3.

5 M Viola de Azevedo Cunha 'Child privacy in the age of web 2.0 and 3.0: Challenges and opportunities for policy' UNICEF Innocent Discussion Paper 2017-3 (2017) 6.

6 UNICEF 'Children's online privacy and freedom of expression: Industry Toolkit' (2018) 8.

7 A Singh & T Power 'Understanding the privacy rights of the African child in the digital era' (2021) 21 *African Human Rights Law Journal* 101.

encountered by children in the merged online or offline environment, hence they are necessary when safeguarding children's privacy.

Article 17(2)(d) of the African Children's Charter, regarding administration of juvenile justice, requires state parties to prohibit the press and public from trials. In its Concluding Observations and recommendations to state parties, the African Children's Committee has encouraged governments to ensure the protection of children's privacy in court proceedings. For example, in its recommendation to Angola, the African Children's Committee called on the government to ensure that children's privacy is protected in court proceedings by holding a closed hearing for cases that involve and concern children.⁸ Also, in its Concluding Observations to Gabon, the African Children's Committee called on the government to safeguard the privacy of children within the juvenile justice system, as well as that of child witnesses and victims. Additionally, the government was recommended to ensure that remedies are available whenever there is a breach of children's privacy.⁹

The role of parents in guiding and directing children in the exercise of their right to privacy under article 10 of the African Children's Charter reinforces the parental responsibilities contained in article 20. Parents or any other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child, including exercising reasonable supervision over the conduct of their children.

Article 27(c) places an obligation on state parties to take measures to prevent the use of children in pornographic activities, performances and materials. The African Children's Committee General Comment on article 27 outlines measures for state parties to protect children from sexual exploitation and abuse, both offline and online. Although it does not explicitly discuss the impact of online sexual exploitation on privacy, the General Comment implicitly interprets children's privacy, as inclusive of the protection of acts of exploitation such as child pornography and grooming affecting their privacy, honour and reputation.

3 Links to other human rights treaties

Article 10 applies specifically to the child but it is also a fundamental civil right already established for every individual in the Universal Declaration of Human Rights (Universal Declaration)¹⁰ and the International Covenant on Civil and Political Rights (ICCPR).¹¹ The UN Human Rights Committee has stated in its General Comment on the right to privacy that the right to privacy is multifaceted and overarching, comprising protections against the arbitrary or unlawful interference with privacy, family, home or correspondence, against unlawful attacks on honour and reputation, the protection of personal information and protection against communication surveillance.¹²

Specific to children, the Convention on the Rights of the Child (CRC) provides for the protection of children's right to privacy in its article 16. Unlike the CRC, the African Children's Charter allows parents or guardians to exercise reasonable supervision over their children. Concerns about the role of parents in the CRC were addressed by including article 5, on the responsibilities, rights and duties

8 Concluding Observations and Recommendations of the African Children's Committee on the initial report of the Republic of Angola on the status of implementation of the African Children's Charter (2018) 8.

9 Concluding Observations and Recommendations by the African Children's Committee on the Republic of Gabon report on the status of implementation of the African Children's Charter para 25.

10 Art 12 Universal Declaration.

11 Arts 17(1)-(2) ICCPR.

12 CPR Committee General Comment 16 on art 17, adopted during the 32nd session of the Human Rights Committee, 8 April 1988.

of parents and guardians to guide children in exercising their rights, in line with the child's evolving capacities.¹³

Additionally, the Optional Protocol to CRC on the sale of children, child prostitution and child pornography provides for the protection of children from sale, child prostitution and child pornography which pose threats to children's privacy and reputation.

Article 10 can also be read along with the provisions of the CRC Committee's General Comment 25 which spells out state party obligations in relation to children's rights in the digital environment.¹⁴ The provisions of this General Comment can also be used to interpret the provisions of article 10 as the African Children's Charter draws a great deal from CRC, and the two instruments are complementary.¹⁵

Also linked to article 10 is the CRC Committee's General Comment 4 on adolescent health and development which provides that in order to promote the health and development of adolescents, state parties are encouraged to strictly respect their right to privacy and confidentiality, including with respect to advice and counselling on health matters.¹⁶ On the other hand, the provisions of General Comment 24 on children's rights in the justice system can be linked with article 10 as it provides guidance to state parties for the protection of children's right to privacy during all stages of proceedings.¹⁷

At the regional level, while the African Charter on Human and Peoples' Rights (African Charter) does not explicitly protect the right to privacy, various regional instruments have been developed to safeguard online privacy. The African Union (AU) Convention on Cyber Security and Data Protection (Malabo Convention), adopted in 2014, addresses cyber security and cybercrime. As of November 2024, only 16 countries have ratified the Convention. Article 29(3) of the Malabo Convention specifically mandates criminalising child pornography, acknowledging its impact on children's privacy. Despite this, the Convention's provisions on personal data protection do not mention children, potentially jeopardising their online privacy. Given children's vulnerability online, legal frameworks should include specific protections for their personal data.

The revised Declaration of Principles on Freedom of Expression and Access to Information in Africa adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2019 acknowledges the importance of the right to privacy both as a self-standing right and an enabler of the rights to freedom of expression and access to information.¹⁸ Notably, the Declaration has provisions relating to children's privacy.¹⁹ As noted by Singh and Power, the adoption of the Principles is a landmark development in the recognition of the right to privacy in Africa.²⁰ The specific provisions of children's privacy are also significant as children's privacy in the digital sphere is important.

13 UNICEF 2007 (n 1) 204.

14 CRC Committee General Comment 25 (2021) on children's rights in relation to the digital environment CRC/C/GC/25.

15 O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underline and repeat the Convention on the Rights of the Child (CRC)'s provisions? Examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 148.

16 CRC Committee General Comment 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child CRC/GC/2003/4 para 7.

17 CRC Committee General Comment 24 (2019) on children's rights in the child justice system CRC/C/GC/24.

18 African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Principle 40.

19 See Principle 37(5) & 42(6).

20 A Singh & M Power 'The privacy awakening: The urgent need to harmonise the right to privacy in Africa' (2019) 3 *African Human Rights Yearbook* 210-211.

Other instruments key in safeguarding children's privacy include the African Union Commission (AUC) Child Online Safety and Empowerment Policy, adopted in 2023; the AU Digital Transformation Strategy (2020-2030); and the AU Data Policy Framework which was developed in 2022.

4 Legal interpretation

Article 10 includes key terms that need to be clarified to fully grasp the provision's content. Each sub-heading in the following discussion refers to these key terms. The discussion draws inspiration from the Human Rights Committee's General Comment on the right to privacy²¹ and the United Nations Children's Fund (UNICEF) CRC Implementation Handbook.²²

4.1 Arbitrary or unlawful interference with family, home or correspondence

The right to privacy is not absolute and can be subject to interference, provided the interference is not arbitrary or unlawful. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the African Children's Charter and should, in any event, be reasonable in the circumstances. The term 'unlawful' means that no interference can take place except in cases envisaged by the law. The CRC Committee has also upheld this view, highlighting that interference with a child's privacy is only permissible if it is neither arbitrary nor unlawful. Any such interference should therefore be provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimisation and be proportionate and designed to observe the best interests of the child.²³

4.1.1 Family

The Human Rights Committee notes that the term 'family' should be given a broad interpretation to include all those comprising the family as understood in the society of the state party concerned.²⁴ Protection from arbitrary or unlawful interference with family means that attempts at alienating a child from one of their parents or siblings could constitute a privacy rights violation.²⁵ In that regard, any arrangements permitting interference with a child's family must be provided for in law and must not be arbitrary. Further, interference with a child's family must be compatible with the other provisions and principles of the African Children's Charter and reasonable in the circumstances. Reference can be made to article 25 on separation from parents, highlighting that any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance.

4.1.2 Home

The term 'home' is also subject to various interpretations and can be understood to indicate the place where a person resides or carries out his usual occupation.²⁶ Therefore, 'home' will encompass, for some children, alternative care settings such as different types of residential institutions, boarding schools, detention centres, long-term hospitals, and similar places.²⁷ The Human Rights Committee

21 CPR Committee General Comment 16 on art 17 (n 12).

22 UNICEF (n 1).

23 CRC Committee General Comment 25 (n 14) para 69.

24 CPR Committee General Comment 16 (n 12) para 5.

25 Whalen (n 2) 99.

26 CPR Committee General Comment 16 (n 12) para 5.

27 UNICEF (n 1) 210.

further notes that searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.²⁸

Any arrangements permitting interference with a child's home, such as searching it, must be set out in law and must not be arbitrary, must be compatible with the other principles and provisions of the African Children's Charter, and must be reasonable in the circumstances. Eviction of a family from its home would have to meet these tests. For children living in alternative care, movements from one 'home' to another or closure of an institution must not unreasonably breach the child's right.²⁹

4.1.3 Correspondence

Every child possesses the entitlement to have their communication, such as letters, phone calls and other forms of correspondence, protected from arbitrary or unlawful interference, whether it is within their family or any other environment in which they find themselves.³⁰ Any arrangements permitting interference with a child's correspondence, such as opening, reading or limiting it, and so forth, must be set out in the law, must not be arbitrary, should be compatible with the other principles and provisions of the African Children's Charter, and must be reasonable in the particular circumstances. The child must have access to a complaints procedure and appropriate remedies in cases of violation of the right.³¹

The Human Rights Committee has also emphasised that compliance with the right to privacy requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Ensuring the integrity and confidentiality of children's correspondence is crucial for protecting their privacy. Prohibiting surveillance and interception of various forms of communication, including electronic and telephonic, is vital to creating a safe environment where children can freely express themselves and communicate without fear of intrusion or breach of privacy.

4.2 Attacks upon honour or reputation

Article 10 protects children from traditional harms such as libel, slander and misappropriation of their image. This can take place in both the offline and online environment. Searches of a child's home should focus solely on finding essential evidence and must not intimidate or harass the child concerned. Personal and bodily searches should respect the child's dignity and privacy, be conducted by same-gender personnel, and take place in the presence of a parent or legal guardian.

The portrayal of children in the media should also not be done in a manner that infringes on their dignity. The African Children's Committee raised concerns regarding the frequent media coverage on accusations of child witchcrafts in Ghana due to its impact on the child's dignity and privacy. The Children's Committee recommended the government to strictly apply media laws to protect the identity of children when portrayed by the media.³² In the Concluding Observations and recommendations to the government of Seychelles, the African Children's Committee raised concerns about the unauthorised portrayal of a protected child living in a children's home in the media. The African Children's Committee encouraged the government to adopt policies and put in place strategies to address this issue, including training journalists and media practitioners about the necessity to

28 CPR Committee General Comment 16 (n 12) para 8.

29 UNICEF (n 1) 210.

30 As above.

31 As above.

32 Concluding Observations and Recommendations by the African Children's Committee to the Republic of Ghana initial report on the status of implementation of the African Children's Charter (2016) 6.

consider the sensitivities related to children's rights issues in general and protecting children in this case while processing information.³³

In 2022 the African Children's Committee issued a landmark ruling against the Republic of Tanzania.³⁴ The complainants alleged that schoolgirls face forced pregnancy, expulsion if found pregnant or married, and even illegal detention, which resulted in the violation of the girls' privacy. The African Children's Committee emphasised that children's consent is crucial in health matters, asserting that they should provide informed consent before undergoing medical procedures, including pregnancy tests. These services must be confidential and conducted by trained healthcare professionals, with results disclosed only with the child's express consent. The African Children's Committee made reference to the decision of the Inter-American Commission on Human Rights which stated that the vaginal inspection of a 13 year-old child every time she wanted to visit her family in prison subjected her to serious psychological damage and resulted in shame and anguish, and further decided that the practice violated the right to privacy and dignity of the child.³⁵ The African Children's Committee deemed mandatory pregnancy testing, lack of informed consent and public disclosure of results as unlawful privacy violations. It also condemned the illegal detention of pregnant girls as an unjustifiable violation of privacy and urged the government of Tanzania to ban such practices and act against perpetrators.

This landmark ruling represents a crucial step forward in safeguarding the fundamental rights of children, particularly their rights to privacy. By condemning the egregious practices of mandatory pregnancy testing and the illegal detention of pregnant girls in schools, the African Children's Committee reaffirms the inviolable nature of children's privacy and dignity. This decision underscores the imperative for informed consent and confidentiality in matters concerning children's health, emphasising that children must have the autonomy to make decisions about their bodies and medical procedures. Moreover, by denouncing the public disclosure of pregnancy test results and the arbitrary detention of pregnant girls, the African Children's Committee sends a clear message that such actions constitute not only legal transgressions but also profound violations of children's rights and well-being. In essence, this decision sets a precedent for accountability and protection, compelling governments to uphold the rights of children and prohibit harmful practices that undermine their honour and reputation.

4.3 Reasonable supervision by parents: The role of parents

Article 10 grants parents and legal guardians the right to exercise reasonable supervision over their children's conduct, in alignment with the right to privacy. However, the scope of 'reasonable supervision' is not defined and, thus, open to interpretation. Some argue that subjecting a child's privacy right to parental supervision limits the exercise of this right, as the reasonableness of such supervision can be hard to determine. Conversely, it can be argued that this limitation does not strip the right of all meaning, given that parental supervision naturally decreases with the child's evolving capacities.³⁶

In the digital environment, while the objective of parental supervision undoubtedly is legitimate as children are protected from online risks, including risks to their privacy, a clear interference with

33 Concluding Observations and Recommendations by the African Children's Committee on the initial report of the Republic of Seychelles on the status of implementation of the African Children's Charter (2022) 8.

34 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*).

35 *Ms X v Argentina* IACHR (15 October 1996) Ser.L/V/II.95 Doc 7 Rev 50 para 93.

36 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 80.

children's privacy,³⁷ freedom of expression, access to information, participation, and development of digital literacy is presented by parental supervision.³⁸ Empirical evidence shows that children are aware of online privacy threats, just as their parents are.³⁹ Moreover, parents can themselves pose privacy risks by sharing information about their children online.⁴⁰

There are divergent opinions on whether parental supervision could be easily relied upon to limit fundamental principles such as freedom of expression, privacy and child participation, and whether it is analogous with positive African traditions.⁴¹ The African Children's Committee's General Comment on the responsibility of the child⁴² addresses this challenge, advocating a balance between the authority exerted by adults over children and the corresponding responsibility of children to be respectful and mindful of such authority.⁴³ The General Comment emphasises that children's rights should not be compromised by reference to 'respect for adults'.⁴⁴ Therefore, addressing the tension between parental supervision and children's rights to privacy requires careful consideration of children's evolving capacities.⁴⁵

4.4 Protection of the law against unlawful interference or attacks

As noted above, the interference with the right to privacy can only take place in ways defined in law, which must not be arbitrary, and must comply with the provisions, aims and objectives of the African Children's Charter. State parties should enact laws that protect children from unlawful interference with or attacks on their privacy. Resonating the Human Rights Committee, state parties should enable children and their parents to make complaints when they believe their right to privacy has been violated and to have appropriate remedies.

5 Nature and scope of state obligations

State parties are obliged to protect children's rights to privacy against interferences or attacks from any source, whether state authorities or private entities. States must ensure protection and offer effective remedies for privacy violations. Specific obligations, including legislative and institutional measures, are detailed below.

5.1 Legislative measures

The African Children's Committee has stated in its General Comment on state party obligations that the child's right to privacy in court and in the media should be spelt out by law.⁴⁶ It further states that children's privacy rights should be legislatively assured, and their rights to redress and a remedy

37 UNICEF 'Privacy, protection of personal information and reputation rights' *Children's Rights and Business in a Digital World Discussion Paper Series* (2017) 17.

38 Cunha (n 5) 14.

39 L Jasmontaite & P de Hert 'The EU, children under 13 years, and parental consent: A human rights analysis of a new, age-based bright-line for the protection of children on the internet' (2015) 5 *International Data Privacy* 7.

40 Cunha (n 5) 14-15.

41 Singh & Power (n 7).

42 African Children's Committee General Comment on art 31 of the African Children's Charter on the responsibilities of a child (2017).

43 African Children's Committee (n 42) para 58.

44 As above.

45 UNICEF 'Child safety online global challenges and strategies' (2012) 53.

46 African Children's Committee General Comment 5 on State Party Obligations under art 1 of the African Children's Charter and Systems Strengthening for Child Protection (2018) 26.

secured.⁴⁷ State parties are under an obligation to provide adequate legislation to protect children against unlawful attacks on their honour and reputation. Provision must also be made for every child effectively to be able to protect themselves against any unlawful attacks that do occur and to have an effective remedy against those responsible.

Regarding children's personal data, legislation on children's personal data should include strong safeguards, transparency, independent oversight and access to remedies. It should not arbitrarily limit children's other rights, such as freedom of expression or protection. State parties must ensure that data protection laws respect children's privacy and personal data in the digital environment.⁴⁸

The business sector, including non-governmental organisations (NGOs), affects children's rights directly and indirectly in the provision of services and products relating to the digital environment. State parties should take measures, including through the development, monitoring, implementation and evaluation of legislation, regulations and policies, to ensure compliance by businesses with their obligations to prevent their networks or online services from being used in ways that cause or contribute to violations or abuses of children's rights, including their rights to privacy and protection, and to provide children, parents and care givers with prompt and effective remedies.⁴⁹ States should also require businesses to implement ethical and safe regulatory frameworks, industry codes and terms of service for their digital products and services.⁵⁰

Recalling its General Comment on children's rights in relation to the digital environment, the CRC Committee recommended Madagascar to enact laws on access to information and the digital environment that adequately protect children from harmful content and materials and online risks and provide for mechanisms to prosecute violations. The CRC Committee also encouraged the state party to develop regulations and safeguarding policies for the media and the digital environment to protect the privacy of children, including by ensuring access for children to information and media adapted to their needs and allowing them to channel their ideas.⁵¹

5.2 Institutional measures

Children face significant challenges in accessing justice in privacy violations particularly in the digital environment due to difficulties in obtaining evidence, identifying perpetrators, and a lack of awareness about online privacy rights violations among children and care givers. Fear of disclosing private activities or reprisals, and social exclusion also hinder access. States must ensure that remedial mechanisms for digital rights violations are widely known, accessible, free, safe, confidential, responsive and child friendly. They should provide for collective complaints, legal assistance, and specialised services for affected children. Frameworks for referring cases and supporting victimised children, including therapy and social reintegration, must be established and regularly monitored. Multi-agency, child-friendly measures are necessary to prevent further victimisation during investigations and judicial processes. Reparations should include restitution, compensation, apologies, correction, content removal and psychological recovery services. Remedial mechanisms must be swift to prevent ongoing harm and ensure non-recurrence of violations through law and policy reforms.

Digital technologies complicate investigating and prosecuting crimes against children, often crossing national borders. States should address these complexities, take preventive and enforcement

47 African Children's Committee General Comment 5 (n 46) 27.

48 CRC General Comment 25 (n 14) para 74.

49 CRC General Comment 25 (n 14) para 37.

50 CRC General Comment 25 (n 14) para 39.

51 Concluding Observations on the combined fifth and sixth periodic reports of Madagascar, CRC Committee (9 March 2022) CRC/C/MDG/CO-5-6 (2022) para 21.

measures, and provide specialised training for law enforcement and judicial officials, including through international cooperation.⁵²

5.3 Other measures

State parties should also implement preventive measures such as dissemination of information and conducting awareness-raising campaigns on the rights of the child to privacy. As stated by the CRC Committee, state parties should advise children, parents and care givers and the public on the importance of the child's right to privacy and on how their own practices may threaten that right. They should also be advised about the practices through which they can respect and protect children's privacy in relation to the digital environment, while keeping them safe.⁵³ Additionally, professionals working for and with children and the business sector, including the technology industry, should receive training that includes how children's privacy is affected by their operations and how they can mitigate the impacts. The African Children's Committee has recommended state parties to conduct capacity-strengthening initiatives to educate stakeholders in the justice system as well as the media on the protection of children's rights to privacy in court proceedings and to disseminate information and conduct awareness-raising initiatives in collaboration with civil society organisations, targeting communities, stakeholders, businesses and the media to educate citizens on the protection of children's privacy and personal information online.⁵⁴

6 State practice

As highlighted in chapter two of this volume, article 1 of the African Children's Charter calls upon state parties to undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter. This part provides a concise overview of the diverse measures undertaken by state parties in alignment with the aforementioned obligations, with regard to children's rights to privacy.

It is worthy of mention that the Republic of Sudan and Sahrawi Arab Democratic Republic made reservations under article 10 of the African Children's Charter. The author is of the view that this may be as a result of the countries cultural and social norms that may permit parents or guardians to intervene in their children's privacy in a way that does not conform to the provisions of the Charter on the right to privacy. Reservations entered on treaties affect the level of harmonisation of laws at the domestic level, as countries that have entered reservations have no obligation to implement the provisions on which they have entered reservations.

Notably, constitutional protection of the right of everyone to have their to privacy protected is a feature of most constitutions of African countries. In some countries there are laws that explicitly protect children's rights to privacy. Legislation on children's privacy is fragmented, with some laws making provisions for the protection of children's privacy in specific situations such as court proceedings and the provision of healthcare services, while some do not. In Nigeria, the provisions of article 8 of the Child Rights Act 2003 provide for the protection of children's right to privacy, provided that it does not affect the rights of parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards. Article 11 on the other hand provides for children's right to dignity and stipulates that no child shall be subjected to attacks upon his honour or reputation. In Mozambique, article 23 of the Law on the Promotion and Protection of the Rights

52 CRC Committee General Comment 25 (n 14) para 39.

53 CRC Committee General Comment 25 (n 14) para 76.

54 Concluding Observations and Recommendations of the African Children's Committee to the Republic of South Africa on its second periodic report on the implementation of the African Children's Charter (2023) 7.

of the Child 7 of 2008 provides for the privacy rights of the child, providing that no child may be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful offences against their honour and reputation.⁵⁵ In 2001 Kenya enacted the Children's Act which explicitly includes the right to privacy in section 19. In Tunisia, Law 95-92 of 9 November 1995 relating to the publication of the child protection code addresses children's rights to privacy in several articles. Article 6 states that every child has the right to respect for their private life, while considering the rights and responsibilities of their parents or those who are in charge, in accordance with the law. The code also states the obligation to protect this right in the judicial process, and implies sanctions in cases of non-respect of these provisions. These provisions all mirror article 10 of the African Children's Charter.

Other countries provide for the protection of juveniles, survivors and child witnesses in the criminal justice system. In Zimbabwe, section 195 of the Criminal Procedure and Evidence Act Chapter 9:07⁵⁶ prohibits the publication of the name, address, school or place of occupation or any other information likely to reveal the identity of any person under the age of 18 years who is being or has been tried in any court on a charge of having committed any offence. Section 197 of the Act criminalises the publishing of the name, address, school or place of occupation or any other information likely to reveal the identity of any person under the age of 18 years who is giving or has given or will give evidence at any trial. However, exceptions exist: A judge, magistrate or minister may consent to such publication if deemed just, equitable and in the public interest or the interest of a particular person. This consent must be conveyed through a signed document by the judge, a High Court registrar, magistrate, magistrate's court clerk or minister.

In Ghana, the Children's Act, 1998⁵⁷ and the Juvenile Justice Act, 2003⁵⁸ protect the right to privacy in civil and criminal judicial proceedings. The Ghana Media Commission has media guidelines that seek to protect vulnerable groups such as children. The guidelines protect the privacy, unnecessary intrusion and the use of photographs of children in news articles. Specifically, the press is prevented from identifying children who are involved in cases concerning sexual offences, whether as victims, suspects or as witnesses. This is done to ensure unnecessary exposure of the child to the public and protect the privacy of the child.⁵⁹

Other situations where children's rights to privacy are protected include in healthcare settings. In its report on the implementation of the African Children's Charter, Ethiopia reported that various guidelines were adopted to ensure that children's privacy is protected in all sectors. The health ethical guidelines provides that children's privacy should be protected in healthcare services.⁶⁰

In Botswana's report to the African Children's Committee, it was noted that the Ministry of Basic Education through the Guidance and Counselling Programmes in all public schools is mandated to protect the privacy of all learners. Guidance and counseling teachers, who offer counseling to learners, keep confidential records of all issues affecting learners. Some schools have counselling rooms where learners who access counselling services are fully assured of confidentiality and privacy. Further, in terms of section 20 of the Anti-Human Trafficking Act, 2014, where a child is a victim of human trafficking, their rights to privacy shall be respected and any person who discloses the name and

55 Centre for Human Rights (n 4) 32.

56 Criminal Procedure and Evidence Act ch 9:07.

57 Children's Act, 1998 sec 38(3).

58 Juvenile Justice Act, 2003 sec 3.

59 Republic of Ghana's initial report to the African Children's Committee on the status of implementation of the African Children's Charter (2005-2013) 26.

60 Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the African Children's Committee (2014-2019) 32.

personal circumstances of the victim of trafficking in persons or any other information tending to establish the identity of a victim of trafficking in persons commits an offence.⁶¹

Section 18(3) of the Children's Law, 2011⁶² of Liberia provides for the protection of children's privacy. The privacy of children in institutions is further protected in section 12(4) which provides that the person registered to operate an institution shall prescribe and oversee the implementation of guidelines for the respect of every child's wish for privacy and confidentiality subject to the protection of the child and sound parenting. Without limiting the general nature of this responsibility, the person registered to operate an institution must ensure, among other issues, that there is no compromise in the provision of quality care and respect for privacy due to the design of rooms and other amenities in the institution.⁶³

Given the rise in internet usage and the privacy-related threats to human rights in the digital environment, countries have adopted cybersecurity laws that seek to protect individuals' personal data. As of July 2023 it was recorded that 36 African countries had enacted data protection laws.⁶⁴ However, not all the data protection laws explicitly mention children, and there are a few countries whose data protection legislation contains provisions regarding the protection of children's personal data. Examples of countries with cybersecurity legislation that have provisions on children's personal data include Kenya,⁶⁵ South Africa,⁶⁶ Benin,⁶⁷ Algeria,⁶⁸ Uganda⁶⁹ and Mauritius.⁷⁰

Additionally, it is noted that most of the cybersecurity laws enacted by African countries have provisions that prohibit child pornography. These include Zimbabwe⁷¹ and Uganda.⁷² Some countries, however, are lagging behind regarding the adoption of legislation that addresses the privacy rights of children. In Cameroon and Senegal, for instance, there is no law that specifically deals with children's privacy.⁷³ In Cameroon, children's privacy is actually explicitly restricted by article 300 of the Cameroonian Criminal Code 7 of 2016, which grants parents and guardians the authority to open or intercept the correspondence of children under the age of 18 years.

Although there is emerging jurisprudence on protecting the right to privacy in Africa, there has not been much jurisprudence on children's privacy specifically. The South African Constitutional Court had an occasion to deal with a case regarding the protection of the identity of child victims of crimes in criminal proceedings. The case had two central issues. The first concerned the scope of protection provided by section 154(3) of the Criminal Procedure Act 51 of 1977 relating to the anonymity of child victims in criminal proceedings. The impugned section expressly provided anonymity protections for child accused or witnesses in criminal proceedings. However, the protection did not extend to child victims. The second issue concerned ongoing protection, and whether the protection afforded by

61 Combined 1st to 7th Report of the Republic of Botswana to the African Children's Committee on the implementation of the African Children's Charter (2003-2021) 27-28.

62 Children's Law, 2011.

63 Children's Law, 2011 sec 13(1)(c).

64 O Babalola 'Transborder flow of personal data (TDF) in Africa: Stocktaking the ills and gains of a divergently regulated business mechanism' (2024) 52 *Computer Law and Security Review* 105940.

65 Data Protection Act 24 of 2019 sec 33.

66 Protection of Personal Information Act 4 of 2013 secs 34 & 35.

67 Book V of the 2017 Digital Code of the Republic of Benin art 446.

68 Law 18-07 of 25 Ramadhan 1439 Corresponding to 10 June 2018 art 7.8.

69 Data Protection and Privacy Act, 2019 sec 8.

70 Data Protection Act 20 of 2017 sec 30.

71 Data Protection Act 5 of 2021 sec 165.

72 Computer Misuse Act 2 of 2011 sec 23.

73 Centre for Human Rights (n 4) 32.

section 154(3) should extend into adulthood for child accused, witnesses and victims. The Court held that '[t]he right to privacy is even more pressing when dealing with children as it is central to a child's self-identity which is still forming, emphasising that the protection of the privacy of young person's fosters respect for dignity, personal integrity and autonomy'.⁷⁴

The Court held that by excluding child victims in criminal proceedings from its protection, section 154(3) limited the right to equality, the best interests of children as well as their rights to privacy and dignity.⁷⁵

In *SM v ABB*⁷⁶ a father had circulated strings of content from his child's WhatsApp chatroom (as also that of her mother) during an acrimonious divorce case. Confirmation of an *ex parte* application for an interim interdict to prevent him further accessing and disseminating both the applicant's (the child's mother) emails and WhatsApp messages and those of his minor child was sought. The Court found that the behaviour of the father in accessing the applicant's and the minor child's messages was an infringement of their right to privacy. The Court found that the dissemination of the information to the headmaster and the medical practitioner was done for no other reason than to try and engender a cognitive bias in the minds of those persons against the applicant and possibly also the minor child. By disseminating messages between the applicant and the minor child, not only was the applicant's right to privacy violated, but so too was that of the child. The case indicates that parental rights to access their child's digital communications without good reason can be limited.

Best practices can be drawn from countries in Europe wherein various countries have passed legislation on data privacy that protects children's privacy online and have dealt with a number of cases on the same. France, for example, has enacted legislation that prohibits the publication and distribution of another person's image without obtaining their consent. In terms of the penalties, offenders can face up to one year in prison or a fine of €45 000. This provision also applies to parents posting pictures of their children on social media.⁷⁷ In The Netherlands, a woman was ordered by the courts to remove photos of her grandchildren from social media as she had posted these without their mother's consent. This was in terms of article 5 of the Dutch Act implementing the General Data Protection Regulation 2018,⁷⁸ which provides that one must obtain consent from a legal guardian to process children's data, and this includes posting pictures of a child below the age of 16 years.⁷⁹ This is an indication of the efforts that have been taken in the European Union (EU) to protect children's privacy in light of technological developments.

7 Conclusion

Article 10 of the African Children's Charter is pivotal in protecting the privacy rights of children in Africa. It addresses the need for safeguarding children from arbitrary interference in and attacks on their honor and reputation, emphasising the supervisory role of parents within reasonable limits. Given the expanding digital landscape, the right to privacy now encompasses protections against online threats, such as data processing, surveillance and cyberbullying, which significantly impact children.

74 *Centre for Child Law & Others v Media 24 Limited & Others* 2020 (3) BCLR 245 (CC) para 49.

75 Para 51.

76 *SM v ABB* Case 20/1732 (2020).

77 G Moody 'French parents face fines, lawsuits and prison for posting pictures of their own children online', <https://www.techdirt.com/2016/03/07/french-parents-face-fines-lawsuits-prison-posting-pictures-their-own-children-online/> (accessed 12 April 2024).

78 General Data Protection Regulation Implementation Act 16 May 2018.

79 R Browne 'Grandmother ordered to delete pictures of her grandkids on social media in EU privacy ruling' *CNBC* 22 May 2020, <https://www.cnn.com/2020/05/22/gdpr-grandmother-ordered-to-delete-social-media-pictures-of-grandkids.html> (accessed 12 April 2024).

The effective implementation of article 10 is crucial, not only for protecting children's privacy, but also for enabling their broader fundamental rights. Comprehensive efforts by state parties to enforce these protections are essential in adapting to the evolving societal and technological challenges.

Children's rights to privacy are given limited attention by regional treaties and human rights organs and some African countries. More focus has been placed on juvenile justice settings and media portrayal of children in vulnerable situations, with scant discussion on the protection of children's personal data, and the general publishing of children's information and videos. While many African countries have constitutional and legislative protections for children's privacy, the extent and specificity of these laws vary. Countries such as Cameroon and Senegal lack specific legal protections, and many cybersecurity laws mainly address child pornography without covering personal data protection. An analysis of the state party reports submitted to the African Children's Committee indicates that not all countries report on the measures taken to ensure children's privacy offline and online. Further, only 16 countries have ratified the AU's Malabo Convention, highlighting inadequate protection of children's digital privacy and personal data in Africa. Children, as a vulnerable group, need explicit protection of their privacy and personal information. Furthermore, cybersecurity initiatives should expand beyond online child sexual exploitation to include data collection, processing, communication interception, surveillance and unauthorised sharing of children's personal information and images.

The African Children's Committee is urged to recommend that member states ratify the Malabo Convention to enhance cooperation on personal data protection, including children's data. Additionally, the African Children's Committee should consider developing a guidance note on children's privacy rights under the African Children's Charter, highlighting the digital environment's implications. It should also link children's rights to privacy with their rights to freedom of expression and participation, which are particularly significant for children in Africa. Continuous engagement with state parties during reporting procedures can help identify gaps in online privacy protection and provide informed guidance to member states.

AU member states are encouraged to ratify the Malabo Convention, enact data privacy laws that have comprehensive provisions regulating the processing of children's data, to report to the African Children's Committee on measures taken to protect children's privacy in all settings, and conduct awareness-raising initiatives on the protection of children's right to privacy in both the online and offline environment.