Chapter 15
Article 14
Health and health services

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1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
(a) to reduce infant and child mortality rate;
(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
(c) to ensure the provision of adequate nutrition and safe drinking water;
(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
(e) to ensure appropriate health care for expectant and nursing mothers;
(f) to develop preventive health care and family life education and provision of service;
(g) to integrate basic health service programmes in national development plans;
(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
(i) to ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of a basic service programme for children;
(j) to support through technical and financial means, the mobilisation of local community resources in the development of primary health care for children.

1 Introduction

This chapter discusses in detail the provisions of article 14. It provides a critical analysis of the provision and draws from other human rights instruments that have inspired its content. The chapter also makes the links with other African Union (AU) initiatives that have implications for the enjoyment of the right to health. In addition, the chapter considers the nexus between article 14 and other provisions of the African Charter on the Rights and Welfare of the Child (African Children's Charter). The idea is that article 14 cannot be discussed in isolation from other articles of the Charter because the right to health intersects with other human rights, such as privacy, dignity, the right to life, and non-discrimination. The chapter then attempts to critically review the interpretation provided by the African Committee

of Experts on the Rights and Welfare of the Child (African Children's Committee) on the realisation of the right to health. This is discussed through the lens of the case law, concluding recommendations and General Comments of the Children's Committee. In conclusion, the chapter makes some concrete recommendations on how the African Children's Committee can better provide clarifications to the meaning of article 14.

Article 14 of the African Children's Charter contains an important provision. The right to health is crucial to the enjoyment of all other rights. Often referred to as the right to the highest attainable standards of physical and mental health, article 14 is inspired by other international and regional human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),[1] the Convention on the Rights of the Child (CRC) and the African Charter on Human and Peoples' Rights (African Charter).[2] Africa is a continent that is bedevilled with a myriad of health challenges that have an impact on children. These range from high infant and child mortality rates, the incidence of malnutrition, stunting, malaria and other communicable diseases. It is estimated that 5,9 million children under the age of five years died in 2015 in Africa due to preventable conditions.[3] The leading causes of death in children under five years are pre-term birth complications, pneumonia, birth asphyxia, diarrhoea and malaria. It is estimated that 45 per cent of all child deaths are linked to malnutrition.[4] Children in sub-Saharan Africa are more than 14 times likely to die of malnutrition before the age of five than children in more developed regions.[5] Pneumonia remains a great threat to the lives of children in Africa, accounting for 16 per cent of deaths in 2015. [6]

In recent times, the incidence of non-communicable diseases (NCDs) is on the rise in Africa with serious implications for the health and well-being of children. According to the United Nations Children's Fund (UNICEF):[7]

> An estimated 2,1 billion children and adolescents less than 20 years of age are affected by NCDs, with the major burden of disease in this age group being congenital or acquired cardiovascular diseases, cancers, chronic respiratory disorders, diabetes, mental health disorders, and injury. Each year, about 1 million people under the age of 20 die from treatable NCDs, accounting for over 15,85% of deaths in the age group.

The majority of deaths occurring as a result of NCDs is relatively higher in sub-Saharan Africa compared to other regions.

In addition to these challenges, poor allocation of resources to the health sector, shortages in the health workforce, and poor infrastructure continues to hinder effective services to advance the right to health of children in Africa.[8] Human health is very important, and since good health can lead to good productivity and bad health may adversely affect one's productivity, it is necessary to be healthy. Thus, the common saying is 'health is wealth and a healthy people is a wealthy nation'. To be healthy goes beyond physical well-being but also requires an individual to be mentally and psychologically well. Generally, the right to health implies the right of all individuals to have access to

1 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (ICESCR).

2 African Charter on Human and Peoples' Rights, adopted by the OAU Summit at Nairobi, Kenya, 2-7 June 1981, OAU Doc. CAB/LEG/6713.

3 World Health Organisation (WHO) 'Child health', https://www.afro.who.int/health-topics/child-health.

4 As above.

5 As above.

6 As above.

7 UNICEF 'Non-communicable diseases', https://www.unicef.org/health/non-communicable-diseases.

8 WHO *State of health in the African region* (2018).

- healthcare services;
- measures for the prevention of diseases;
- health information;
- maternal and infant health care; and
- environmental care and social services.

2 Unpacking the content of article 14

Article 14 of the African Children's Charter contains broad provisions in relation to the right to health. Beyond the traditional provisions on the right to the highest attainable standard of physical and mental health, it also recognises spiritual well-being as an essential component of the social determinants of health. This is peculiar to the African Children's Charter. The broad definition of the right to health in article 14 resonates with the peculiar challenges facing the right to health of children in the region. Africa is said to be a highly-religious region, where religious and cultural sentiments play crucial roles in informing policies, laws and programmes in relation to the right to health. Issues that may have implications for the enjoyment of children's rights are subject to moralisation or religious sentiments. For instance, the need for sexuality education or access to contraception for children and young people is often opposed on the basis of religion and morality. It is often erroneously believed that exposing children to sexuality education will likely compromise their moral values and lead to early debut of sexual activity. The provisions of article 14 deal extensively with different aspects of the right to health, including the need to prevent epidemics and pandemics; primary health care; the prevention of non-communicable diseases; child and infant mortality; seeing to the health needs of expectant and nursing mothers; and combating malnutrition through the use of appropriate technology. From this broad provision on the right to health, one could draw some conclusions.

First, the right to health in the African Children's Charter reaffirms the right to the highest attainable standard of physical and mental health of children. In essence, this draws from the provisions of ICESCR, CRC and the African Charter. It emphasises the need to ensure necessary medical assistance and health care to all children. Since the African Children's Committee is yet to provide a clarification on article 14, one can draw from the authoritative clarifications provided by other treaty-monitoring bodies. In its General Comment 14, the Committee on Economic, Social and Cultural Rights (ESCR Committee) notes that the right to health contains four elements, namely, availability, accessibility, acceptability and quality.[9] In other words, states must not only ensure the availability of healthcare services in sufficient quantity to children, but must also ensure that such services meet the threshold of physical accessibility, information accessibility, economic accessibility and non-discrimination. Also, healthcare services for children must be ethically and culturally acceptable and of good quality.

Second, article 14 places an emphasis on primary and preventive healthcare services as well as access to safe drinking water. This is important in addressing epidemics or other communicable diseases. The fact that a vast majority of Africans live in rural areas without adequate access to healthcare services makes it imperative to lay emphasis on primary and preventive healthcare services.[10] This would seem to be in tandem with the Alma-Ata Declaration, where the international community affirmed that primary health care is not only a human right but crucial to addressing many health-related challenges.[11] It was further affirmed that primary healthcare services will go a long way in preventing common diseases such as malaria, dysentery and cholera. This provision also relates to what may be regarded as the social determinants of health care. The enjoyment of the right to health of children cannot be realised unless the social determinants of health are addressed. Indeed, the ESCR

9 See General Comment 14 of the ESCR Committee.

10 See E Durojaye 'An analysis of the contribution of the African human rights system to the understanding of the right to health' (2021) 21 *African Human Rights Law Journal* 441-468.

11 Declaration of Alma-Ata. International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

Committee in General Comment 14 notes that access to safe drinking water, food, adequate housing and medicines constitutes the minimum core obligations of the right to health. These determinants are crucial to ensuring the well-being of an individual and, ultimately, the realisation of the right to health.

Third, the provision of article 14 recognises the importance of addressing the causes of NCDs by enjoining African governments to ensure access to nutritious and safe food. It is a known fact that in many African countries, NCDs are becoming a major health challenge due to poor diet. A report by the World Health Organisation (WHO) indicates that mortality associated with NCDs in Africa, especially among young people, has increased steadily over the years.[12] It is further projected that the numbers may double by 2030 if urgent measures are not adopted.[13] This is a serious concern for a region that is already burdened by other health challenges such as malaria, HIV and tuberculosis. Due to the shoestring budget allocations to the health sector and the acute shortages of healthcare providers, the incidence of NCDs being addressed through preventative measures is not only a wise approach but also cost effective in the long run.

Fourth, article 14 also recognises the right of maternal care for expectant and nursing mothers. This provision would seem to address the dire maternal mortality situation in Africa. Despite the significant improvement in reducing maternal mortality ratios over the years, Africa remains one of the most unsafe places to give birth. According to the WHO, the majority of the countries with high maternal mortality ratios are in Africa. Also, the largest number of maternal deaths occur in Africa, with a country such as Nigeria accounting for the largest number of maternal deaths.[14] It should be noted that the AU in 2009, in conjunction with UN agencies such as the United Nations Population Fund (UNFPA), launched the Campaign on Accelerated Reduction of Maternal Mortality in Africa (CARMMA).[15] It is aimed at lowering the unacceptably high levels of maternal and child deaths on the continent. The campaign has now been adopted by African countries as a way of redoubling efforts to improve the health and survival of mothers, babies and young children. This campaign has now been launched in more than half of the AU member states. While it can be said that CARMMA has enjoyed modest success, much more still needs to be done by African governments to significantly reduce the number of women dying during pregnancy and childbirth. Studies have shown that the death of a mother during pregnancy can have serious implications for the well-being and survival of the born child.[16] The CRC Committee in its General Comment 15 has highlighted the nexus between the death of a woman during pregnancy and the likelihood of the baby born surviving.[17] Thus, there is a need for more commitments and allocation of resources to address this serious challenge.

3 Link to other initiatives of the African Union

One of the important goals contained in Agenda 2063 is the need to improve the health of the people in order to be productive.[18] Goal 3 of Aspiration 1 aims at ensuring health and nourished citizens and expanding universal access to health for all, especially women and girls. This aspiration coincides with the need to ensure the realisation of the right to health of everyone, including children.[19] Thus, ensuring the physical and mental well-being of children is crucial to building a society of mentally and

12 WHO *Saving lives, spending less: The case for investing in non-communicable diseases* (2021) 6-7.

13 WHO (n 12).

14 WHO and others *Trends in maternal mortality* 2000-2020 (2020).

15 Campaign on Accelerated Reduction on Maternal Mortality in Africa (CARMMA) first launched in 2019 by the African Union (au.int). The second phase was re-launched in February 2024 for the period 2021-2030.

16 C Moucheraud and others 'Consequences of maternal mortality on infants and child survival: A 25 years longitudinal analysis in Butajira, Ethiopia (1987-2011)' (2015) 12 *Reproductive Health Matters* 54.

17 CRC Committee General Comment 15 on the right to health of the child.

18 African Union Agenda 2063, 'The Africa we want' adopted at the African Union Summit in January 2015.

19 As above.

physically-able individuals that can drive the economy and ultimately ensure economic development and growth. This aspiration would seem to recognise that a healthy nation is a wealthy nation, hence, the need to give priority to ensuring the realisation of the right to health of children in the region. It has been noted that when the health of children is assured, they grow to be strong and responsible adults who in turn will run the economy of a nation. This will require African governments to eliminate infectious and communicable diseases as well as NCDs.

The right to health of children implies that governments should take appropriate measures to ensure access to healthcare services, including sexual and reproductive health services, without discrimination. It equally requires that governments must emphasise the need to prevent diseases and epidemics that may threaten the lives of children. The AU has adopted different initiatives that have implications for the health and well-being of the child. For instance, the African Health Strategy prepared by African ministers of health aims at addressing the causes of burden of diseases that continue to plague the region.[20] In other to achieve this, the strategy adopted some guiding principles, which include that health must be treated as a human rights issue; the need for a multi-sectoral approach to addressing health; that health must be seen as a continuum from conception to adulthood; the need for more trained and skilled health work force; and the need to improve infrastructure in the health system. No doubt, these guiding principles, if properly implemented, will lead to better and quality healthcare services for children. The principles will in the long run complement the realisation of the right to health of children.

The AU Feeding Scheme Programme is also relevant towards the realisation of the right to health of children. As mentioned earlier, safe and nutritious food can bolster a child's health and prevent other diseases, particularly NCDs. On a continent where there is a high rate of malnutrition and stunting among children, the feeding scheme programme will go a long way towards improving the health of children in the region. The AU has noted that 'the AU School Feeding initiative recognises that school feeding programmes have a significant impact on access and retention, and attendance, and in reducing drop-out rates among school-age children'.[21]

Recently, the AU, together with other UN partners, launched the Continental Strategy on Education for Health and Well-Being of Young People (EHW) during the Global Forum for Adolescents led by the Partnership for Maternal, Newborn and Child Health.[22] This is aimed at making the important connection between education and the promotion of good health. The programme is informed by the need to ensure the realisation of the right to health through access to quality education. It is believed that access to technological education can enhance a well-informed citizenry and a better realisation of the right to health. The AU EHW strategy is intended to enhance the physical, mental and reproductive health of young people, while contributing to the achievement of education goals.[23] The strategy makes the crucial link between health and education and provides a solid framework for African nations.[24] Furthermore, it ensures that young people not only gain vital knowledge but also acquire life skills, values, attitudes, and agency necessary for improved health, well-being, and learning.[25] This strategy represents a holistic approach to addressing the needs of young people on the continent. Bearing in mind the link between education and health, the strategy addresses topical health challenges, such as drug and substance use, malnutrition, infectious disease, early pregnancies, HIV and gender-based violence, which hinder both the health and educational prospects of Africa's adolescents and young

20 African Union African Health Strategy 2016-2030.

21 African Union 'Promoting health and nutrition', https://au.int/en/promoting-health-nutrition. (accessed 2 August 2024).

22 African Union 'Continental Strategy on Education for Health and Well-Being of Young People during the Global Forum for Adolescents led by the Partnership for Maternal, Newborn and Child Health' (2023).

23 As above.

24 As above.

25 As above.

people. This Strategy no doubt will lead to better quality health outcomes for children and young people, thereby advancing their right to health. The EHW strategy aligns seamlessly with the AU's broader Agenda 2063, envisioning a prosperous and peaceful Africa with a strong focus on education, health, and the well-being of all citizens.

It should be noted that the AU Campaign to End Child Marriage in Africa also complements the provision on the right to health in article 14. Harmful practices such as child marriage and female genital mutilation have serious implications for the health and well-being of the child. Apart from the danger of dying during pregnancy or child birth, child marriage can also lead to other deleterious consequences, such as fistula. The girl child is further exposed to other health consequences, such as sexually-transmitted infections, including HIV. In the same vein, female genital mutilation undermines the fundamental rights of the girl child and may result in serious health consequences such as HIV and loss of blood due to excessive bleeding. The African Commission on Human and Peoples' Rights (African Commission) and the African Children's Committee adopted a joint General Comment addressing child marriage[26] and other consequences. In the General Comment, the Commission and Committee reiterated the need to address deep-rooted practices that perpetuate discriminatory practices against women and the girl child as these further predispose women and girls to other human rights violations and health consequences.

The discussion above clearly demonstrates that the AU has taken positive steps and measures with a view to addressing social-cultural issues affecting the health of girls in the region. This implies that some of the initiatives by the AU seem to complement the right to health guaranteed in article 14. Thus, the recognition of the right to health under the Charter serves as an important guarantees and bulwark against health consequences that may arise as result of social and cultural practices.

4 Links to other Charter articles

Article 14 intersects with other provisions of the African Charter. Therefore, a holistic interpretation of the article is required for a better and congruent application of the provision to the realisation of children's rights. This requires a consideration of other provisions that are indirectly applicable to advancing the right to health of children. The indirect provisions relating to the right to health in the Charter include the four cardinal principles for advancing the rights of the child. These include the best interests of the child, the right to life and survival, the right to participation and non-discrimination.[27] Each of these principles must be taken into consideration in any matter related to the right to health of the child. The best interests principle implies that in all matters relating to the child, their best interests must be the primary consideration. It has been argued that the threshold for this principle adopted by the Charter is higher than CRC[28] because of the use of the phrase 'the' primary consideration as opposed to 'a primary consideration' used in CRC. In designing laws, policies and programmes in relation to the right to health of the child, the best interests of the child must be given priority. For instance, any law or policy purporting to limit access to sexual and reproductive health information and services to adolescents would not be said to be in their best interests.[29] Similarly, policies or programmes that limit access to sexual and reproductive health information or services to adolescents may pose a threat to their right to life and survival. For instance, a denial of access to contraception services for adolescents could lead to unwanted pregnancies, which may lead to unsafe abortions, given that most African countries have restrictive laws on abortion. The corollary of this would be death arising from unsafe

26 See the chapter on article 21 in this *Commentary*.

27 See arts 3, 4, 5 and 12

28 See D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127-136.

29 CRC Committee General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1).

abortion or sexually-transmitted infections, including HIV. It must be noted, however, that the best interests principle does not necessarily confer absolute rights on children.

Furthermore, the right to non-discrimination guaranteed in article 3 of the Charter implies that adolescents should not be denied access to healthcare services, including sexual and reproductive healthcare services on the basis of age. Such discrimination would be impermissible in law, unless this can be justified. Laws and policies that require children and adolescents to seek parental consent before they could access some healthcare treatments, including contraceptive treatments, would amount to the violation of the right to non-discrimination. Moreover, judgmental attitudes of healthcare providers that prevent adolescents, especially adolescent girls, from seeking sexual and reproductive healthcare services would amount to a violation of the right to non-discrimination. The CEDAW Committee has noted that the failure by the state to ensure access to healthcare services specifically needed by women and girls will amount to an act of discrimination prohibited by the Convention.[30] CRC has echoed the same position.[31] Thus, placing age restrictions on adolescents to access sexual and reproductive healthcare services in the region would result in an act of discrimination under the African Children's Charter. For instance, in most parts of the region, the norm is that parental consent is required for young people seeking sexual and reproductive health and rights (SRHR) services.[32]

Child participation is another important principle that is crucial to the realisation of the right to health. This requires that the views of children are considered before a decision is made that may affect them. Implicit in this is that the views of children are considered in the designing and implementation of health-related policies and programmes that affect children. Related to this principle is the concept of the evolving capacity of the child, which the Charter recognises.[33] This presupposes that in certain circumstances children or adolescents could exhibit adult-like traits. For instance, seeking contraceptive services when a child becomes sexually active would be regarded as a responsible act similar to that of an adult. Thus, imposing a blanket age restriction on young people to consent to medical treatment, including sexual and reproductive health services, may be inconsistent with the evolving capacities of the child and, therefore, may undermine the right to health.

In essence, respect for the evolving capacities of children in decision making is an essential element of the right to health. It must be recognised, though, that issues relating to children's rights to access sexual and reproductive health services remain controversial in Africa.[34] For most parts of the region, religion, culture and moral stances tend to serve as barriers to the realisation of these rights. A good example was the situation in Uganda where a policy on sexuality education was approved but later withdrawn due to opposition from parents based on religious reasons.[35]

Another provision of the African Children's Charter relevant in addressing the right to health of children is the article on harmful cultural practices.[36] These provisions urge states to prohibit cultural practices that may endanger the health and well-being of children, including child marriage and female genital mutilation/cutting. Studies have shown that girls who marry early and start rearing children are

30 See General Recommendation 24 on women and health.

31 See General Comments 3 and 4 of the CRC Committee.

32 See R Tarrico and others 'Age of consent: A case for harmonising laws and policies to advance, promote and protect adolescents' sexual and reproductive health rights' (2021) 25 *African Journal of Reproductive Health* 94.

33 See art 9 of the African Children's Charter

34 For a detailed discussion on this, see E Folaka & A Rudman 'Age or maturity? African children's rights to participate in medical decision-making-processes' (2020) 20 *African Human Rights Law Journal* 667-687; see also G Kanguade and others 'Childhood sexuality in Africa' (2020) 20 *African Human Rights Law Journal* 688-712.

35 For a detailed discussion of this issue, see EV Moore and others 'Debating sex and sovereignty: Uganda's new national sexuality education policy' (2022) 19 *Sexuality Research and Social Policy* 678-688.

36 See ch 22 in this *Commentary.*

more likely to die during pregnancy or childbirth or even suffer life-long debilitating injuries, such as fistula, compared to girls who marry at a later age.[37]

5 Links to other human rights treaties

As mentioned earlier, article 14 of the African Children Charter is inspired by the provisions of other human rights instruments such as the ICESCR, CRC, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the African Charter. Thus, the ESCR Committee has provided a detailed authoritative clarification on article 12 of ICESCR dealing with the right to health. Also, CRC has clarified the nature of obligations imposed by the right to health under CRC in its General Comment 15. This clarification will also apply to article 14. Although the African Children's Charter, unlike ICESCR, does not contain the 'claw-back' clause subject to maximum available resources, some commentators have argued that the realisation of the right to health and other socio-economic rights in the African Charter are subject to progressive realisation.[38] It should also be noted that the clarification provided by the CRC Committee in its General Comment 15 is relevant to the interpretation of article 14 of the African Children's Charter.

The CRC Committee has provided an elaborate interpretation of article 24 on the right to health to include states' obligations to ensure access to sexual and reproductive health information and services to children.[39] Moreover, the CRC Committee has explained that non-state actors have an important role to play in ensuring the realisation of the right to health of children.[40] In particular, the CRC Committee notes that actions of non-state actors, such as the absence or poor regulation of smoking among children, child labour, marketing and advertisement of sugary and sweetened products, could have implications for the enjoyment of the right to health of children.[41] Similarly, the CEDAW Committee has explained that the failure by states to ensure access to health services required by women and girls will constitute discrimination, in violation of the Convention.[42] The Committee further notes that states must ensure the repeal of discriminatory laws and policies that perpetuate the subordination of women in society.[43] This may have implications for the right to health of women and girls. These interpretations resonate with the intent and spirit of article 14 of the African Children's Charter and obligate African governments to take appropriate measures with a view to advancing the right to health and sexual and reproductive health rights of women and girls.

In recent times, the African Commission has had the opportunity to clarify some provisions of the Charter and the Maputo Protocol on the right to health.[44] In relation to article 14 of the Maputo Protocol, the Commission has adopted two important General Comments. In General Comment 1 on articles 14(1)(d) and (e) of the Maputo Protocol, dealing with the protection of women and girls from sexually-transmitted infections, including HIV, the Commission explained that states are to ensure equal access to healthcare services for women and girls by removing barriers through reforms of laws, policies and practices that perpetuate discriminatory acts against women and girls.[45] The Commission

37 NN Nour 'Health consequences of child marriage in Africa' (2006) 12 *Emerging Infectious Diseases* 1644.

38 See for instance, M Gose *African Charter on the Rights and Welfare of the Child* (2002).

39 CRC Committee General Comment 15 on the right to the highest attainable standard of health of the child, paras 31 & 60.

40 General Comment 15 para 77.

41 Paras 65 & 66.

42 CEDAW Committee General Recommendation 24 on women and health.

43 As above.

44 For a detailed discussion on this, see A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*: *A commentary* (2023).

45 African Commission on Human and Peoples' Rights General Comment 1 on arts 14(1)(d) and (e) of the Maputo Protocol, adopted in 2012; see also E Durojaye 'Article 14' in Rudman and others (n 45) 308.

particularly recommends the establishment of youth-friendly healthcare services to address the peculiar needs of women and girls while accessing sexual and reproductive health services. In General Comment 2 the Commission urges states to ensure that barriers to sexual and reproductive health services, including abortion services and contraception, are removed. States are further enjoined to provide information and education that will promote access to sexual and reproductive health services for women and girls, especially those that are vulnerable.[46]

6 Legal interpretation of article 14

The African Children's Committee has provided guidance and interpretation of the African Children's Charter in order to clarify the nature and content of states' obligations. The analysis in this part is based on the three-fold obligations of states to realise the right to health of children. In essence, this includes the duty to respect, protect and fulfil. The discussion of these duties includes the clarifications provided by the African Children's Committee through its case law, Concluding Observations and General Comments.

6.1 Duty to respect

This requires that states are to refrain from interfering with the enjoyment of the right to health of children. A state may be in breach of the obligation to respect if it adopts laws and policies that impede access to the enjoyment of the right to health of children. Similarly, a state may be in breach of the duty to respect where it fails to adopt laws and policies that can facilitate access to the enjoyment of the right. In the *Children of Nubian Descent* case, for instance, the African Children's Committee affirmed that the non-recognition of the Nubian people as part of Kenya had put them in a precarious situation, thereby violating a number of rights, including the right to health in the African Children's Charter.[47] In arriving at this decision, the Children's Committee clarified the nature of states' obligation in article 14 of the Charter, namely, that it should not be construed narrowly to mean access to physical health care, but should also require states to ensure access to health-related goods and services. The African Children's Committee further endorsed the African Commission's decision in *Purohit* and noted that the right to health encompasses the provision of health-related goods and services for all.[48]

Implicit in these interpretations is that state parties must ensure access to medicines, syringes, bedding, gloves and other infrastructure to enable people to enjoy the right to health. This interpretation is very important in an African setting where many public hospitals are underfunded and lack basic amenities to meet people's needs.

Second, the African Children's Committee in *Children of Nubian Descent* affirmed that the enjoyment of the right to health is dependent on other social factors or social determinants of health, such as water, nutrition, housing and sanitation. The Committee approved the African Commission's position in *Free Legal Services v Zaire* where the Commission found the Zaire government to be in violation of article 16 of the Charter for failing to ensure electricity, water and access to medicines.[49] This is an important consideration given that millions of people, including children, in Africa live in poverty and lack access to basic amenities. This in turn has implications for the enjoyment of the right to health. Indeed, it

46 African Commission on Human and Peoples' Rights General Comment 2 on arts 14(1)(e), (f), (g), (h) and 2(c) of the Maputo Protocol adopted in 2014.

47 *Institute for the Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent in Kenya v Kenya* (2011) AHRLR 181 (ACERWC 2011) para 59 (*Children of Nubian Descent*).

48 *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*).

49 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

has been established that poverty can lead to poor health conditions and *vice versa*.[50] It therefore is important for African governments to ensure that vulnerable and marginalised children have access to quality housing, education, water and sanitation. Studies have identified malnutrition and poor diet as a major challenge facing many children in Africa.[51] This has serious health implications, such as stunting, kwashiorkor or obesity.

In essence, the right to health guaranteed in article 14(2)(c) of the Children's Charter requires states to address the likely causes of NCDs, which can lead to great economic and social costs for families.[52] The approach of the Committee in this regard is commendable. NCDs have become a major health challenge in Africa and are responsible for millions of deaths yearly. This position is consistent with the African Children's Committee's decision in *Senegalese Talibés*, where it held that states must take steps, such as ensuring safe drinking water, in order to prevent diseases and other health problems.[53] The African Children's Committee further notes 'efforts undertaken by the state party in realising the right to health should be directed toward the prevention of diseases and health problems'.[54]

More importantly, in *Children of Nubian Descent* the Children's Committee interpreted article 14(2)(b) as requiring states to pay more attention to primary health care as a means of addressing the different health challenges facing children in vulnerable and marginalised communities.[55] The emphasis on primary health as a pathway to ensuring universal access to health care is significant in Africa where millions of people in rural areas are deprived of access to basic healthcare needs. Thus, preventative health care must be considered integral to the realisation of children's rights to health.[56] Due to their inextricable links to NCDs, these obligations may be framed as a human rights obligation to prevent NCDs. It would be recalled that during the Alma-Ata Declaration, the international community affirmed that access to primary and preventive health care is a fundamental right that must be guaranteed to all individuals, especially disadvantaged and marginalised groups in rural areas.[57] It has been noted that a functional primary healthcare system with emphasis on preventive health will go a long way towards addressing the healthcare challenges facing millions of people in many African societies.[58]

Third, in *Children of Nubian Descent* the African Children's Committee affirmed the link between inequality and the enjoyment of the right to health. According to the Children's Committee, article 14(2)(g) requires states to ensure the implementation of policies and programmes that will facilitate access to healthcare services for children in marginalised communities. It seems that the Children's Committee reasoned that addressing inequality in society will go a long way in advancing the right to health of marginalised communities. The African Children's Committee notes:[59]

50 See eg E Durojaye & G Mirugi-Mukundi 'General introduction to poverty and human rights' in E Durojaye & G Mirugi-Mukundi (eds) *Exploring the link between poverty and human rights in Africa* (2020) 5.

51 See eg AW Onyango and others 'Regional overview on the double burden of malnutrition and examples of programme and policy responses in African region' (2019) 75 *Annals of Nutrition and Metabolism* 127-130.

52 PAHO *The economic burden of non-communicable diseases in the Americas* Pan American Health Organisation 4, https://www.paho.org/hq/dmdocuments/2011/paho-policy-brief-3-En-web1.pdf (accessed 11 March 2021).

53 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal* Communication 3/Com/001/2012 para 52 (*Senegalese Talibés*).

54 As above.

55 See para 60.

56 See eg *Children of Nubian Descent* (n 47) and *Senegalese Talibés* (n 53).

57 Declaration of Alma-Ata (n 12).

58 AG Onokerhoraye 'Achieving universal access to health care in Africa: The role of primary health care' (2016) 20 *African Journal of Reproductive Health* 29-31.

59 See para 61 of *Children of Nubian Descent* (n 47).

> Where the underlying conditions, such as conditions in informal settlements and slum areas, present a heightened risk to the child's enjoyment of her/his right to health, the duty bearer must accept that there is a corresponding more urgent responsibility to plan and provide for basic health service programmes under article 14(2)(g).

In General Comment 5 the African Children's Committee has noted that it is 'incumbent upon states parties to keep health and health-related laws under review to ensure that the laws regulating various dimensions applicable to children's health remain relevant and provide maximum protection'.[60] It explains further that this includes 'regulations relating to the advertising or distribution of breast milk substitutes, restrictions on advertising or marketing of less healthy foodstuffs to children, [and] prohibitions related to children's access to alcohol and toxic substances'.[61] According to the Children's Committee, state parties must take regulatory and budgetary action in reducing the incidence of NCDs and ensure accountability for violations of the right to health.[62]

In a more recent case, *Tanzanian girls*, the African Children's Committee deals with discrimination against pregnant girls in Tanzania.[63] In that case the Children's Committee affirmed that the practice of expelling pregnant pupils from schools violated adolescent girls' fundamental rights,[64] and urged the Tanzanian government to reform its education policies. The Committee notes that this act is in violation of Tanzania's obligations under the African Children's Charter.[65] The African Children's Committee further held that the government should immediately prohibit pregnancy testing in schools, and adopt measures, including enactment of laws and policies, to prevent the expulsion of pregnant girls from schools and readmit students that have been expelled due to pregnancy or marriage.[66] This decision is significant in the sense that it serves as the recognition of the right to reproductive health and rights of adolescent girls in Tanzania and the need to prohibit discriminatory practices in this regard. The decision effectively places obligations on states to recognise the peculiar circumstances of adolescent girls who fall pregnant while in school and to ensure that they do not suffer further harm for this reason.

60 General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection' (2018) para 5.3.4.

61 General Comment 5 (n 60) para 5.3.4.

62 As above.

63 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* Communication 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*).

64 Such as non-discrimination; the best interests of the child; protection of privacy; health and healthcare services; education; freedom from torture; inhuman and degrading treatment; and freedom from harmful social and cultural practices.

65 *Tanzanian Girls* (n 63) paras 30-80.

66 *Tanzanian Girls* (n 63) para 109.

In some of its its Concluding Observations and recommendations to the governments of Eritrea,[67] Cameroon,[68] Ghana,[69] Chad,[70] Comoros,[71] Niger[72] and Sierra Leone,[73] the African Children's Committee recommended that these state parties ensure the provision of healthcare services that are appropriate to children's healthcare needs and staffed with adequate and trained healthcare personnel.[74] The need for skilled healthcare providers speaks to the importance of quality healthcare services to children.

The above observations to states by the Children's Committee through its case law and Concluding Observations coincide with Agenda 2040 adopted by the Committee in 2015.[75] Aspirations 4 and 5 of the Agenda are crucial to advancing the right to health of children. The Committee aspires that 'every child survives and have a healthy childhood'.[76] Also, the Committee observes that 'every child grows up well-nourished and with access to the basic necessities of life'.[77] As noted above, these aspirations would seem to recognise the link between social determinants of health and the enjoyment of the right to health.

6.2 The duty to protect

This requires that the state must monitor and regulate the activities of a third party so that they do not interfere with an individual's right to health. In the context of children's right to health, this will require the state to adopt laws and policies to control the activities of non-state actors so that they do not undermine the right to health of children. In other cases, the African Children's Committee has affirmed the indivisibility and interrelatedness of rights guaranteed in the Charter as the basis for protecting the rights of children. For instance, in *Mauritanian Enslaved Brothers* the Committee construed article 5 of the Charter broadly by noting that 'the duty to protect the right to survival and development requires the respondent state to ensure the right to education, health, nutrition, leisure and recreation are realised'.[78] Implicit in this statement is an affirmation of states' obligations to provide the resources

67 African Children's Committee Concluding Observations and Recommendations to the government of Eritrea, https://acerwc.africa/wp-content/uploads/2018/14/Concluding_%20Observations_%20Eritrea.pdf (accessed 15 February 2019).

68 African Children's Committee Concluding Observations and Recommendations to the government of Cameroon, https://acerwc.africa/wp-content/uploads/2018/14/Concluding_%20observations_%20Cameroon_ACERWC-2016.pdf (accessed 15 February 2019).

69 African Children's Committee Concluding Observations and Recommendations to the government of Ghana, https://acerwc.africa/wp-content/uploads/2018/14/Concluding_oberservation%20Ghana.pdf (accessed 15 February 2019).

70 African Children's Committee Concluding Observations and Recommendations to the government of Chad, https://acerwc.africa/wp-content/uploads/2018/14/Concluding%20Observations%20Chad%20Fr.pdf (accessed 15 February 2019).

71 African Children's Committee Concluding Observations and Recommendations to the government of Comoros, https://acerwc.africa/wp-content/uploads/2018/14/Concluding%20Observations%20Comoros%20Fr.pdf (accessed 15 February 2019).

72 ACERWC, Concluding Observations and Recommendations to the Government of Niger, available at https://acerwc.africa/wp-content/uploads/2018/14/CO_Niger_French.pdf (accessed 15 February 2019).

73 African Children's Committee Concluding Observations and Recommendations to the government of Sierra Leone, https://acerwc.africa/wp-content/uploads/2018/14/Sierra%20Leone_Concluding%20Observation%20final_English.pdf (accessed 15 February 2019).

74 African Children's Committee Concluding Observations and Recommendations, https://acerwc.africa/reporting-table/ (accessed 1 December 2018).

75 Africa's Agenda for Children (Agenda 2040) adopted in 2015 as part of the commemoration of the 25th anniversary of the African Children's Charter.

76 Aspiration 4 of Agenda 2040.

77 Aspiration 5 of Agenda 2040.

78 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* Communication 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) para 73 (*Mauritanian Enslaved Brothers*).

necessary for a child to develop healthily. This includes access to nutritious food and clean drinking water, and the ability to play and get sufficient physical exercise.[79] Similarly, in *Senegalese Talibés* the African Children's Committee affirmed that the obligations imposed on states under article 5(2) of the Children's Charter encapsulate 'the right to access healthcare and education services, access to clean water, the right to live in a safe and clean environment'.[80] This approach of the Children's Committee is consistent with the reasoning of human rights bodies such as the African Commission[81] and the Inter-American Commission.[82]

6.3 The duty to fulfil

This requires states to take appropriate measures to ensure the realisation of the right to health of children. This may include administrative, judicial, budgetary and legislative measures. In this regard, the Joint General Comment on child/early marriage developed by the African Children's Committee in collaboration with the African Commission has great potential in advancing the rights to health of children in the region. Some of the language relates to how states should ensure the fulfilment of the right to health of children. This General Comment provides a detailed clarification of the human rights implications of child marriage, its impact on the health and well-being of the girl child and measures African governments should take to address this harmful practice.[83] It outlines concrete measures including legal, educational, administrative, judicial and budgetary, that African governments should adopt to eliminate this practice. Given the attendant health consequences of child marriage, this General Comment can go a long way towards promoting the well-being of children, particularly girls, in Africa.

In its General Comment 1 the African Children's Committee noted that the child's right to life, survival and development encompasses a right to 'health, food, shelter, education and adequate standard of living',[84] and that state parties are under 'positive obligation not only to protect the life of the child but also to provide adequate resources to ensure the child's survival and development'.[85] A failure to ensure access to nutritious food and clean drinking water can therefore be considered a violation of the obligation to fulfil the right to survival and development.[86] This explanation is relevant for the realisation of the right to health of children. It could be argued that it is a recognition on the part of the African Children's Committee that the right to life and survival of the child will become illusory if the right to health, food and water are not secured. This is also a clear indication of the indivisibility and interdependence of children's rights.

In *Children of Nubian Descent* the African Children's Committee, as part of the efforts to fulfil the right to health of children, 'encourage' states to give effect to their obligations under article 14(2)(g). This approach of simply 'encouraging', however, is not firm enough to push African governments to take decisive measures to live up to their obligations in article 14(2)(g). No doubt, removing inequality

79 As above.

80 *Senegalese Talibés* (n 53) para 43.

81 See eg the decision in *International Pen and Others (on behalf of Saro Wiwa) v Nigeria* (2000) AHRLR 212 60 (ACHPR 1998); see also *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

82 *Senegalese Talibés* (n 53).

83 Joint General Comment of the African Commission and the African Children's Committee on ending child marriage adopted by the African Commission and the African Children's Committee in 2017.

84 African Children's Committee General Comment 1 (art 30 of the African Children's Charter) on 'Children of incarcerated and imprisoned parents and primary care givers' ACERWC/GC/01 para 26 (2013), https://www.refworld.org/pdfid/545b49844.pdf (accessed 23 July 2024).

85 As above.

86 African Charter art 5, https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf (accessed 23 July 2024).

or other structural barriers to the realisation of the right to health of children is consistent with the state obligation to fulfil the right to health of children. Some commentators have argued that unless inequality and inequities are addressed, the enjoyment of the right to health by marginalised groups may remain unfulfilled. Yamin has noted that removing structural inequalities through the adoption of a substantive equality approach is crucial to the realisation of the rights to health of vulnerable and marginalised groups.[87] A substantive equality approach requires that efforts should be made to remedy or correct disadvantage suffered by a group. This goes beyond merely ensuring equal status, but rather taking additional measures aimed at alleviating the disadvantaged position of a group. Other institutions such as the WHO have made the important link between the social determinants of health and the enjoyment of the right to health of vulnerable groups. The WHO defines determinants of health as conditions in which people are born, grow, live, work and age, and that these conditions are shaped by political, social and economic forces.[88] A toxic mixture of poor policies and programmes, unfair economic arrangements and bad governance may lead to unfavourable conditions. Ideally, the socio-politico-economic conditions in a society should be such that its citizens enjoy a favourable set of social resources, and that these resources are distributed fairly. The quality, quantity and distribution of these resources, together, to a large extent determine a citizen's health and well-being.

While the African Children's Committee has made an important connection between equality and the enjoyment of the right to health, however, it missed the opportunity to send a strong message to states regarding their obligations under the African Children's Charter. Rather than hitting the nail on the head by not condoning the lack of political will on the part of African governments, the African Children's Committee opted for a 'soft' approach by merely 'encouraging' African governments to strive to abide by their obligations in the Children's Charter.[89] This choice of word is disappointing and, to say the least, unsatisfactory. One would expect the Children's Committee to be more emphatic by not mincing words in its clarification of the nature of obligations imposed on states by article 14(2)(g).

7 Conclusion

The chapter has analysed the provision of article 14 on the right to health of children. It has drawn lessons from other human rights instruments and interpretations provided by relevant human rights bodies. In addition, article 14 has been discussed in relation to the development at the AU level. The chapter has discussed the relevance of some of the policy developments and norms at the regional level to the understanding of the right to health. The chapter identifies that article 14 contains comprehensive provisions on the right to health of children. Apart from considering the traditional provisions on the right to health, it goes further by discussing some topical health issues such as NCDs, social determinants of health and the importance of primary health care to the realisation of the right to health of children. While the African Children's Committee is yet to adopt general Comments to clarify the nature and content of article 14, it has given interpretation to the article through its case law and Concluding Observations. While these have somewhat provided clarification on the meaning of article 14, a few grey areas require further clarification. In this regard, it is suggested that the Children's Committee should adopt an important norm that will elaborate on the meaning of article 14.

87 AE Yamin *When misfortune becomes injustice: Evolving human rights struggles for health and social equality* (2020).

88 WHO Commission for Social Determinants of Health (CSDH) *Closing the gap in a generation: Health equity through action on the social determinants of health* (2008).

89 For a detailed analysis of this case, see E Durojaye & E Foley 'Making a first impression: An assessment of the Committee of Experts of the African Children's Charter in the Nubian children communication' (2012) 12 *African Human Rights Law Journal* 564.