

Chapter 17

Article 16

Protection against child abuse and torture

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1. State parties to the present Charter shall take specific legislative, administrative, social, and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.
2. Protective measures under this article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

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1 Introduction

At the time the African Charter on the Rights and Welfare of the Child (African Children's Charter) was being drafted in the 1980s, research, policy and broader public discourses on child abuse and neglect in Africa were significantly limited. In relation to sexual abuse, the limited attention paid to this phenomenon was stark, with much of the literature that *did* exist focusing on South Africa. Some of this lack of literature in this period has been explained thus:

Some commentators were of the view that child sexual abuse did not occur in the region due to the close-knit communal living structures of 'pre-modern' Africa culture. Where it did occur, it was purportedly linked to labour migration and changing family and social structures.¹

However, over 34 years after the adoption of the African Children's Charter by the Organisation of African Unity (OAU) (now known as the African Union (AU)) this lacuna in research, evidence and policy discourses has been well addressed.² Today, a proliferation of studies has emerged that illuminate the scope and prevalence of child abuse and neglect in the wide-ranging forms that are identifiable across the continent – although there is more available data on children's experiences in relation to some forms of abuse or in some countries compared to others. To address these phenomena the AU has adopted a number of strategies. This chapter provides an outline of the ways in which child abuse

1 AK Johnson & J Sloth-Nielsen 'Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead' (2020) 20 *African Human Rights Law Journal* 648.

2 See Johnson & Sloth-Nielsen (n 1).

manifests itself on the continent, documents the various strategies adopted to tackle these phenomena, outlines article 16 of the African Children's Charter within the context of other articles in the treaty, and explores its link to other related regional and international treaties. It will then provide an analysis of article 16 and assess its implementation in a range of domestic contexts in the region.

2 Forms of abuse identifiable on the continent

Corporal punishment remains prevalent across the continent as it is seen as a socialisation strategy and an acceptable form of discipline to ensure that children grow up to become the kind of adults their society wants them to become.³ According to a survey conducted by the United Nations Children's Fund (UNICEF) in sub-Saharan Africa, 82 per cent of children aged between one and 14 years of age reported experiencing violent discipline in the month before the survey was undertaken between the years 2012 and 2019.⁴ Of this figure, 83 per cent were located in the West and Central African sub-region. In Ghana, where the practice continues to be widely accepted in many households regardless of social class and geographical location,⁵ its prevalence is further borne out by multiple indicator cluster surveys (MICS) produced by the government of Ghana with support from UNICEF between 1995 and 2018, whenever the question of child discipline was asked as part of the survey. The latest published survey undertaken in 2017/2018 showed that 94 per cent of children aged one to 14 experienced some form of physical correction, with 17 per cent experiencing severe forms of corporal punishment, while 76 per cent reported experience of less severe forms of corporal punishment.^{6 7}

Added to this phenomenon, the drafting of the African Children's Charter coincided with the intensification of protracted conflicts in the region, with a range of civil wars erupting in several countries from the late 1980s onwards as the Cold War came to an end. Examples in the 1990s were Sierra Leone, Liberia and Northern Uganda. While civil strife has dissipated in some countries, in more recent years new conflicts have emerged in countries such as the Democratic Republic of Congo (DRC) and Chad, and others continue to persist in countries such as Sudan, Somalia and Ethiopia (Oromo region). In these civil wars the main sphere of violence occurs within communities rather than on designated battle fields. The resulting outcome is that the lives of whole communities become intertwined with conflicts taking place in their midst regardless of age and gender.⁸ The implications of this are increased data highlighting the violence experienced by civilians caught up in battles between different armed groups, with women and children bearing the brunt of this violence, much of which takes the form of torture and rape, which has come to be recognised as a weapon of war.

3 A Twum-Danso Imoh 'Children's perceptions of physical punishment in Ghana and the implications for children's rights' (2013) 4 *Childhood: A Journal of Global Child Research*; Twum-Danso Imoh 'Framing reciprocal obligations within intergenerational relations in Ghana through the lens of the mutuality of duty and dependence' (2022) 3 *Childhood: Journal of Global Child Research* 439; 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's provisions? Examining the similarities and the differences between the ACRWC and CRC' (2015) 7 *International Journal of Humanities and Social Science* 143.

4 V Vohito 'The African Children's Charter and ending corporal punishment of children in Africa: A work in progress' (2021) 21 *African Human Rights Law Journal* 74.

5 A Twum-Danso Imoh 'Children's perceptions of physical punishment in Ghana and the implications for children's rights' (2013) 4 *Childhood: A Journal of Global Child Research*; A Twum-Danso Imoh *Turning global rights into local realities: Realizing children's rights in Ghana's pluralistic society* (2024); S Kyei-Gyamfi 'Corporal punishment in Ghana' in R Aye, D Agbenyiga & N Apt (eds) *Children's rights in Ghana: Reality or Rhetoric?* (2011) 77-98.

6 In these multiple cluster surveys physical punishment is defined as 'shaking, hitting, or slapping a child on the hand/arm/leg, hitting on the bottom or elsewhere on the body with a hard object, spanking or hitting on the bottom with a bare hand, hitting or slapping on the face, head, or ears, and hitting or beating hard and repeatedly'. Severe physical punishment is understood as 'hitting or slapping a child on the face, head, or ears, and hitting or beating a child hard and repeatedly' (Ghana Statistical Service 2019).

7 Twum-Danso Imoh (n 5); see also Vohito (n 4).

8 A Twum-Danso *Africa's young soldiers: The co-option of childhood* (2003).

With regard to children involved in armed conflict, the change in approaches to warfare has resulted in increased numbers of children participating in civil wars as combatants, a development that has been facilitated by the increasing use of light weapons such as the Soviet AK-47 and the G-3, which feature prominently in modern, post-Cold War warfare.⁹ In recent decades, the nature of these conflicts has evolved further with the emergence of insurgencies by Islamist groups such as Boko Haram, which is estimated to have abducted over 200 000 children in Northern Nigeria, forcing them not only into marriage and sexual slavery, but also training them as insurgents.¹⁰ While many children volunteer to join a fighting group, primarily for survival, a significant number are abducted and forced to participate in conflict. In the process, many experience various forms of abuse, including physical, mental/emotional and sexual abuse as well as coercion to misuse drugs as part of keeping them under control and compliant in order to ensure that they obey instructions issued by their commanders – be they part of government-led armed factions or rebel groups.

Data on child sexual abuse in times of conflict in the region have been instrumental in increasing the body of evidence on this form of abuse in recent decades. In particular, the research on child sexual abuse that has been steadily growing since the 1980s revealed the scale of the phenomenon within the home, the school and the broader community and how it has evolved in the years since the African Children's Charter was adopted in 1990. Girls, in particular, face the brunt of much of this sexual abuse, with those aged between 15 and 17 and those living with disabilities being especially susceptible to this form of abuse.¹¹ The prevalence of the sexual abuse of girls is further supported by data that reveal that the first sexual experience is forced in the case of approximately 40 per cent of girls on the continent.¹² According to the African Child Policy Forum, evidence from Malawi shows that 22 per cent of women reported experiencing some form of sexual abuse as children.¹³ In the case of Ghana, research findings from a 2016 study illuminated that: 39,4 per cent of children had experienced indecent assault; 17,9 per cent had experienced defilement; 8 per cent had experienced rape; and 5,4 per cent had experienced incest, with most of these occurring within the home or the school.¹⁴ In relation to trafficking, the rates of which are the highest in Africa compared to other regions, women and girls comprise more than 70 per cent of human trafficking victims, especially those relating to sexual exploitation and domestic servitude.¹⁵

Further, there are traditional practices that have now been deemed harmful to the welfare and development of children, primarily girls, such as child marriage and female genital cutting (FGC). With regard to child marriage (discussed in chapter 22 of this volume), recent estimates reveal that in the region 12 million girls are married under the age of 18 years.¹⁶ These phenomena pertaining to child sexual abuse have, in recent years, been compounded by the COVID-19 pandemic, which resulted in rising incidents of gender-based violence, online sexual abuse, child marriage, female genital cutting and adolescent pregnancy due to government-initiated lockdowns and their attendant ramifications, most notably, economic insecurity, prolonged school closures and the rapid de-institutionalisation of children in care from children's homes and other alternative care institutions.¹⁷ Patriarchal and

9 As above.

10 M Yakubu 'Child insurgents in West Africa: The Boko Haram example in Nigeria, Chad and Cameroon' (2016) 2 *African Journal of Governance and Development* 34.

11 African Child Policy Forum *The African report on child well-being 2020: How friendly are African governments towards girls?* (2020).

12 As above.

13 African Child Policy Forum *Sexual exploitation of children in Africa: A silent emergency* (2019).

14 As above.

15 African Child Policy Forum (n 11).

16 African Union *The African Union accountability framework on the elimination of harmful practices* (2022), (41106-wd-AUC_Report_on_Getting_to_Zero_Female_Genital_Mutilation_in_Africa_-ENGLISH.pdf (accessed 5 April 2024).

17 Johnson & Sloth-Nielsen (n 1); African Union (n 16).

discriminatory cultural and social norms, which construct childhood, especially the status of girlhood, as subordinate to that of adult male status, are critical to understanding the persistence of child sexual abuse.¹⁸ While much of the existing research focusing on the region has centred around the sexual abuse of girls, it is important to note that boys are also affected, especially in conflict situations and in environments with a predominance of men and boys such as prisons and juvenile detention centres.¹⁹

3 AU strategies to address child abuse

That these phenomena, and their impact on many children on the continent, are prioritised by the AU is evident through a review of a number of programmes that have been introduced in recent decades. First, Africa's Agenda 2063 (The Africa we want) is a strategic framework, adopted at the twenty-fourth ordinary assembly of the AU Heads of State and Government in Addis Ababa, Ethiopia, on 31 January 2015. The overall objective of the blueprint is the achievement of 'inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress, and collective prosperity pursued under Pan-Africanism and African Renaissance'.²⁰ To achieve this objective, Agenda 2063 consists of seven aspirations, each of which comprises a series of goals, all of which are geared towards facilitating the achievement of the overall objective of this vision by 2063. Various aspirations within this agenda, as well as the actions to which they have led, or propose, illuminate the extent to which the principles underpinning article 16 are prioritised by the AU. For instance, as part of its agenda to 'build an integrated, prosperous, and peaceful Africa', the AU established the African Peace and Security Architecture (APSA) which is a framework for promoting peace, security and stability. This tenet of Agenda 2063 also seeks to bring about the end to wars, conflict and gender-based violence on the continent as well as ensure that mechanisms are put in place to prevent genocide.

With specific regard to children, the AU Peace Support Operations Division (AU PSOD) has developed several documents that reference child protection in conflict situations, including the Peace Support Operations Doctrine (2019); the AU Protection of Civilians Guidelines (2012); the African Standby Force (ASF) Civilian Dimensions Policy (2007); and the African Union Policy on the Prevention of Sexual Exploitation and Abuse in African Peace Support Operations (PSOs) (2019). Furthermore, child protection provisions have been incorporated in peace agreements in the period since 2000 to support children who have been involved in conflicts as they proceed through demobilisation and reintegration processes. Additionally, child protection officers have been introduced at the mission level, with the first child protection officer being deployed in the African Union Mission in Somalia in 2015. Despite the merits of these programmes, it has also been acknowledged that the AU's Peace and Security Council has, hitherto, not paid sufficient attention to child protection issues in conflict situations in the region. As a result, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) decided, at its twenty-fourth ordinary session hosted in Cairo, Egypt, in December 2019, to undertake a study that would explore the extent to which child protection is embedded in the decisions and frameworks of key AU policy programmes such as APSA. Beyond its provisions relating to armed conflict, Aspiration 6 (priority 6.1.2) of Agenda 2063 stipulates the goal of achieving 'an Africa whose development is people driven, relying on the potential of African people, especially its women and youth, and caring for children'. To this end, then, the AU has taken a number of steps which seek to end all forms of gender-based violence. This provision in the Agenda now sits alongside existing policies such as the AU Gender Strategy and the Protocol to the African Charter on

18 African Child Policy Forum (n 11); (n 13).

19 African Child Policy Forum (n 13).

20 African Union Agenda 2063: The Africa we want, www.au.int/en/agenda2063/overview#:~:text=It%20is%20the%20continent%27s%20strategic,African%20Renaissance%20The%20genesis%20of (accessed 5 April 2024).

Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which is part of the 1981 African Charter on Human and Peoples' Rights.²¹

Second, in addressing gender-based violence, the AU has pinpointed specific phenomena upon which to focus, which are addressed by the Accountability Framework on the Elimination of Harmful Practices, introduced at the request of the AU Heads of State and Government. The adoption of this framework was a culmination of a range of initiatives on traditional practices by the AU over a period of time. For example, at the seventeenth ordinary session of AU Heads of State and Government held in Malabo, Equatorial Guinea, in July 2011, member states adopted a decision in support of a draft resolution at the 66th ordinary session of the General Assembly of the UN to ban female genital cutting.²² In addition, at the thirty-second ordinary session of the AU in 2019, the Heads of State and Government launched a continental initiative to end female genital cutting (also known as the Saleema Initiative) through mobilising political action; promoting legislation enforcement; advocating for increased allocation of financial resources at the national level; and strengthening partnerships.²³ With regard to child marriage in particular, in 2014 the AU launched a campaign to eliminate child marriage involving different regional and international stakeholders such as member states, law enforcement agencies, UN agencies and the private sector.

Third, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa were adopted by the African Commission on Human and Peoples' Rights at its thirty-second ordinary session, held in Banjul, The Gambia, in October 2002. This was more recently strengthened by the adoption of a resolution on the prohibition of the use, production, export and trade of tools used for torture in early December 2020 at a meeting of the African Commission on Human and Peoples' Rights. Fourth, a memorandum signed between the AU and Child Fund on 23 April 2023 was part of a series of broader endeavours to protect children in online spaces/platforms. As part of this memorandum the AU and Child Fund commit to advocating for AU member states to take steps to establish legal frameworks to protect the rights of children online.²⁴ Finally, following calls by the African Child Policy Forum and the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) for the development of an effective child protection system in 2013, in 2018 the African Children's Committee set out its approach to child protection systems in its General Comment 5.²⁵

4 Links to other Charter articles

While states' obligation to protect children from maltreatment, abuse and neglect is the focus of article 16, it is, similar to other articles in the treaty, also informed by its four guiding principles (best interests, non-discrimination, participation and survival and development).²⁶ In addition, the principles underpinning this provision can also be identified in numerous other articles in the Charter, including:

- article 11(5) which sets out provisions for states to adopt measures to ensure that children subjected to discipline in schools or at the hands of parents/caregivers are treated with respect for their inherent dignity;

21 African Union (n 16).

22 As above.

23 As above.

24 M Chelangat 'New push to safeguard rights of children in digital space' *Nation* (Nairobi) 24 April 2023, (www.nationafrica/kenya/news/new-push-to-safeguard-rights-of-children-in-digital-space-4210236) (accessed 6 April 2024).

25 See African Children's Committee General Comment 5 on State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems of strengthening for child protection (2018); Johnson & Sloth-Nielsen (n 1).

26 See Preamble to the African Children's Charter.

- article 13(1) which stipulates the obligations of states to take special measures to ensure the protection of the dignity and physical and moral needs of children living with disabilities;
- article 20(1)(c) which reiterates the principles underpinning article 11(5) but with a specific focus on the sphere of the home as it specifies that domestic discipline should be administered with respect for the inherent dignity of the child;
- article 21 which articulates provisions that seek to eliminate traditional harmful practices that are deemed to affect the welfare and development of children;
- article 22(3) which outlines that state parties must take all possible measures to protect and care for children who are affected by armed conflict, including civil wars – be they perpetrators or victims;
- article 23(1) which commits state parties to adopt measures that assure the protection of children seeking refugee status or who are considered refugees regardless of whether they are accompanied by their parents/caregivers;
- article 27 which articulates the obligations of states to protect children from all forms of sexual exploitation and sexual abuse with specific measures being taken to address issues relating to coercing/encouraging a child to engage in sexual activity, facilitating children's engagement in prostitution and pornographic activities or materials;
- article 29 which stipulates that governments must take measures to prevent the (i) abduction, sale, and trafficking of children for any purpose and by any actors, including by the parents/caregivers of the child; (ii) the use of children in begging activities.

The fact that numerous articles in the African Children's Charter are designed to ensure that governments adopt measures to protect children from a range of abuses indicates the extent to which priority was attached to child protection by those who drafted the Charter. This aligns well with Johnson and Sloth-Nielsen's assertion that 'many substantive articles of the African Charter are geared towards child protection'.²⁷

5 Links to other human rights treaties

While the African Children's Charter sought to consider the African 'cultural heritage, historical background and the values of the African civilization'²⁸ and address 'certain peculiarly African problems',²⁹ its provisions in many respects are coterminous with those of the 1989 Convention on the Rights of the Child (CRC) which was drafted at the same time and was adopted by the UN General Assembly less than a year earlier in November 1989. This synergy is evident in numerous articles of in the CRC. In relation to article 16 of the African Children's Charter, which outlines states' obligations to protect children from neglect, maltreatment and abuse, the language deployed in articulating the obligations of governments is very similar to that deployed in setting out the provisions of article 19 of the CRC.³⁰ In particular, article 19 of the CRC stipulates:

- (1) States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

27 Johnson & Sloth Nielsen (n 1) 648.

28 See Organisation of African Unity *African Charter on Children's Rights and Welfare* (1990).

29 F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 2 *Comparative and International Law Journal of Southern Africa* 205.

30 See also D Chirwa 'The merits and demerits of the African Charter in the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; J Sloth-Nielsen 'Regional frameworks for safeguarding children: The role of the African Committee of Experts on the Rights and Welfare of the Child' (2014) 3 *Social Sciences* 948; PA Issahaku 'Raising the future leaders: An analysis of child and family welfare policy in Ghana' (2019) 13 *Journal of Public Child Welfare* 148.

- (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

In addition, this article of the Children's Charter corresponds closely with other provisions in the CRC:

- article 22 outlines special protections children with, or seeking, refugee status should receive.
- article 23 sets out the steps that state parties should take to create a conducive environment that protects the dignity of children living with disabilities.
- article 28(2) commits governments to ensuring that school discipline is administered in a manner that maintains the child's human dignity.
- article 34 outlines the commitments governments have made to protect children from all forms of sexual exploitation and sexual abuse.
- article 35 sets out governments' obligations to prevent the sale or trafficking of children.
- article 37 stipulates that governments must protect children from torture, inhuman or degrading treatment or punishment, including capital punishment or life imprisonment. In article 37(c) those children who are deprived of their liberty for a period of time must be treated with respect for their inherent dignity as a human being.
- article 38(4) stipulates that governments are required to take all possible measures to protect children who are affected by armed conflict.
- article 39 obliges governments to take steps to ensure the physical and psychological recovery and social reintegration of a child who has experienced any form of neglect, exploitation, abuse, torture, or any other form of cruel, inhuman, or degrading treatment or punishment, or armed conflicts.

These similarities notwithstanding, there are some distinctions between the articulation of states' obligations pertaining to child abuse between the two treaties. In particular, article 16 of the African Children's Charter differs in one key respect from its primary counterpart article of the CRC (article 19), as its wording includes the need to protect children from torture, ill treatment and degrading treatment.³¹ This connection made in article 16 between abuse and torture is significant because abuse can, in some instances, lead to torture as evidenced by the case of a Sudanese national, Umjumah Osman Mohamed, who was raped and impregnated in 2016 at the age of 16 years. While the perpetrator was initially convicted under the country's 2010 Child Act and sentenced to 20 years' imprisonment as well as directed to pay a fine of 20 000 Sudanese pounds by the Child Court in 2017, a year later the case was overturned by the High Court in accordance with the 1991 Criminal Act which defines an adult as an individual whose 'puberty has been established by definite natural features and has completed fifteen years of age'.³² This provision clearly is at odds with the 2010 Child Act which defines a child as those under the age of 18. The High Court not only repealed the perpetrator's sentence, but in addition charged both the perpetrator and the victim with adultery under the premise that Umjumah Osman Mohamed was an adult who understood the sexual act, drawing on the definition of the 1991 Criminal Act instead of the 2010 Child Act. If found guilty, Mohamed will be sentenced to 100 lashes. The dismissal of rape charges and the issuance of a new conviction of adultery to both victim and perpetrator was later upheld, in 2019, by the High Court Review Chamber and the Constitutional Court. This case, thus, highlights the extent to which child sexual abuse in some contexts can be compounded by state torture for some victims.

31 See Sloth-Nielsen (n 30).

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

The alignment between this article of the African Children's Charter and the CRC can further be identified when the latter's optional protocols, namely, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict, both of which were adopted in May 2000, are taken into account. Beyond the CRC, this article of the African Children's Charter corresponds well with other treaties in the UN machinery, especially those focusing on gender-based violence. A notable example is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted in 1979 by the UN General Assembly. In relation to African regional instruments, this article is further influenced by the African Charter on Human and Peoples' Rights adopted by the OAU in 1981, which requires state parties to ensure for all people:

- equal protection of the law (article 3).
- respect for personal integrity (article 4).
- respect for human dignity (article 5).
- protection from torture and cruel, inhuman or degrading punishment and treatment (article 5).

Beyond drafting the treaty, the African Commission on Human and Peoples' Rights which monitors the implementation of this earlier human rights charter, has, in the years since its adoption, expressly stated that the use of corporal punishment by state parties was in violation of the African Charter on Human and Peoples' Rights, further demonstrating the extent to which the two charters are closely aligned.³³ Also worth noting is the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (also known as the Maputo Protocol) adopted by the AU in 1995.

6 Legal interpretation

Article 16 is divided into two parts. Part 1 stipulates that all governments that have ratified the African Children's Charter should include a myriad of protective measures encompassing legislative, administrative, social and educational steps to protect children from a wide range of abuses and neglect within their national boundaries. Much of this focus is on preventing children from experiencing such treatment. Hence, governments are obliged to provide a conducive environment that facilitates the protection of children from all forms of abuse and neglect through various sector agencies as well as non-state institutions.³⁴ Since the adoption of the African Children's Charter, the African Children's Committee has further clarified the obligations on governments that have ratified the treaty. Key to this process was the Committee's General Comment 5, in which it set out its approach to child protection systems.³⁵ Moreover, due to the rapid transformations that have occurred in digital technology in recent years the Committee clarified, in 2021, in General Comment 7 focusing on article 27 of the African Children's Charter, the measures required by state parties to combat both 'offline' and online sexual exploitation and abuse of children.³⁶

Establishing an effective legislative environment is a critical component of this article. As Johnson and Sloth-Nielsen assert, 'the development of the normative framework is one of the most important contributions of the African Children's Charter and Committee'.³⁷ The vision of the drafters was that national legislation should not only cover state actors such as law enforcement agents, but also encompass community-based actors, including volunteers and, further, make explicit the role of

33 See Vohito (n 4).

34 Sloth-Nielsen (n 30).

35 African Children's Committee (n 25); Johnson & Sloth-Nielsen (n 1).

36 African Children's Committee General Comment 7 on article 27 of the African Children's Charter (Sexual exploitation) (2021), General-Comment-on-Article-27-of-the-ACRWC_English_0.pdf (acerwc.africa) (accessed 6 April 2024).

37 Johnson & Sloth-Nielsen (n 1) 662.

different actors in protecting children.³⁸ In terms of the nature of abuse focused on in this provision, the article is wide-ranging and covers all forms of child neglect and abuse that may have ramifications for the child's mental health or bodily integrity. While the article specifies sexual abuse, it also makes clear that its focus is also on physical and emotional abuse. In addition, this article of the African Children's Charter includes an added focus on torture and degrading treatment, an element that had not been considered within its counterpart provision in the CRC (although included in a separate provision of the CRC – article 37 focusing on the deprivation of children's liberty). Further, with its focus on protecting children from parents, legal guardians, school authorities or anyone who has the care of the child at a given moment in time, its provisions comprise a variety of spheres in which children live out their everyday lives, including the home, the school and other settings where others may be charged with the care of the child for certain periods; for example, churches, youth groups, juvenile detention centres and other alternative care settings. In the years since the adoption of the African Children's Charter, the African Children's Committee has elaborated on the commitments expected of state parties in relation to legal reform. For instance, it has asserted that the effective achievement of article will require:

- legislation protecting refugee and migrant/stateless and internally-displaced children specifically;
- the introduction of domestic violence and anti-trafficking legislation;
- sector-specific legislation that is needed to ensure full prohibition of corporal punishment is achieved.³⁹

While laws are key to fulfilling state obligations in relation to this article, the wording of the article also recognises the importance of a holistic approach to abuse prevention. This is evidenced by its articulations of states' obligations to adopt various administrative, social and educational measures to protect children from abuse. Governments are obliged to put in place a range of mechanisms. These include the establishment of institutions such as courts, including special courts or special procedures in court and specialist law enforcement agencies as well as the development of a range of child protection or welfare initiatives and policy actions in different settings. Further, the African Children's Committee has also noted in the years since the adoption of the Children's Charter the need for sufficient budget allocation to facilitate the realisation of government objectives in relation to this article, and that without this provision its implementation will be limited. That such a concern is considered by the African Children's Committee clearly emerges in its review of the government of Liberia's state party report in 2014:

The 2014 recommendations for Liberia are notable as the first explicit discussion of the various elements of the system that need to be put in place for children's protection and the capability of the state to deliver the system. The Children's Committee observes that implementation of the law is constrained as the 'structure devised by the law is not compatible with the available human resources for social welfare' recommending that Liberia adopt a 'coherent policy framework to meet the welfare needs of children'. This realistic assessment by the Committee does not appear to be reiterated in any other recommendation.⁴⁰

In relation to social and educational measures, the article recognises the importance of changing behaviours and mindsets through raising awareness within communities of how social and cultural norms that have been passed down for generations within communities violate the rights articulated within the text of this article. Such initiatives have included educational and sensitisation programmes led by both state and non-state agencies.⁴¹ Since 2016, the African Children's Committee has

³⁸ African Children's Committee (n 25).

³⁹ African Children's Committee (n 25).

⁴⁰ Johnson & Sloth-Nielsen (n 1) 655.

⁴¹ See Johnson & Sloth-Nielsen (n 1).

provided further guidance to states on addressing such barriers through a range of community-level interventions.⁴²

While the tone of the article places an emphasis on prevention, it also seeks to set out the obligations of governments once the neglect or abuse has occurred. To this end, then, part 2 of this provision sets out protective mechanisms or strategies required of state parties to identify incidents of abuse, mistreatment, torture and neglect, report cases to relevant authorities, refer victims for support and outline the treatment that should be made available for victims as well as the requirements for following up cases. Specific measures governments are expected to consider are special monitoring units that are positioned to provide support for both children at risk and their care givers. An example is the establishment of national child protection registers to monitor those who apply to work with children. This expectation has further been clarified by the African Children's Committee, which has encouraged states to ensure that those who have previously been found guilty of harming children should not be employed in positions where they can access children. As part of this recommendation, it encourages governments to put in place effective screening processes in institutions such as schools and institutions of care.⁴³ At the same time, the African Children's Committee has outlined further strategies governments can take to identify and investigate abuse and set up effective referral and reporting systems, with clear channels for professionals to report incidents of abuse and neglect and the need to ensure that the consequence of failure to report is made clear.⁴⁴ The African Children's Committee has encouraged a range of responses to reported incidents of abuse, neglect, maltreatment, 'bearing in mind that removal of the child from the family be a last resort, and that parental poverty should ordinarily not be a sufficient ground for the separation of children from their families'.⁴⁵ Hence, the African Children's Charter provides that states should support parents who are unable to fulfil their parental responsibilities (as articulated in article 20(2)). In relation to reporting processes, since 2017 the African Children's Committee has recognised the importance of toll-free helplines being available in order to enable child survivors of abuse to directly report incidents as it strengthens greater protection of children's rights. The Children's Committee further acknowledges that special protective measures may be needed for children with disabilities, in the justice system and those subject to customary or informal legal systems.⁴⁶ Added to this, it advises governments to prepare guidelines for the rehabilitation of victims. These additional guidelines by the African Children's Committee reinforce the expectation of governments in the region to put in place the requisite infrastructure to ensure the well-being of survivors of abuse and neglect as well as to strive to achieve justice for this group of children.

In relation to reporting, the African Children's Committee has set out guidelines on reporting processes by which governments must abide, including those that indicate the information required on child protection issues. One set of guidelines focuses on the form and content of periodic state party reports to be submitted pursuant to article 43(1) of the African Children's Charter. In particular, state parties should provide information on legislative, administrative, social and educational measures taken to protect children from all forms of torture, inhuman or degrading treatment. Special mention is made of the need for governments to state whether they have prohibited corporal punishment in all settings.⁴⁷ The recommendations issued to state parties following the review of the state party reports, which did not start being submitted until 2005, offer the African Children's Committee an opportunity to respond to reports submitted and identify ways for improvement. For example, in its first Concluding

42 As above.

43 African Children's Committee (n 25).

44 As above.

45 African Children's Committee (n 25) 21.

46 African Children's Committee (n 25).

47 See Vohito (n 4).

Observations and recommendations, which were issued in response to Egypt's initial state party report, it was evident that while these Concluding Observations lacked depth, the issue of child sexual abuse was of concern for the African Children's Committee. In particular, the Committee recommended that the government adopt 'very severe' criminal penalties for child sexual exploitation and 'mechanisms' for victim support. Moreover, over the years the Committee has urged governments to introduce laws banning corporal punishment in all settings.⁴⁸ The Committee has further encouraged governments to go beyond law and strengthen their specialised child protection services, leading to the establishment of specialised sections of police services in countries such as Liberia, Ethiopia and Kenya.⁴⁹

Given the timeframe in which the African Children's Charter was both drafted and adopted, it is important to note that at the time many African countries were subject to the dictates of the International Monetary Fund (IMF) and World Bank and their Structural Adjustment Programme that resulted in cut-backs in government expenditure and the introduction of user fees for a range of services relating to, for example, health and education. It is this context that has led Johnson and Sloth-Nielsen to claim that the adoption of article 16 in the Charter was 'almost aspirational' as at the time the Charter was being drafted, most countries in the region did not have systems in place to collect information on investigations, reporting, monitoring and follow-up.⁵⁰ Added to that, very few countries had set up specialisation in child protection services such as specialist units of police forces and special courts that were equipped and trained to investigate instances of child abuse and effectively support survivors.

7 Domestication of article 16 in national legal systems, and national courts' interpretations

In the years since the adoption of the African Children's Charter, a rich legislative environment has emerged on the continent outlining a range of provisions set out by new or amended constitutions and laws to protect children within the national boundaries of different states. This is supported by Johnson and Sloth-Nielsen who claim that 'it is commonly agreed that the child protection architecture covering laws, policies and institutions, is by and large well developed and fairly well established, in Africa'.⁵¹ In relation to sexual abuse specifically, governments have taken numerous steps to develop laws that criminalise this phenomenon. The South African Children's Act 2005, for instance, established a National Child Protection Register, and part B contains the names of persons found unsuitable to work with children. Further, anybody managing or operating an institution, centre, facility or school must establish whether the name of any person who works with, or has access to, children at the institution, centre, facility or school appears in part B of the Register.⁵² Following this, in the same country, the 2007 Criminal Law Amendment Act broadened the definition of rape to sexual grooming, sexual exploitation, and use of children in, and their exposure to, pornography.

Laws criminalising online sexual exploitation in Botswana, Ghana and South Africa have been introduced.⁵³ Human trafficking is now criminalised by law in all countries except Chad and Somalia.⁵⁴ Some countries have taken additional measures to prohibit the trafficking of children in particular, such as Benin (Act Relating to the Transportation of Minors and the Suppression of Child Trafficking Act 2006-04); Cameroon (Anti-Trafficking Law 2011); Comoros (Law Countering Child Labour and

⁴⁸ Johnson & Sloth-Nielsen (n 1); Vohito (n 4).

⁴⁹ Johnson & Sloth-Nielsen (n 1).

⁵⁰ Johnson & Sloth-Nielsen (n 1) 648.

⁵¹ Johnson & Sloth-Nielsen (n 1) 662.

⁵² Sloth-Nielsen (n 30).

⁵³ African Child Policy Forum (n 11).

⁵⁴ As above.

Trafficking in Children 2015); Côte d'Ivoire (Law No 2010-272 Pertaining to the Prohibition of Child Trafficking and the Worst Forms of Child Labour, 2010); Gabon (Law Preventing and Combatting Child Smuggling, 2004); and Togo (Law Relating to Child Smuggling 2005).

The range of legal measures undertaken in a single country is vast as evidenced by the example of Egypt. The Constitution of Egypt includes protection 'from all forms of violence, abuse, mistreatment and commercial and sexual exploitation'.⁵⁵ In addition, the legislative framework includes the Child Law which protects children specifically from abuse and torture as it prohibits the exposure of a child to illegitimate physical abuse or harmful practice as a means of discipline.⁵⁶ However, this provision is not interpreted to have abolished corporal punishment altogether as the law still recognises the right of care givers to discipline the child through legitimate means. Corporal punishment thus remains lawful in the home, alternative care and day care institutions under the concept of the 'right to discipline', as long as it does not intentionally lead to the child being exposed to illegitimate forms of physical abuse or harmful practice.⁵⁷ The Child Law also criminalises the abduction, trafficking and sale of children, and obliges the state to eliminate practices that are harmful to the health of the child. Further, Egypt passed an anti-human trafficking law in 2010 that criminalises the trafficking, exploitation and sale of children, and provides for the protection, assistance and rehabilitation of victims. This piece of law additionally mentions that the consent of the child or guardian is irrelevant for the designation of the occurrence of a crime. To facilitate the implementation of this legislation, the National Action Plan against Human Trafficking was adopted to ensure the prevention of human trafficking, to protect and assist the victims of trafficking, to 'ensure serious and effective punishment of traffickers' and to promote national and international cooperation in combating human trafficking.⁵⁸

Beyond law, social policies have also been instrumental in providing governments with a framework to protect children within their boundaries. For instance, Ghana's child and family welfare policy was introduced due to the fact that despite numerous laws protecting children from violations of rights, there was 'no overarching national policy for the delivery of a comprehensive child and family welfare services ... [in] an integrated approach aimed at strengthening core child and family welfare services across issues'.⁵⁹ This realisation engendered a search for a new and comprehensive policy that would embody all best practices while addressing identified gaps in previous initiatives. The result was the Child and Family Welfare Policy of Ghana which was launched in late 2014.⁶⁰ The policy seeks to give 'purpose and direction to legislation, strategic plans, and plans of action, as well as "intervention-specific standards and protocols concerning the protection of children"'.⁶¹ These different measures have had some impact in some contexts, as noted by the African Child Policy Forum:

Today, as compared to some years ago, we have fewer girls in Africa dying of preventable causes, more girls going to school, fewer child brides, and adolescent mothers and lower incidences of violence and prevalence of harmful practices.⁶²

This is something that I have discussed in a recent publication where I draw on data from research conducted with key policy and civil society informants which indicate that in the Ghanaian context, increased recognition of children's rights has led to greater scrutiny of issues facing children:

55 MG Nyarko 'Towards effective implementation of the African Charter on the Rights and Welfare of the Child in Egypt' (2019) 2-3 *African Journal of Legal Studies* 151.

56 Nyarko (n 55).

57 Nyarko (n 55) 151.

58 Nyarko (n 55).

59 Cited in Isshaku (n 29) 156.

60 Cited in Isshaku (n 29).

61 Cited in Isshaku (n 30) 157.

62 African Child Policy Forum (n 11) xx.

We've been forced to look at issues such as child betrothals, dowries, early marriages and so on in the north and in other parts of the country. We've been forced to look at education, not just in terms of providing the infrastructure which we are not able to do very well, but in terms of schooling you know as something children have to undertake on a daily basis so that they can, er ... we've been forced to look at [the] teacher – child relationship and how the presumption that I am a teacher, an adult, and I have unlimited powers in the classroom and I can do whatever I want to do at any time, we've been forced to look at that; things like sexual abuse of children, you know, we looked at this; these are things that 30 years ago, 40 years ago er, even 25 years ago happened on a regular basis. Some of them were not even questioned; some people even tried to make some of them as [part of] our culture and so on, you know (K12 1 December 2022, Study 6).⁶³

However, these results are uneven and often lack depth in their impact. Furthermore, there remain limitations in government legislation to address all forms of abuse and neglect. For instance, in relation to sexual abuse, laws persist that are discriminatory such as those that allow perpetrators to marry the victim, thereby protecting themselves from prosecution in countries such as Cameroon.⁶⁴ Added to this, abduction is only seen as a misdemeanour in Malawi, Ghana and Uganda.⁶⁵

In relation to corporal punishment, only nine out of 52 African countries have outlawed corporal punishment in all settings.⁶⁶ This is despite the fact that the African Children's Committee and other human rights bodies have made it very clear that all corporal punishment of children must be prohibited and eliminated, including within the family. This limitation relating to corporal punishment can largely be attributed to the fact that governments in the region, represented by individuals in their respective parliaments and in sector agencies who are part and parcel of their communities and, hence, cultures, have demonstrated a reluctance to fully prohibit corporal punishment within their boundaries.⁶⁷ Therefore, many state parties to the African Children's Charter enact laws pertaining to children without including the explicit prohibition of corporal punishment. An example is the Central African Republic (CAR) that ratified the African Children's Charter in 2016. This followed an advocacy mission to CAR for the ratification of the African Children's Charter by the African Children's Committee in 2014. In June 2020 the President promulgated the first Child Protection Code in the country. Although the new Child Protection Code explicitly refers to both the CRC and the Charter, it fails to prohibit corporal punishment of children in all settings. Another example can be taken from the case of Mozambique where the Law for the Protection of the Rights of the Child (2008) provides for the concept of justifiable discipline as a legal defence for the use of physical punishment in child rearing.⁶⁸ The case of Botswana is especially noteworthy due to the government's stance on this issue which has seen it explicitly, and repeatedly, reject the African Children's Committee's recommendations on this issue. For instance, during the first cycle of the Universal Periodic Review of Botswana in 2008 the government rejected recommendations to prohibit all corporal punishment, stating:

63 Twum-Danso Imoh (n 5) 119.

64 African Child Policy Forum (n 11).

65 As above.

66 As above.

67 Vohito (n 4).

68 E Fokala, N Murungi & M Aman (eds) *The status of the implementation of the African Children's Charter: A ten-country study* (2022).

The Government ... has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code, and the Education Act.⁶⁹

Five years later, in 2013, the government rejected recommendations to fully prohibit corporal punishment during its second periodic review, claiming:⁷⁰

Botswana does not accept the recommendation. Public consultations have so far confirmed that Botswana still prefer the retention of corporal punishment. However, Government is committed to undertake educational awareness campaign before it can consider prohibition of corporal punishment of children in all settings.⁷¹

In 2018 the government clarified that it had taken some steps in addressing, but not fully implementing, the recommendations of the African Children's Committee in relation to this issue within the stated reporting period. It is worth noting that while Botswana ratified the African Charter in 2001 and submitted its initial state party report to the African Children's Committee in 2021,⁷² corporal punishment, as the Concluding Observations note,⁷³ remains prevalent in the country and has not been legislatively outlawed.

8 Conclusion

What emerges in this review of article 16 of the African Children's Charter is that since its adoption in July 1990 much has been achieved in terms of legal reform and programmatic interventions on the continent, some of which have started to have a meaningful impact on the lives of small groups of children. However, in most cases translating law and policy into practice that genuinely impacts, or is transformative to, children's welfare has, for most of the period under review, been met with a series of pitfalls and obstacles in all countries in the region.

These challenges are, arguably, a result of contradictions, inconsistencies and weaknesses in the legal reforms that have taken place since 1990. Specifically, despite the rich legal environment that has been created in many countries on the continent, this has not been without its limitations, especially in relation to the development of strongly-worded laws on controversial issue areas such as corporal punishment, which remains a desirable child-rearing strategy by large sections of the population within the majority of national contexts in the region. The lack of such strongly-worded laws is problematic as it leads to the creation of loop holes for those who lack the will to enforce government laws and policies.

The difficulties in translating law into practice cannot only be attributed to weakly-worded and inconsistent legislative frameworks. They also have to be understood as underscoring the limitations of law for social and cultural phenomena, especially in contexts where resources prevent governments from being able to effectively enforce and monitor any new legislation introduced. It is within this context that social and educational measures, such as community awareness and behavioural change programmes, need to be appreciated.

Bearing these difficulties in mind my recommendations are as follows:

69 Vohito (n 4) 66.

70 Vohito (n 4) 67.

71 Vohito (n 4) 67.

72 Vohito (n 4).

73 Para 29, https://www.acerwc.africa/sites/default/files/2024-03/485.23_Concluding%20Observations%20and%20Recommendations-%20Botswana.pdf (accessed 6 April 2024).

Recommendations

- State parties should tighten the wording on existing laws on controversial issues relating to child abuse and neglect such as corporal punishment and the ability of parents marrying off their sexually abused children to their perpetrator. Enabling governments to learn lessons from each other would be an important component of such an exercise.
- State parties and civil society, including community and religious leaders, should collaborate much more closely on the design and implementation of programmes to protect children from abuse and neglect.

In addition to these recommendations that emerge from the commentary above, two other recommendations have been identified during the course of my review of article 16:

- State parties should introduce new legislation targeting abuse that takes place online if they have not already done so and, alongside that, they should develop new programmes. The AU should provide further guidance to assist governments in this process.
- The AU should explore much more centrally the violence, abuse and neglect faced by children on the continent who identify as lesbian, gay, bisexual, transgender and queer (LGBTQ), especially given the tightening of laws on homosexuality in a number of states. Much of the existing focus of the AU, African Children's Committee and individual governments have overlooked this group.

While the first recommendation has been acknowledged by some governments and the AU as is evidenced by numerous reports and policies that have emerged in recent years, this form of abuse needs greater attention and more joined-up collaboration between sector agencies in countries and regional agencies across the continent. The second recommendation points to a group of children who are invisible in much of the documentation reviewed both within national boundaries and at the AU regional level. Given the fact that several countries in the region have taken, or are taking, steps to significantly strengthen laws against homosexuality within their borders, it is imperative that more is done to consider the responsibilities of states and AU regional bodies for children whose identity does not align with the heteronormative orientation that has come to underpin the societies and cultures of large swathes of the continent, primarily as a result of the work of Christian teachings, not only transmitted by missionaries who started to arrive on the continent from the fifteenth century onwards, but also more recently by primarily US-based Christian organisations seeking to transport their agenda to other societies.