

Chapter 18

Article 17

Administration of juvenile justice

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1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child respect for human rights and fundamental freedoms of others.
2. State parties to the present Charter shall in particular:
 - (a) ensure that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment;
 - (b) ensure that children are separated from adults in their place of detention or imprisonment;
 - (c) ensure that every child accused of infringing the penal law:
 - (i) shall be presumed innocent until duly recognised guilty;
 - (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
- iii. shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
- (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
- (v) shall not be compelled to give testimony or confess guilt.
3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.
4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

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1 Introduction

In many countries it is not uncommon for children to be in conflict with the law. Because of their special status, children cannot be treated as adults at the time of their arrest, detention or imprisonment. It is against that background that article 17 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) was included to guide state parties on the measures they have to promote and implement to ensure that children in conflict with the law are dealt with in a manner that recognise their special status.

This chapter discusses the rights and obligations under article 17. There are some differences between article 17 of the Children's Charter and article 40(2)(b) of the Convention on the Rights of the

Child (CRC), which will be discussed further below. The chapter also suggests ways in which article 17 can be interpreted better to protect, promote and fulfil the rights of children in the criminal justice system. These suggestions are informed by, among others, the text of CRC and the jurisprudence of African human rights bodies such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). Each of the rights or obligations under this article is discussed independently.

2 Legal interpretation

2.1 Article 17(1): The right to special treatment

This provision deals with two categories of children, namely, (i) those accused of having infringed penal law; and (ii) those found guilty of infringing penal law. Irrespective of the category in which the child falls, they have 'the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'. The second category of children is straightforward and does not raise problems regarding application or interpretation. However, the opposite is true with the first category since the term 'accused' is open to two possible interpretations. The first and strict interpretation is that it is limited to a child who has already appeared before court on allegations that they have committed an offence. The second and broad interpretation is that it also applies to a child who has been arrested or summonsed by law enforcement officers on suspicion that they have committed an offence. In support of this approach, it could be argued that, had the drafters of the treaty wanted article 17(1) to protect the second category of children, they would have expressly stated so.¹ The second interpretation seems more appealing if viewed in the context of the best interests of the child principle. Put plainly, article 17(1) should be applicable to children the moment they come into contact with the law enforcement officer.

Article 17(1) provides for the 'right to special treatment'. This right is made up of two components. The first component is that the child must be treated in 'a manner consistent with the child's sense of dignity and worth'. This implies that the child's view(s) of what amounts to their 'sense of dignity and worth' must be considered. In other words, it is not upon to the authorities to determine, unilaterally, what amounts to the child's sense of dignity and worth. The words are 'dignity and worth' and not 'dignity or worth'. This implies that the two terms must be read conjunctively, otherwise the drafters would have used 'or' instead of 'and'. The second component is that the special treatment should reinforce the child's 'respect for human rights and fundamental freedoms of others'. This implies that the child should be informed or 'educated' of those rights and of the obligation(s) to respect the same. Central to article 17(1) is that a child who has been found guilty of infringing penal law should be rehabilitated. The purpose of this rehabilitation is to prevent the child from violating the rights of others. This means that article 17(1) should be read with article 17(3). The latter is discussed later in this chapter.

2.2 Article 17(2)(a): Freedom from torture and ill-treatment (abuse)

Article 17(2)(a) obliges state parties to 'ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment'. This provision is applicable to three categories of children, namely (i) those who are detained; (ii) those who are imprisoned; and (iii) those who are deprived of their liberty other than through detention or imprisonment. Detention normally takes place immediately after arrest – when the child is reasonably suspected of having committed an offence. Imprisonment normally takes place when a child has been convicted of an offence and the court or tribunal has imposed a custodial sentence. However, as article 17(2)(a) rightly provides, these are not the only forms of deprivation of liberty. There are instances

¹ See eg, art 40(1) of CRC where the words 'alleged' and 'accused' are used.

where a child may be deprived of liberty on grounds such as immigration violations or public health.² Irrespective of the reason(s) for deprivation of liberty, the child enjoys the protection under article 17(2)(a). The use of the word ‘ensure’ implies, amongst others, that state parties have to put measures in place to guarantee that those rights are respected by state and non-state actors who have the power(s) to deprive children of their rights.³

Article 17(2)(a) guarantees several rights. These are the right to freedom from torture; the right to freedom from inhuman treatment; the right to freedom from inhuman punishment; the right to freedom from degrading treatment; and the right to freedom from degrading punishment. The African Children’s Charter does not define torture. Likewise, it does not define or describe what amounts to inhuman or degrading treatment or punishment. However, torture is defined under article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁴ which is to the effect that torture means:

- (1) ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
- (2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The above definition has been invoked by some African regional human rights bodies in their definition of torture. These include the African Commission⁵ and the African Court.⁶ In *El Sharkawi*⁷ the African Commission referred to the definition of torture under article 1 of CAT and held that

[t]he definition of torture under UNCAT contains four (4) cumulative elements: that severe mental or physical suffering must be inflicted; that an act or omission must be inflicted intentionally; that the infliction of such or omission must be for a specific purpose; and that the act or omission must be by a public official or with the consent or acquiescence of a public official. For torture to have occurred all these elements must be present cumulatively.⁸

It is evident that for conduct to amount to torture under article 1 of CAT, a public official has to be involved directly or indirectly. However, the African Children’s Charter also requires state parties to prohibit and prevent torture by private individuals. This is inferred from article 16(1) (discussed in chapter 17 of this volume) which states:

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

2 In *Cherif Madi v Republic of Niger* ECW/CCJ/APP/ 30 of 2020 [2022] ECOWASCJ 17 (1 April 2022) para 124, the ECOWAS Court observed that ‘[d]etention or deprivation of liberty occurs as soon as an individual is forcibly held in a police station or prison or when an authority orders him/her to remain in a certain place’.

3 Eg, psychiatric institutions.

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) (CAT).

5 *El Sharkawi (represented by EIPR and OSJI) v Republic of Egypt* Communication 396/11 [2021] ACHPR 521 (20 October 2021) para 209.

6 *Maige v United Republic of Tanzania* Application 18/2017 [2023] AfCHPR 28 (5 September 2023) para 134.

7 *El Sharkawi* (n 5).

8 *El Sharkawi* (n 5) para 210.

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.

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) referred to article 16 and held that '[a]buse and torture are among the practices strictly prohibited in the child protection systems'.⁹ Implied in article 16 is that state parties are required to, among others, criminalise torture by private individuals and non-state actors. Doing so would not be contrary to CAT.¹⁰ It is against that background that the African Children's Committee has recommended that '[t]orture in all forms should be criminalised'.¹¹ This implies that although parents, guardians and school authorities still retain the right to discipline children under their care, this treatment or punishment should not amount to torture, or be inhuman or degrading.¹²

As mentioned above, although CAT prohibits torture and requires state parties to put in place measures to eliminate cruel, inhuman or degrading treatment or punishment,¹³ it does not define or describe what amounts to cruel, inhuman or degrading treatment or punishment. The CAT Committee has explained the difference between torture, on the one hand, and cruel, inhuman or degrading treatment or punishment, on the other. In its General Comment 2¹⁴ the CAT Committee stated that '[i]n comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes'.¹⁵ Unlike CAT, article 17(1)(a) does not prohibit cruel treatment or punishment. However, this does not make any practical difference as degrading or inhuman treatment will invariably be cruel. The prohibition of inhuman and degrading treatment or punishment is not limited to the criminal justice system. It also applies in domestic set-ups and school environments.¹⁶ Therefore, state parties are required to abolish practices such as corporal punishment in homes and

9 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*) para 85.

10 Some states have criminalised torture by public officials and private persons. See, eg, sec 2(1) of the Ugandan Prevention and Prohibition of Torture Act 3 of 2012 which provides that '[i]n this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act'.

11 General Comment 5 on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection' (1 October 2018) para 5.3.1.

12 In its Concluding Observations on the period reports of some African countries, the CRC Committee has called upon states to ensure that chastisement does not violate specific rights. Eg, its Concluding Observations on the Eswatini report, the Committee urged the state party 'to consider narrowing the legal interpretation of "moderate chastisement" so that it excludes corporal punishment, explicitly prohibit corporal punishment in law in all settings and promote positive, non-violent and participatory forms of child-rearing and discipline'. See CRC/C/SWZ/CO/2-4 (CRC 2021) para 37. See also CRC/C/ZAF/CO/2 (CRC 2016) (South Africa) para 36; CRC/C/ERI/CO/4 (CRC 2015) para 38 (Eritrea); CRC/C/NAM/CO/2-3 (CRC 2012) (Namibia) para 38.

13 Art 16 of CAT provides: '1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.'

14 General Comment 2 on the implementation of article 2 by state parties (CAT/C/GC/2) (24 January 2008).

15 General Comment 2 (n 14) para 10.

16 Art 16 African Children's Charter.

schools.¹⁷ For example, in its Concluding Observations on Benin's initial periodic report, the African Children's Committee stated:¹⁸

The Committee notes that, despite the legal prohibition, corporal punishment remains high in the State Party, particularly in the family and school settings. The Committee recommends that the State Party undertakes trainings and sensitizations to families, teachers, and law enforcement officials on prohibition of corporal punishment and on positive disciplining mechanisms. The Committee also encourages the State Party to prosecute teachers and law enforcement officials who inflict abuse while treating and disciplining children. Additionally, the Committee recommends that the State Party empowers children through education about their right to be free from any form of abuse and procedures for reporting corporal punishment and abuse when they occur.

The African Children's Committee has also singled out some of the sentences it considers to be contrary to articles 16(1) and 17(2)(a). These include '[t]he death sentence, life imprisonment, indeterminate sentences and corporal punishment'.¹⁹ Article 5(3) also prohibits the imposition of the sentence of death on children. The African Children's Committee's view that states should not sentence children to life imprisonment and indeterminate sentences is in line with the international law principle that if children are to be deprived of their liberty, that deprivation should be a measure of last resort and for the shortest time possible. In its General Comment 5 the African Children's Committee stated:²⁰

Article 37 of the CRC, which deals with children deprived of their liberty, is only partly accommodated in Article 17 of the African Children's Charter as the principle that where child [*sic*] are deprived of their liberty, this shall be a last resort and for the shortest appropriate period of time, has not been included. Since all States Parties to the African Children's Charter are also State Parties to the CRC, the higher standards on child justice contained in the CRC instrument apply in any event. The 'last resort' and 'shortest period of time' principles entail that strict limitations on deprivation of liberty (pre-trial and as a sentence) should be put in place, and that alternatives to custody must be legislatively enshrined to ensure that custody is used as a last resort.

Life imprisonment means at least two different things in African countries. First, in some countries an offender sentenced to life imprisonment is expected to stay in prison for the rest of their life.²¹ In other words, life imprisonment is an indeterminate sentence. This can be referred to as life imprisonment without the possibility of release. Such an offender can only be released by the President when exercising their prerogative of mercy. However, there are countries in which an offender sentenced to life imprisonment is required to serve a specified number of years before being considered for early release.²² If such an offender meets the requirement(s) for early release, they will be released. In these countries, life imprisonment is a determinate sentence. The African Children's Committee does not explain what is meant by life imprisonment. There are also countries in which courts impose *de facto* life sentences, for example, when an offender is sentenced to a lengthy determinate sentence and there is no

17 General Comment 5 (n 11) para 5.3.1.

18 Concluding Observations and Recommendations of the African Children's Committee on the Initial Report of the Republic of Benin on the Status of the Implementation of the African Children's Charter (30 September 2019) para 23.

19 General Comment 5 (n 11) para 5.3.2.

20 As above.

21 Eg, sec 2 of the Criminal Procedure Code of Seychelles as amended by the Statute Law Revision (Miscellaneous Amendments) (No 2) (Act 49 of 2021) defines 'imprisonment for life' to mean 'imprisonment for the duration of a person's natural life'. See also Guideline 2 of the Ugandan Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 which defines 'imprisonment for life' to mean 'imprisonment for the natural life of an offender'.

22 See, eg, sec 73 of the South African Correctional Services Act 111 of 1998.

possibility that they will be released while still alive.²³ In some African countries such as Zimbabwe,²⁴ Namibia,²⁵ Kenya²⁶ and Mauritius,²⁷ courts have held that life imprisonment without the possibility of release constitutes cruel, inhuman and degrading treatment. It is not clear which of the above two types of life imprisonment was meant by the African Children's Committee. However, its prohibition on both life imprisonment and indeterminate sentences²⁸ creates room for the argument that by life imprisonment, it meant life imprisonment without the possibility of parole or early release. Although the African Children's Committee does not prohibit *de facto* life sentences, the prohibition on such sentences should be inferred from the requirement that imprisonment should be used as a measure of last resort and for the shortest time possible.

2.3 Article 17(2)(b): Separation of children from adults

Article 17(2)(b) requires state parties to 'ensure that children are separated from adults in their place of detention or imprisonment'. Article 17(2)(b) of the African Children's Charter should be contrasted with article 37(c) of CRC, which provides that

[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

There are at least two differences between article 17(2)(b) of the Children's Charter and article 37(c) of CRC. First, article 17(2)(b) is only applicable in two situations – where the child is detained or imprisoned.²⁹ On the other hand, article 37(c) is applicable to all cases in which a child is deprived of their liberty. Second, article 17(2)(b) suggests that there are no circumstances in which a child can be detained with adults. However, under article 37(c) a child can be detained or imprisoned with adults if doing so is in their best interests. In its General Comment 24 the CRC Committee referred to article 37(c) and stated that

[e]very child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37(c) of the Convention – 'unless it is considered in the child's best interests not to do so' – should be interpreted narrowly and the convenience of the state parties should not override best interests. State parties should establish separate facilities for children

23 See, generally, D van Zyl Smit & C Appleton *Life imprisonment: A global human rights analysis* (2019). See also *Moran v Republic of Cabo Verde* ECW/CCJ/APP/ 43 of 2020 [2021] ECOWAS CJ 8 (15 March 2021) where the ECOWAS Community Court of Justice dealt with the issue of *de facto* life imprisonment.

24 *Makoni v Prisons Commissioner & Another* [2016] ZWCC 8.

25 *S v Tcoib* [1996] NASC 1.

26 In *Julius Kitsao Manyeso v Republic* [2023] eKLR (7 July 2023) para 21, the Court of Appeal held that 'an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28'. In the same case, the Court also held that a mandatory life sentence was unconstitutional.

27 *De Boucherville v The State of Mauritius* [2008] UKPC 70.

28 Indeterminate sentences for children include detention at the President's pleasure. See, eg, JD Mujuzi 'Sentencing of children to life imprisonment and/or to be detained at the President's pleasure in Eastern and Southern Africa' (2010) 6 *International Journal of Punishment and Sentencing* 49-61.

29 See also General Comment on article 6 of the African Charter on the Rights and Welfare of the Child: 'Right to Birth Registration, Name and Nationality' (1 October 2014) para 27.

deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.³⁰

The CRC Committee added:³¹

The above rule does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.

Nothing prevents the African Children's Committee or state parties from interpreting article 17(2)(b) as applicable to all instances where a child is deprived of their liberty. Likewise, the Children's Committee could also insist that as a general rule, children should be separated from adults. However, in exceptional circumstances, and in particular when it is in the best interests of children, they could be detained with adults.³² The Children's Committee requires state parties in their periodic reports to, among others, include details on '[w]hether children are separated from adults in their place of detention or imprisonment' and '[t]he number of institutions specifically for children accused of infringing the penal law and the number of children in these institutions'.³³ The report(s) must also include 'the number of children detained in institutions where they are not separated from adults'.³⁴ The African Commission is of the view that for state parties to fulfil their obligation under article 17(2)(b), they have to '[b]uild [a] dedicated juvenile facility or construct separate units for juvenile offenders'.³⁵ A similar obligation is also imposed by the African Youth Charter.³⁶ However, in some countries children are detained in the same facilities as adults but in separate 'sections'.³⁷ Irrespective of which approach is adopted, what matters is that as a general rule children should be separated from adults in places of deprivation of liberty.³⁸ It is against this background that Guideline O(k) of the

30 General Comment 24 (2019) on children's rights in the child justice system (CRC/C/GC/24) (18 September 2019) para 92.

31 General Comment 24 (n 30) para 93.

32 The drafting history of art 37 of CRC is silent on the circumstances in which this exception could be invoked. See Office of the United Nations High Commissioner for Human Rights *Legislative history of the Convention on the Rights of the Child* (2007) 762-769.

33 Working Documents of the African Committee of Experts on the Rights and Welfare of the Child (30 October 2022) 94-95.

34 Working Documents (n 33) 95.

35 Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Republic of Namibia (17 June 2023) para xvi, <https://africanlii.org/akn/aa-au/statement/statement/achpr/2023-06-17/press-statement-at-the-conclusion-of-the-promotion-mission-of-the-african-commission-on-human-and-peoples-rights-to-the-republic-of-namibia/eng@2023-06-17> (accessed 9 January 2024).

36 Art 18(2) of the African Youth Charter (2009) requires state parties to '(b) ensure that accused minors shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status' and to '(c) build rehabilitation facilities for accused and imprisoned youth who are still minors and house them separately from adults'.

37 See, eg, *Dalia Lotfy on behalf Ahmed Bassiouny v Egypt*, No 8/Com/001/2016, inadmissibility decision, May 2017 (non-exhaustion of local remedies) (*Ahmed Bassiouny (Inadmissibility)*) para 12.

38 Rule 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) provides that '[t]he different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus: (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate; (b) Untried prisoners shall be kept separate from convicted prisoners; (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence; (d) Young prisoners shall be kept separate from adults.' See also Rule 112(2) which provides that '[y]oung untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions'.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa³⁹ provides that '[c]hildren who are detained pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults'.

2.4 Article 17(2)(c): The right to a fair trial

Article 17(2)(c) provides for safeguards to ensure that the child's trial is fair. It includes five interdependent rights that must be enjoyed by 'every child who is accused of infringing the penal law'. Strictly interpreted, article 17(2)(c) is only triggered once the child has become an accused, that is, when they have pleaded to an offence. This implies that it does not apply to children who are suspected of having committed offences, otherwise, the drafters of the provision would have stated that 'every child who is suspected or accused of infringing penal law'. However, for the better protection of children, it is more appropriate to interpret some of the provisions (rights) under article 17(2)(c) as applicable to children who have been arrested or detained on suspicion of infringing the penal law even before they become accused (formerly charged or indicted). This is important because some actions or omissions at the time of arrest or during detention can impact on the outcome of the trial. For example, the rights to consult with a lawyer (under article 17(2)(c)(iii)) and to remain silent (under article 17(2)(c)(v)) should be applicable at the time of arrest, after arrest and during detention. This would enable children to consult with their lawyers before deciding whether or not to make any statements that could have a bearing on the outcome of the trial.⁴⁰

Article 17(2)(c) of the African Children's Charter differs from article 40(2)(b) of CRC in many ways. For one to appreciate these differences, it is unavoidable to reproduce article 40(2)(b) of CRC in detail. It states:

Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- (i) to be presumed innocent until proven guilty according to law;
- (ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
- (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- (v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) to have his or her privacy fully respected at all stages of the proceedings.

The differences between articles 17(2)(c) of the African Children's Charter and 40(2)(b) of CRC include the following: First, as mentioned above, article 17(2)(c) is only applicable to children who are 'accused' of having committed offences. On the other hand, article 40(2)(b) is applicable to children

39 African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (29 May 2003).

40 Principle M(2)(f) of the Principles and Guidelines (n 39) provides that '[a]ny person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present'.

who are both alleged to have and accused of having committed offences. Second, unlike article 40(2)(b), which precedes the enumeration of the rights therein with the words ‘at least’, article 17(2)(c) does not include these words. This creates room for the argument that the list of the fair trial rights under article 17(2)(c) is exhaustive, whereas that under article 40(2)(b) is open. Third, article 17(2)(c) is silent on some of the rights that are included in article 40(2)(b). These include the rights to examine witnesses, to review of the decision and to privacy. Four, even in cases where the rights are included in both article 17(2)(c) and 40(2)(b), there are notable differences, as explained below.

Both articles provide for the right to be presumed innocent. However, they are worded differently. Article 17(2)(c) of the African Children’s Charter provides that this right must be guaranteed until the child is ‘duly recognised guilty’. Article 40(2)(b) of CRC is to the effect that a child is presumed innocent ‘until proven guilty’. Implied in article 17(2)(b) of the African Children’s Charter is that a child’s guilt does not always have to be proved by the prosecution. They can plead guilty to the commission of the offence. If that plea of guilt is ‘duly recognised’, then the child is convicted. On the other hand, article 40(2)(b) contemplates a situation where the child’s conviction is only possible after the prosecution has proved that they have an offence. This could explain why in its General Comment on article 40(2)(c), the CRC Committee states that

[t]he presumption of innocence requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence. The child has the benefit of the doubt and is guilty only if the charges have been proved beyond reasonable doubt. Suspicious behaviour on the part of the child should not lead to assumptions of guilt, as it may be due to a lack of understanding of the process, immaturity, fear or other reasons.⁴¹

However, a proper reading of article 17(2)(c) leads to the conclusion that in cases where a child has not pleaded guilty to an offence, the prosecution has a duty to prove their guilt beyond a reasonable doubt. Indeed, this the position of the African Children’s Committee.⁴²

Article 17(2)(c)(iv) provides for, among others, the right to be tried ‘as speedily as possible by an impartial tribunal’. On the other hand, article 40(2)(b) provides for the right to be tried ‘without delay by a competent, independent and impartial authority or judicial body’. Both provisions guarantee the right to be tried within a reasonable time. As the African Court explained, what is reasonable will depend on the circumstances of each case.⁴³ However, article 17(2)(c)(iv) does not require the tribunal or court to be independent and competent. The fact that article 17(2)(c)(iv) is silent on these elements does not mean that state parties are absolved from ensuring that the trial is conducted before an independent, impartial and competent tribunal. This is so because African regional human rights bodies, such as the African Commission⁴⁴ and the African Court⁴⁵ have held that the right to be tried by an independent, impartial and competent tribunal is an integral element of the right to a fair trial. The same view has been echoed not only in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance

41 General Comment 24 (n 30) para 43.

42 The Committee requires state parties in their periodic reports to ‘provide relevant and updated information on the measures taken to ensure children accused or found guilty of a criminal offence are accorded special treatment’. See Working Documents (n 33) 93.

43 In *Mallya v Tanzania* Application 18/2015 [2019] AfCHPR 41 (26 September 2019) para 50, the African Court on Human and Peoples’ Rights relied on the jurisprudence of the Inter-American Court of Human Rights to conclude that ‘three elements should be taken into account to assess reasonableness of time to conclude judicial proceedings. These elements are (a) the complexity of the matter; (b) the procedural activities carried out by the interested party; and (c) the conduct of judicial authorities.’

44 See, eg, *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 27; *Justice Thomas S Masuku v The Kingdom of Swaziland* Communication 444 of 2013 [2021] ACHPR 518 (19 July 2021) paras 146-162.

45 See, eg, *Rajabu & Others v Tanzania* Application 7/2015 [2019] AfCHPR 52 (28 November 2019) para 78; *Kabota v United Republic of Tanzania* Application 32/2017 [2023] AfCHPR 25 (5 September 2023) para 56.

in Africa,⁴⁶ but also by international and regional human rights bodies such as the Human Rights Committee,⁴⁷ the European Court of Human Rights,⁴⁸ the Inter-American Court of Human Rights⁴⁹ and the Inter-American Commission on Human Rights.⁵⁰ This right has also been emphasised in the United Nations (UN)'s Social and Economic Council (Bangalore Principles of Judicial Conduct) (2002).⁵¹

Article 17(2)(c)(v) of the African Children's Charter guarantees the rights against self-incrimination and to remain silent. It requires the prosecution to prove the accused's guilt beyond reasonable doubt. To do so, it has to adduce admissible evidence before court. Thus, evidence that was obtained from the child through violating their rights prior to the commencement of the trial, as a general rule, should be excluded unless the prosecution can convince the court that its admission would not render the child's trial unfair.⁵² Although article 17(2)(c) does not provide for the child's right to call witnesses and examine state witnesses, this right is implied in the right to defence.

With regard to the right to be informed of the charge against them, article 40(2)(b) of CRC requires that the child should be informed 'promptly and directly' of such charges. It also adds that in appropriate cases, the child can be informed of such charges through their parent(s) or guardians. The absence in article 17(2)(c) of the requirement to inform the child 'directly' of the charges against them creates room for the argument that such a child can be informed of the charges indirectly through their parent(s) or guardians. In other words, a proper interpretation of article 17(2)(c) requires states to ensure that a child is either directly or indirectly informed of the charges against them.

3 Article 17(3): Aim of treatment

Article 17(3) provides that '[t]he essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation'. A provision to the same effect (including all the elements) was not included in CRC. Article 40(1) of CRC provides:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth,

46 Principles and Guidelines (n 39) para A (under General Principles Applicable to All Legal Proceedings). For a detailed discussion of this right, see JD Mujuzi 'The accused's right to be tried by a competent, independent and impartial tribunal: The drafting history of article 14(1) of the International Covenant on Civil and Political Rights and how it has been implemented in practice' (2023) 7 *Problemy Prawa Karnego* 1-40.

47 See Human Rights Committee General Comment 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial UN Doc CCPR/C/GC/32 (2007).

48 Guide on article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb) (updated on 31 August 2022) 20-32, https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng (accessed 9 January 2024).

49 In *Apitz Barbera & Others ('First Court of Administrative Disputes') v Venezuela* (Preliminary Objection, Merits, Reparations, and Costs) (Judgment of 5 August 2008, Series Case 182) paras 52-57 the Inter-American Court of Human Rights explains the concepts of a competent, independent and impartial court or tribunal.

50 Inter-American Commission on Human Rights, Corruption and Human Rights, Resolution 1/18 (approved in the city of Bogota, Colombia, during its 167 Period of Sessions, on 2 March 2018) para 1, <https://www.oas.org/en/iachr/decisions/pdf/resolution-1-18-en.pdf> (accessed 7 January 2024).

51 Principles 1 & 2.

52 Principle F(4)(c) of the Principles and Guidelines (n 39) states that '[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice'.

which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The CRC Committee has stated that '[a] strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40(1) of the Convention' and that '[w]eight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society'.⁵³ A provision slightly different from article 17(3) of the African Children's Charter is included in the International Covenant on Civil and Political Rights (ICCPR).⁵⁴ Article 10(3) of the ICCPR provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'⁵⁵

Unlike article 10(3) of ICCPR, which is only applicable after the person has been convicted of an offence, article 17(3) is applicable before and after a child has been convicted of an offence. However, strictly interpreted, it is not applicable before the commencement of the trial. During this period, the state's duty is to ensure that the child is not subjected to torture or inhuman or degrading treatment or punishment (article 17(2)(a) rights). Once the trial has commenced, the state has to ensure that the child's article 17(2)(a) rights are protected and, in addition, ensure that the child is treated in a manner that will lead to their reformation, re-integration into their family and social rehabilitation. The same obligation is imposed on state parties once the child has been convicted of an offence. In the latter situation, state parties implement rehabilitation programmes in prisons (juvenile centres) to ensure that by the time the child offender is released, the three objectives under article 17(3) have been achieved. For a state to comply with its obligation under article 17(3), the child justice system must achieve all the three objectives in respect of each child.

Put differently, article 17(3) has to be read conjunctively. According to article 17(3), the three enumerated aims are not the only aims to be achieved by the child justice system. They are the 'essential' aims. This means that in addition to those three aims, the child justice system can also achieve other aims. This could explain why in its General Comment 5 the African Children's Committee stated that '[l]egislation to give effect to a child justice system ... should ensure that the aim of the juvenile justice system is rehabilitative and restorative, and not retributive only'.⁵⁶ Thus, the child justice system can also be retributive provided that retribution is not the only objective. A combined reading of article 17(3) and the African Children's Committee's General Comment 5 suggests that the child justice system should have at least five aims, namely, reformation, reintegration, social rehabilitation, restorative, and not be purely retributive.⁵⁷ Deterrence (both specific and general) is not mentioned. However, since neither the Children's Charter itself nor the African Children's Committee expressly excludes deterrence, it remains a valid aim of punishment provided that it does not exclude those aims under article 17(3).

53 General Comment 24 (n 30) para 76.

54 International Covenant on Civil and Political Rights (1966).

55 For the drafting history of art 10(3), see JD Mujuzi 'Remission of sentences and the constitutionality of life imprisonment in Seychelles' (2024) 15 *Jurnal HAM* 63-84, 78-80.

56 General Comment 5 (n 11) para 5.3.2.

57 Guideline 28 of the Guidelines on Action for Children in Justice Systems (2012) provides that '[w]herever appropriate and consistent with human rights standards, alternatives to formal adjudication, such as mediation, conciliation, restorative justice practices, and traditional dispute resolution mechanisms, the essential aim of which is the child's reformation, re-integration into his or her family and social rehabilitation, must be promoted'.

4 Conclusion

In this chapter, the author has dealt with article 17 of the African Children's Charter. He demonstrated the differences and similarities between article 17 of the Children's Charter and other international human rights instruments, especially CRC and ICCPR. The author has also suggested ways in which some of the rights under article 17 can be interpreted to better protect the rights of children in the criminal justice system. Article 40(3)(b) of CRC provides that '[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'. The CRC Committee has interpreted this provision as requiring state parties to, among others, adopt 'non-judicial measures' such as diversion.⁵⁸ However, article 17 of the African Children's Charter does not contemplate diversion. That notwithstanding, the African Children's Committee require state parties to include diversion in their criminal justice system.⁵⁹

58 See, eg, CRC/C/EGY/CO/5-6 (CRC 2024) (Egypt) para 47(d); CRC/C/MLI/CO/3-5 (CRC 2024)(Mali) para 48(e); CRC/C/ZAF/CO/3-6 (CRC 2024)(South Africa) para 46(c).

59 See 'Aspiration 8: Children benefit from a child sensitive criminal justice system' which provides that by 2020, states 'should have taken special measures allowing for diversion and restorative justice in respect of children'. Africa's Agenda for Children 2040 (2016) 103, https://www.acerwc.africa/sites/default/files/2022-10/Agenda_2040_for_Children_Rights_in_Africa_8.pdf (accessed 7 January 2024).