

Chapter 20

Article 19

Parental care and children's right to reside with parents

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1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.
3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.
4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

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1 Introduction

Article 19 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for children's rights to non-separation from their parents. It is consistent with the Charter's articulation of the duty of the state to protect the family; the Charter's provisions on the duty of parental care (such as article 20); and the children's right to family protection (article 18). The Charter's aspiration in the Preamble is that every child grows up in a family environment in an atmosphere of happiness, love and understanding.¹ The Charter's default stance is that all children are entitled to care and protection by their parents within a family context.² The overarching theme in the Charter is that

1 African Children's Charter, Preamble.

2 These provisions cumulatively protect children's rights to family life. 'Family' is not synonymous with just parental care by a child's biological parents. In fact, the CRC Committee has interpreted 'family' broadly to include 'biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom'; see CRC Committee General Comment 14: 'The right of the child to have his or her best interests taken as a primary consideration' CRC/C/GC/14, 29 May 2013, para 59. However, the role of biological and other parents is a vital part of children's right to family life.

the family environment, including parental care, is one prerequisite for the optimum development of a child.³

There is no definition of 'parent' under the Charter. A recent African Children's Charter commissioned study on article 19 interprets 'parent' to refer to the person(s) with the legal responsibility to provide emotional, social and physical support to children in order for them to achieve their full potential; the separation of a child from that person may hamper such support.⁴ Parents may include biological, adoptive or foster parents or, where applicable, the members of the extended family.⁵

In the absence of notes on the drafting history or the *travaux préparatoires* of the African Children's Charter, it is worth gleaning the rationale for article 19 of the African Children's Charter from the more documented equivalent rationale for article 9 of the Convention on the Rights of the Child (CRC). Vandenhoe and others discuss that the safeguards in article 9 of CRC were intended to apply when children are separated from parents in cases of abuse and neglect by the parents, when the parents are living separately and beyond.⁶ The implication is that article 9 of CRC applies to diverse long and short-term situations of parental absence.⁷ These include protection for the rights of separated children in state care; abandoned children; runaway or unaccompanied children living or working on the streets; children in hospitals; children of parents in prison; child offenders; children of parents working abroad; children affected by migration or armed conflict; children separated from their parents as a result of traditions and customs; or children who for other reasons are unable to stay in their family environment.⁸

The obligations of article 19 of the African Children's Charter, therefore, are contemporarily relevant to address the resilient problem of children without or at risk of being without parental care and protection.

2 Current relevant context

In Africa, the problem of children separated from their parents or without parental care has become more highlighted and understood with time, considering that the nature and scale of it across Africa had not until recently been studied in great depth.⁹ According to anecdotal statistical research cited in the recent study commissioned by the African Children's Committee, some 35 million children

3 Similarly, art 18(1) of the African Charter on Human and Peoples' Rights provides that 'the family shall be the natural unit and basis of society'. This provision places an obligation on the state to protect the family. In art 29(1) the African Charter provides for the duty of individuals to 'preserve the harmonious development of the family'.

4 See the definition of 'parenting' in African Union and African Children's Committee *Children without parental care* (2023) 3, <https://www.acerwc.africa/en/resources/publications/children-without-parental-care-africa>. (accessed 1 September 2024).

5 As above; CRC Committee General Comment 14 (n 2) para 59.

6 W Vandenhoe and others *A commentary on the United Nations Convention on the Rights of the Child and its Protocols* (2021) 117.

7 As above.

8 Vandenhoe and others (n 6) citing UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2007) 123-127.

9 African Union and African Children's Committee (n 4). This study conducted by the African Children's Committee, between 2020 and 2022, was done in collaboration with 43 countries across all five regions of Africa and involved data collection and analysis from government entities, civil society organisations, leading academicians, child rights advocacy groups, children and young people. It defines the category of children without parental care (CWPC) as including 'abandoned children; double orphans and/or children in child-headed households; children in detention, incarceration, or remand homes; children participating in conflict (child soldiers, abducted girls); children living in residential care settings; children living in institutions; street-connected children or children living on the streets; unaccompanied minors; trafficked children; and children in forced or child marriages' (viii).

were without parental care or were separated from their parents across the continent in late 2023.¹⁰ The study further noted that these children are exposed to various forms of violence, including sexual violence; forced labour; trafficking; natural or man-made disasters; coming into contact with the law; substance and drug abuse; mental health issues; limited access to education; and health care.¹¹

These children's plight requires immediate steps to strengthen protection systems that involve providing better quality of care.¹² This aligns with the global recognition of the risks faced by children without parental care.¹³ In its final 2023 session, the African Children's Committee took the decision to embark on the process of developing a General Comment that elucidates the state obligations regarding children without parental care and protection.¹⁴

3 Links to other human rights treaties

Article 19 of the African Children's Charter closely mirrors article 9 of CRC. While there are noteworthy differences, such as the anchoring of the article on affirmative right to parental care, the shared essence of both is the obligation to ensure non-separation of children from parents and the specific conditions under which separation may be justifiable. For both CRC and the Children's Charter, separation from parents is not the rule but the exception. Article 19 subsequently details the state party obligations that apply if children are separated from their parents.

There are only a handful of treaty provisions in the same mold. Article 24 of the International Covenant on Civil and Political Rights (ICCPR)¹⁵ provides for children's rights to special measures of protection and includes separation from parents where circumstances require.¹⁶ Article 8 of the European Convention on Human Rights (ECHR) provides for the right to private and family life and includes a principled position on non-separation of children from their parents.¹⁷ Article 19 of the American Convention on Human Rights (ACHR) and article 16 of the Additional Protocol to that Convention precludes the separation of very young children from their mothers, except in exceptional judicially-authorised circumstances.¹⁸

The next part of this chapter discusses the concepts, nature and scope of state obligations resting on article 19. This discussion is followed by an analysis of the national implementation of article 19, as reflected in the African Children's Committee's examination of state reports and examples of national

10 African Union and African Children's Committee (n 4) viii, asserting that the study could not authoritatively estimate the total prevalence of CWPC in Africa due to reasons such as differences in how CWPC are defined, limitations in statistical data, and the low response by state parties, UN agencies and civil society organisations to the study's online survey.

11 African Union and African Children's Committee (n 4) viii.

12 As above.

13 UN Guidelines for the Alternative Care of Children, adopted by General Assembly Resolution A/RES/64/142, 24 February 2010, para 4, noting: 'Every child and young person should live in a supportive, protective, and caring environment that promotes his/her full potential. Children with inadequate or no parental care are at special risk of being denied such a nurturing environment.'

14 Communiqué on the 42nd ordinary session of the African Committee of Experts on the Rights and Welfare of the Child, Addis Ababa, Ethiopia, 8-17 November 2023, para 4.14, https://www.acerwc.africa/sites/default/files/2023-12/Communique_42nd%20Ordinary%20Session_ACERWC_English.pdf (accessed 20 December 2023).

15 International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200 A (XXI), 16 December 1966 (ICCPR).

16 J Doek 'The right not to be separated from his or her parents' in A Alen and others (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 19.

17 European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950, 4, XI.

18 Additional Protocol of San Salvador to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – 'Protocol of San Salvador', adopted 17 November 1988.

legal and policy frameworks in part 5. In part 6 the chapter concludes by highlighting the impact of legislative, policy and other reforms and proposes what remains to be done.

4 Links to other Charter articles

4.1 Every child shall be entitled to the enjoyment of parental care and the right to reside with parents

By its reference to 'every child', article 19 applies to all children and not only to some children, such as children of a tender age. Therefore, the article applies to all categories of children, including migrant, foreign or refugee children, as the African Children's Committee has had occasion to consider in one communication involving migrant children in Sudan.¹⁹

It is of note that while the bulk of article 19 mostly concerns children's rights to non-separation from parents, the article is sub-headed as 'parental care and protection' and begins with this reiteration of the right of children to the enjoyment of parental care and protection. This is a significant distinction from article 9 of CRC, which does not expressly include the right to parental care and dives straight into children's right to non-separation from their parents. This distinction has several implications. First, the Charter's articulation of the right to parental care and protection, alongside the right to reside with parents as a prelude to the right to non-separation, reinforces the overall intention of the Charter to centre the role of family and parents in the care and protection of children. This, therefore, means that the right of children not to be separated from parents must be read together with the child's right to parental care and protection in the Charter, which is also expressly provided for under article 20 of the Charter, which deals with parental care, as well as other Charter articles such as article 4(1) on the best interests of the child. This point about a contextual reading of article 19 of the Charter was reinforced by the African Children's Committee in the adjudication of a communication against the government of Sudan.²⁰ In that instance, the Committee dealt with the issue of separation of children from their parents in the context of an alleged violation of the right to nationality.²¹ The Children's Committee considered the right to non-separation in article 19 as part of a consideration whether a claim of a violation of the right to family protection under article 18 of Charter was established, and noted as follows:²²

Violation of the right to protection of the family at least presupposes, among others, existence of unlawful interference in the family either by state actors or non-state actors, dissolution of family because of interference of state or non-state actors, unjustified separation of child from his or her family without considering the best interests of the child.

This articulation of article 19 by the African Children's Committee is notable for how it attributes potential unlawful interference with the family to both state and non-state actors, which in turn makes it clear that the Children's Committee envisages that there can be a violation of children's rights to family protection (article 19) by both state and non-state actors. This premise is also supported by a plain reading of article 19 which opens with a general phrasing of children's rights to parental care and protection.

19 African Children's Committee decision in *African Centre of Justice and Peace Studies and Peoples Legal Aid Centre v Sudan* Communication 5/Com/001/2015, decided May 2018 (*Sudanese Nationality*).

20 As above.

21 As above.

22 Para 100. In paras 101-103 the African Children's Committee did not find a violation of the right to family protection because the risk of the child's deportation by the state, which would have separated her from her mother as her sole surviving parent, at that stage was a risk, rather than a fact.

The African Children's Committee has not only invoked children's rights not to be separated from their parents in expressing concerns around state institutional care (which clearly is a direct state action) but also in the context of practices, such as slavery, which may be attributed to the actions of private individuals and non-state actors.²³ Thus, article 19 of the Charter applies not only in contexts such as alternative institutional care or the child's or parent's detention as a result of the direct action of conduct of state actors, but also in situations that involve the conduct of non-state actors, including divorce proceedings.²⁴

The application of article 19 beyond state action may be contrasted with the corresponding CRC's article 9, which does not reiterate the right to parental care as a prelude to the right to non-separation. Article 9 of CRC has been interpreted by legal experts as being state-centric, in the sense that its scope and purview of the nature of legal obligations do not to extend to non-state actors.²⁵ In this sense, article 19's remit of protection is broader than that of CRC and complements other Charter provisions that seek to protect children from forced separation from their parents, whether by the state, the parents or other non-state or private actors.²⁶

4.2 Presumption against separation

In the circumstances when it is not possible for children to live with their parents, article 19 allows that children may be separated from the parents, as a last resort, where there are no other alternatives, such as when a child is in imminent danger.²⁷ The Charter envisages instances of separation. For example, article 25(2) of the Charter (discussed in chapter 26 of this volume) explicitly provides that a child 'who in his or her best interest cannot be brought up or allowed to remain in [the family] environment' shall be provided with alternative family care, which could include foster placement, or placement in suitable institutions for the care of children. However, as a first step, article 19 requires that a separation is contingent upon three factors: the consideration of the children's will or views; the determination of a judicial authority in accordance with an appropriate law; and consideration of what is in the best interests of the child.

Regarding the question of will, the wording of article 19 makes it clear that it is the children's views rather than those of the parents that are of primary relevance in the determination of the decision on separation. Article 19's primary focus on children's views as opposed to those of the parents is a marked difference to the article 9 wording of CRC, which deploys the word 'their will' which has in turn been interpreted to refer to the will or views of parents and children's considered together rather than sole

23 The African Children's Committee addresses concerns on state institutional care in nearly all the state reports it considers. Regarding concerns about slavery and slave-like practices, see Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the initial report of Mauritania, para 33 where the African Children's Committee 'notes with concern, the separation of children from their families in instances of slavery or slave-like practices'.

24 Vandenhoe and others (n 6) 122, explaining that divorce is an example of unavoidable separation between parents and children and generally is not the result of an (in)action on behalf of the state, and thus not within the purview of art 9 of CRC.

25 See J Tobin & J Cashmore 'Art 9. The right not to be separated from parents' in J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 313, pointing out that nothing in the drafting history of CRC suggests the application of art 9 to non-state actors, that most of the article is preoccupied with the standards and procedures that regulate state removal of a child from his or her parents; other CRC articles such as on parental abduction or child trafficking (arts 11 and 35) are better suited to offering protection for children from separation from one or both of their parents.

26 This is in line with General Comment 14 (n 2) para 67, which articulates the need to consider a child's best interests regarding maintenance of contact and a relationship with the parents in all actions whether by public officials or parents and other private actors.

27 In the words of the CRC Committee in General Comment 14 (n 2) para 61.

or exclusive consideration of children's will.²⁸ For the Charter obligation, the decision to separate children from their parents is to be made by a judicial authority, primarily taking into account only the child's will or views alone in tandem with what is in the best interests of the child. While in practice it is likely that the parents' views would be a relevant and even weighty factor in this consideration, primary consideration is to the child's views alongside the child's best interests rather than a default to the consideration of the views of the parents. The emphasis on children's views also reinforces article 7 of the Charter (see chapter 8 of this volume) which requires that every child is assured the right to express his or her opinions.²⁹

The African Children's Committee has thus far not had occasion to flesh out in detail how the best interests of the child apply in the context of a decision to separate children from their parents in the context of article 19.³⁰ Therefore, guidance may be sought from other comparative sources, particularly the views of the CRC Committee and the United Nations (UN) Guidelines for the Alternative Care of Children (UN Guidelines).³¹ The CRC Committee notes that it is 'indispensable' to carry out the assessment and determination of the child's best interests in the context of a potential separation of the child from parents.³² The UN Guidelines provide that a decision on providing care that is alternative to parental care should be rigorously made on a 'case-by-case' basis, involving an evaluation or assessment by a multidisciplinary team of 'suitably qualified professionals' within structures and mechanisms that allow for assessment, planning and review of such decisions.³³ A commentary regarding the implementation of these UN Guidelines further explains that a consideration of children's best interests should take into account a set of factors, such as³⁴

- the child's own freely-expressed opinions and wishes consistent with children's rights to participate in decisions affecting them;
- the views and capacities of the child's family members (parents, siblings, and other interested parties as well as the level of risk associated with the child's current and potential alternative living arrangements);
- the likely effects of separation of a child from their parents and the potential for family reintegration, including any special developmental needs the child may have;
- any other appropriate factors such as the child's ethnic, religious, cultural or linguistic background.

The third set of criteria that applies to decisions on separation, under article 19 of the Children's Charter, is the reference to an 'appropriate law' and the article's exclusive vesting of the separation decision to a 'judicial authority'. This requires that such a decision is made by a court of law or institution with judicial authority, rather than by administrative or non-judicial institutions. This

28 Tobin & Cashmore (n 25) 314, citing Doek (n 16) 21-22, opining that 'from the drafting history it is clear that it refers to the will of the parents, but it can equally refer to the will of both the parents and the child'.

29 African Children's Charter art 7.

30 The African Children's Committee, however, has provided some guidance to state parties in the context of art 30 which deals with children of incarcerated parents and care givers. See General Comment 1 (article 30 of the African Children's Charter) on 'Children of incarcerated and imprisoned parents and primary caregivers' (2013) para 54, noting that under art 30(d), states must ensure that a 'mother shall not be imprisoned with her child' in reflection of the importance placed in the Charter for children to grow up in a family environment. At para 55 the Committee recommends, however, that 'when it is decided that it is in children's best interests to live in prison with their mothers then State Parties have the same obligations to respect, protect and fulfil their rights as they do to any other child'. The Committee adds that several safeguards would be required including children's nutritional needs encompassing breastfeeding for children of tender years and regular assessments and monitoring of the conditions and suitability of the living environment to ensure that these are in the child's best interests.

31 General Comment 14 (n 2) paras 58-70 (preservation of the family environment and maintaining relations); UN Guidelines (n 13).

32 General Comment 14 (n 2) para 58.

33 UN Guidelines (n 13) para 57.

34 N Cantwell and others *Moving forward: Implementing the Guidelines for the Alternative Care of Children* (2012) 25, cited in Tobin & Cashmore (n 25) 321.

African Children's Charter requirement is a point of difference from article 9(1) of CRC which vests this decision in 'competent authorities', which may be interpreted to include judicial or administrative institutions and systems, even if CRC provides for judicial review of a separation decision.³⁵ Moreover, the African Children's Committee has emphasised, such as in a recent recommendation to Ethiopia, the need for expert evidentiary-based procedures to help judicial authorities come to decisions on the need for and viability of separation of children as a measure of last resort.³⁶

The African Children's Committee has also more broadly considered the plight of children separated from their parents and the necessary remedial action. It has emphasised that states should prioritise family reunification of children separated from their parents or families by taking steps to ensure that alternative care in a family setting is exhausted, including the deployment of foster care, before a child is placed in institutional care.^{37 38 39 40} The Committee expects a systematised procedure that involves family tracing, an assessment of the separated child and reunification with the parents or family considering the best interests of the child.⁴¹

The Committee considers the placement of children in institutional care, under regular review, as an option where the parents cannot be retraced, and where family reintegration is not possible.⁴² Even in the event of such justified separation, the African Children's Committee has emphasised the obligation of states to ensure reunification of separated children with their parents and families.⁴³ It recommends that children being reunited with parents and families from institutions should have access to programmes that empower them with the necessary skills to fully reintegrate.⁴⁴

The African Children's Committee has adopted the position that separation should be deemed a last resort where less intrusive measures are not possible. This aligns with the overall approach of the CRC Committee in articulating the purpose of article 9 of CRC, even if the scope of article 19 of the African

35 CRC art 9(1).

36 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the first periodic report of Ethiopia (2022) para 20, recommending that the state party takes separation of children as a last resort and trains social workers and other professionals who can determine the separation, reunification, and reintegration of children.

37 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial report of Algeria (2015) para 26.

38 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial report of Angola (2017) para 29.

39 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial report of Congo Republic (2015) para 29.

40 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial report of Eswatini (2019) para 29, where the Committee urges Eswatini to de-institutionalise and reduce the numbers of children in residential care by placing them into foster care and kinship care.

41 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the second periodic report of Rwanda (2019) para 28.

42 Concluding Observations by the African Committee of Experts on the Rights and Welfare of the Child on the initial report of Namibia (2015) para 29.

43 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the initial report of Gabon (2015) para 29, where the Committee recommends Gabon to implement child tracking and reunification system for children separated from their families; Concluding Observations on Ethiopia (n 36) para 21, where the Committee states that it 'notes that in cases where children are separated from either or both of their parents, there are several alternative procedures which the State Party utilises in addition to reunification'.

44 Concluding Observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the second periodic report of Kenya (2020) para 38.

Children's Charter obligations are more expansively worded compared to article 9 of CRC.⁴⁵ The CRC Committee's words regarding CRC's article 9 obligations, which can be said to apply to article 19 of the African Children's Charter, are the following:⁴⁶

Before resorting to separation, the state should provide support to the parents in assuming their parental responsibilities and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons [or grounds such as disability] cannot be a justification for separating a child from his or her parents ... Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care ... but should be seen as a signal for the need to provide appropriate support to the family.

4.3 Maintenance of personal relations and direct contact between the child and parents

The use of the verb 'shall' in this sub-article denotes that the state has an obligation to ensure that a separated child is able to maintain personal relations and contact with the parents. Also, compared with the equivalent provision in article 9 of CRC,⁴⁷ which is specifically worded on the duty of state to 'respect', the nature of obligations in the African Children's Charter include not only the duty to respect (which requires the state to refrain from infringing on children's rights to maintain relations and contact) but also other typical duties that apply in human rights law, namely, the duty to fulfil (which entails the state taking steps to ensure that this right is enjoyed or exercised by children), and the duty to protect (which entails the state taking steps to ensure that all actors – state and non-state – do not constrain the exercise of this right).

This expansive reading of the obligations of the state aligns with the previous discussion about article 19 of the Children's Charter applying to both state and non-state actors in ways that article 9 of CRC does not. Beyond the differences in approach, however, the import of the African Children's Charter's article 19 on the right of children to maintain relations and contact with their parents is similar to the CRC in that the intention is to preserve children's contact with their parents in the event of temporary or permanent separation. For a child separated from parents, maintaining relations and regular contact is a key factor for the prospects of the child's reintegration and eventually enabling parental care and protection.⁴⁸

The wording of the obligation for children to maintain 'personal relations' and 'direct contact' with the parents on a 'regular basis' denotes that states should take steps to ensure that children separated from their parents are reasonably able to maintain regular contact in person or through correspondence. A commentary on the equivalent article in CRC makes the point that states should be guided by the 'closeness principle', which stipulates that children should not be required to travel a

45 Vandenhoe and others (n 6) 118 write that CRC considers 'separation a temporary measure, that is it is to be discontinued as soon as circumstances permit, with the ultimate aim of family reunion'. The authors further explain how separation may be permissible in exceptional circumstances as has been considered in the European context in cases where parents persistently refused to take their child to school and in instances of persistent physical abuse.

46 General Comment 14 (n 2) paras 61, 62 & 63, citing the UN Guidelines (n 13) para 15. Similarly, the UN Guidelines articulate in para 32 that '[s]tates should pursue policies that ensure support for families in meeting their responsibilities towards the child and promote the right of the child to have a relationship with both parents'. Emphasis reworded. Art 23(4) of the UN Convention on the Rights of Persons with Disabilities provides that '[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents'.

47 Art 9(3) of CRC: 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

48 UN Guidelines (n 13) para 3, providing that the family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members.

long distance to enable contact with their parents.⁴⁹ The beneficiary of this right is the child and not the parents, thus upending decades old historical legal approaches whereby access or contact was a basic right of any parent.⁵⁰ This also aligns with contemporary research which reveals that in the event of separation, such as during divorce or alternative care arrangements, children generally want contact with both parents, and often more contact than what they have.⁵¹

Considering the unique communal and extended context of the family unit in Africa, this right of children to maintain relations and contact may be reasonably interpreted to apply not only to the child's biological or adopted parents, but to other members of the family and care givers. The recently completed African Children's Committee-commissioned study notes how, in the African context, parenting is a caregiving responsibility that is not limited to biological parents but extends to a greater network of relations, which includes uncles, aunts, grandparents, cousins and others.⁵² This African Children's Committee study discusses general gaps in legal frameworks to ensure that children's rights to parental care and protection is upheld, including with regard to child-headed households in Africa, which is prevalent despite a lack of accurate estimates.⁵³ It makes wide-ranging recommendations to ensure, among others, recognition for the reality that many children are cared for within African family kinship structures despite the dilution, of migration, urbanisation, and Western influence on this idea of an extended family network.⁵⁴

4.4 Obligation of the state to provide essential information

Article 19(3) details instances where separation results from state action in contrast to separation that may result from private acts or conduct, such as divorce between parents. The Children's Charter does not list examples or instances of state action that may result in separation. Potential instances of separation occasioned by the state action may be drawn from the corresponding CRC provision that expressly lists such cases in a non-exhaustive manner and includes instances of detention, imprisonment, exile, deportation, or death of either or both parents or of the child.⁵⁵ The scope of this sub-article in regard to separation applies to a child's separation from the parents or, where relevant, a family member, who may presumably be in parental relationship with the child.

The state obligation under article 19(3) is to provide 'essential information' about the whereabouts of the family member(s) whose separation from the child occurs because of state conduct. Commenting on the equivalent CRC provision, Doek explains that, given the purpose of maintaining the child's connection with the parents and family members, at the very least, 'essential information' should be interpreted to include the address or location of the child, parent or family member and the possibility of visitation or contact between the child and the parent or family member.⁵⁶

49 Tobin & Cashmore (n 25) 329.

50 As above.

51 Tobin & Cashmore (n 25) 330, citing, among others, JB Kelly 'Paternal involvement and child and adolescent adjustment after separation and divorce: Current research and implications for policy and practice' (2014) *International Family Law Policy and Practice* 2. Tobin & Cashmore further explain that while children may also not want contact with either or both parents, and that those views of children are to be considered, the views may eventually be disregarded in the circumstances where the best interests of the child necessitate maintenance of contact and relations between the child and parents, including where separation is caused by armed conflict, natural disasters, or other intervening factors.

52 African Children's Committee study (n 4) 3-4.

53 African Children's Committee study (n 4) 2, 16-22.

54 As above.

55 CRC art 9(4).

56 Doek (n 16) 30, also citing art 37(c) of CRC which provides every child deprived of liberty the right to maintain contact with her/his family through correspondence and visits.

The beneficiary of this right to information is both the affected child and, where relevant, an appropriate family member. As discussed in the previous part, an appropriate family member should be read to include extended family such as uncles, aunts, grandparents, cousins, and others who may have parenting responsibility and relationship with the child.⁵⁷

The first sentence of article 19(3) of the Charter provision does not make this right and obligation to provide information contingent on a request by the child or appropriate family member compared to the equivalent CRC article which includes the wording 'the state party shall, upon request, provide the parents, the child or, if appropriate, another member of the family'.⁵⁸ While this may be interpreted to mean that the obligation of the state to provide information on the whereabouts of a family member is automatic upon the fact of separation, and without a request, the second sentence of article 19(3) of the Charter debunks this reading by its reference to the 'submission of a request' for such information. Therefore, the Charter obligation of states is analogous to that in CRC in requiring that there is a request for information for the state to provide the same. The state has an additional obligation in article 19(3) of the Charter to ensure that the submission of a request for information does not entail adverse consequences for the person in whose respect it is made. For CRC, legal experts have interpreted this to prohibit the state or its officials from taking any reprisal, punishment, or retaliatory measures in relation to the exercise of this right.⁵⁹

4.5 Obligation to notify parent or guardian where a child is apprehended

Article 19(4) requires states to notify the parents or guardians as soon as possible if the child is arrested and placed in custody. In this sense, the Charter provides an additional obligation for the state to inform a child's parents or guardians in the event of a child's apprehension or detention. In contrast to article 19(3), the obligation here is to be executed by the state 'as soon as possible' upon the child's arrest or placement into custody. It is not contingent upon a request being made by the parent or guardian for information about the arrest, apprehension, or detention. While this article 19(4) provision is not contained in CRC, it mirrors those of earlier normative instruments that provide protection for the rights of children who may be caught up in the criminal justice system or placed in state detention. An example is contained in the UN Minimum Rules for the Administration of Juvenile Justice, which requires that '[u]pon the apprehension of a juvenile his or her parents or guardian shall be immediately notified of such apprehension and where such immediate notification is not possible the parents or guardian shall be notified within the shortest possible time thereafter'.⁶⁰

The underlying rationale for this obligation is in keeping with the overall premise of article 19 to preserve and enable the child's right to parental care and protection even in instances where the child is apprehended and detained.

5 Insight from state practice and national domestication and implementation

The African Children's Committee's consideration of state reports and its communication procedure have not explicitly dealt with article 19 obligations. This may partly be because states have consistently not provided information or statistics before the Committee that reveal and delve into more detail

⁵⁷ African Children's Committee (n 4) 3-4.

⁵⁸ CRC art 9(4).

⁵⁹ See eg Tobin & Cashmore (n 25) 339; Doek (n 14) 30.

⁶⁰ UNGA United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 29 November 1985 A/Res/40/33, Rule 10.1.

into the issue of children separated from their parents and how they deal with it.⁶¹ The dearth of information appears to have motivated the Committee to undertake an African-wide study that has been referred to throughout this chapter.⁶²

For the majority part of the Children's Committee's consideration of state reports, it has dealt with and provided general guidance related to several obligations under article 19. For starters, it has noted how the common contexts of poverty, unemployment, forced displacement and HIV lead to the abandonment and separation of children from their parents and families.⁶³ It has recently noted how this vulnerability of families was worsened by the COVID-19 pandemic.⁶⁴ In mitigation, the Committee has called for the obligation of states to put in place legal and policy measures that preserve children's rights to care and protection within a family environment. On legal measures, it has appreciated constitutional provisions that explicitly protect this right⁶⁵ and made recommendations for specific legislation that criminalises and provides civil liability for child abandonment, among others, such as in its recommendation to Angola.⁶⁶

Overall, the Committee has emphasised extra-legal measures that encompass an obligation under the Charter, which require states to put in place positive measures to support parents and families to care for children.⁶⁷ For example, when considering Ethiopia's report, the Committee welcomed the establishment of safety net programmes which include cash and food transfer schemes to support poor families. At the same time, the Committee was concerned that 'families still struggle financially due to poverty' and, hence, the number of children at risk of losing the family environment is higher.⁶⁸ It recommended that the Ethiopian government expands its safety net programmes to cover more families; to promote child sponsorship programmes and increase poverty alleviation programmes.⁶⁹ Such measures should ensure families' economic and social well-being through job creation and programmes for family support.⁷⁰

Therefore, faced with a state reporting procedure that has been devoid of a detailed interrogation of the incidence and magnitude of children separated from their families, the African Children's Committee's overarching approach and consistent recommendations coalesce around the obligation of states to take the full breadth of steps or measures that prevent the separation of children from their parents and families.⁷¹

61 See eg Concluding Observations on the second periodic report of Kenya (n 44) para 39, urging Kenya to collect disaggregated data on the number of children in institutional care to inform interventions. Similarly, in the Concluding Observations on Eswatini (n 40) para 11, it notes with concern that 10 to 15% of families in the country are child headed but there is a lack of specific disaggregated data on child-headed households. Concluding Observations on the initial report of Mauritania (2019) para 33 recommends that the state party conducts surveys and collects data on the prevalence of child separation, abduction and trafficking due to slavery.

62 See study (n 4).

63 Concluding Observations on the initial report of Angola (n 37) para 29. See also Concluding Observations on the initial report on Eswatini para 29 on HIV as a specific vulnerability to families in Eswatini.

64 Concluding Observations on the second periodic report of Kenya (n 44) para 38.

65 Concluding Observations on the first periodic report of Senegal (2019) para 54, which notes that art 17 of the Senegalese Constitution provides for family rights and family protection.

66 See Concluding Observations on the initial report of Angola para 29: 'The Committee encourages the government of Angola to take measures against parents who abandon children and those who fail to pay maintenance fee.'

67 As above.

68 Concluding Observations on the first periodic report on Ethiopia (n 36) para 19.

69 Concluding Observations on the first periodic report on Ethiopia (n 36) para 20.

70 Concluding Observations on the initial report of Angola (n 37) para 29.

71 See eg Concluding Observations on the second periodic report of Kenya (n 44) para 38; also Concluding Observations on the initial report of Angola (n 37) para 29, where the state party is urged to strengthen its efforts to prevent the deprivation of family environment for children.

6 Conclusion

Article 19 reinforces the obligation of states under article 9 of CRC to ensure that children are not separated from parents and their families, unless such separation is a measure of last resort and in exceptional circumstances that are in the best interests of the child and where separation is unavoidable. The African Children's Charter bolsters this obligation by reiterating the right of children to parental care and protection and making it clear that the presumption against separation applies to state or public and non-state or private action. The Charter's application to both private and public conduct is particularly relevant in the African context where the African Children's Committee has consistently observed, through the state reporting procedure, how children are separated from their families due to a wide set of factors linked to the socio-economic and political environment that include poverty and migration. The Children's Committee has regularly recommended to states to take legislative, administrative and policy measures, including implementation of comprehensive social welfare programmes. There is more to be done by states on both the legal and policy fronts. The continental study cited earlier in this chapter established that there were legal gaps across the continent: 60 per cent of East African countries have explicit child-related laws that provide for protection and care mechanisms and procedures for children without parental care, while in West Africa, Central Africa and North Africa, this was less than 50 per cent of countries and 40 per cent for West Africa.⁷² Overall, up to 70 per cent of African countries lacked explicit comprehensive policies, beyond the legal frameworks, to deal with children without parental care.⁷³

In the event of separation, the article centres the need for judicial determination of separation, mandates primary consideration of the views of the child and details procedural safeguards, such as notification of children and their families if separation occurs or is resorted to. Moreover, for children in certain circumstances such as children in institutional care, reintegration or reunification with the family should be the primary goal. The process of separation and reintegration should involve assessment procedures that involve consideration of expert assessments on the child's best interests. With these safeguards, article 19, just like article 9 of CRC, seeks to strike a balance that leans in favour of giving autonomy to the child's best interests within the goal of protection from the vulnerability of losing parental care. In this sense, it disavows pre-children rights' exclusively welfarist conceptions of childhood in which children's interests were determined or subsumed in the interests of parents and other adults, often to the detriment of children. However, the overall intention is not to pit the rights of children against those of the parents but rather to construe a relationship between rights through which the enjoyment of a child's rights is intimately connected to the relationships that children have with their parents, and the children's rights to care and protection within those relationships.⁷⁴

⁷² African Children's Committee study (n 4) ix.

⁷³ As above.

⁷⁴ Tobin & Cashmore (n 25) 340-341.