

Chapter 3

Article 2

Definition of a child

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For the purposes of this Charter, a child means every human being below the age of 18 years.

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1 Introduction

Article 2 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) is one of the most important provisions of the treaty as it defines the subject to which the rights and duties enshrined in it apply. One needs a definition of the subject to which children's rights and duties apply because without the subject, these rights and duties have neither meaning nor relevance. As Van Bueren has argued, 'the definition of childhood in international law is critical because it determines which specific rights attach to the status of childhood and which legal remedies are available to children as a class'.¹ Once the subject is defined, children's rights can and should be applied to, and implemented for, all qualifying children consistently and equally without any form of discrimination.

Yet, the question of who a child is has always been a fraught one partly because conceptions of childhood, including the markers for the beginning and end of childhood, and general characteristics of childhood vary from one society to the next and from one generation to the other.² Definitional problems relate not only to the beginning and the end of childhood, but also relate to specific issues for which a child could be deemed mature enough to make rational choices. Furthermore, while the term 'child' is a universal category, development patterns and capabilities of children vary widely depending on various factors, making it difficult to render a generally-acceptable definition for all.

However, there is general agreement that the entire spectrum of childhood, however defined, encompasses phases of mental and physical immaturity, learning and experimentation, evolving capacities, vulnerability, special needs, and inestimable potentiality. Archard defines childhood as

¹ G van Bueren *The international law on the rights of the child* (1995) 32.

² See eg J Fionda 'Legal concepts of childhood: An introduction' in J Fionda (ed) *Legal concepts of childhood* (2001) 3-17; C Heywood *A history of childhood* (2002).

‘that which lacks the capacities, skills and powers of adulthood’.³ This definition largely considers childhood as a deficit and presupposes a transitory state of being that is not yet full or complete as if adulthood itself is not also transitory or not always in flux. Hence, it fails to recognise that childhood designates a state of being for its own sake and not for the sake of others (such as parents) or another yet to be (future adult).

In any case, a lack of the skills or capacities associated with adulthood is not a valid reason for denying rights to children. As proclaimed by the 1959 Declaration of the Rights of the Child,⁴ ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.⁵ This approach is reflected in the African Children’s Charter which proclaims that ‘on account of the child’s physical and mental immaturity, the child needs special safeguards and care’,⁶ and that ‘the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security’.⁷ Indeed, for the African Children’s Charter, children have rights by virtue of being human. This is why its Preamble starts by recognising

the paramountcy of human rights and the African Charter on Human and Peoples’ Rights proclaimed and [agreed] that everyone is entitled to all the rights and freedoms recognised and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The challenge for any legal instrument, hence, lies in recognising the universal category of childhood and the variabilities that make it possible for children to be recognised as autonomous and worthy members of society.⁸

This chapter focuses on the definition of childhood adopted by the African Children’s Charter. It begins by commenting on the factors that need to be considered in defining childhood before proceeding to discussing the general definition, focusing in particular on the beginning and end of childhood. This will be followed by a discussion of specific themes and the minimum ages of capacity for certain actions that attach to them.

3 D Archard *Children: Rights and childhood* (2015) 43.

4 Adopted by the UN General Assembly on 20 November 1959, Resolution 1386 (XIV).

5 See Preamble. See also the Preamble to CRC, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), adopted on 20 November 1989, entered into force 2 September 1990.

6 See Preamble.

7 As above.

8 The issue of age discrimination was at stake in the recent communication in the *African Centre for Justice and Peace Studies on behalf of Ms Umjumah Osman Mohamed v Sudan* No 16/Com/004/2020 (*Sudanese Rape/Adultery*) case because the High Court of Sudan had overturned the decision of the previous courts and issued an acquittal in the case of rape on grounds that the victim was not a child in accordance with the definition in art 3 of the Sudanese Criminal Act 1991, which states that an adult is a person whose puberty has been established by definite natural features and has completed 15 years of age, and provides that whoever attains 18 years of age is an adult even if the features of puberty do not appear. The victim alleged that the Court used an ambiguous determination of childhood as ‘attainment of puberty’ in accordance with art 3 of Sudan’s Criminal Act 1991 to rule that she was not a child. The definition of a child was also the subject matter of *Institute for Human Rights and Development in Africa (IHRDA) v Malawi* No 4/Com/001/2014 (*Malawian Amicable Settlement*), discussed in more detail in chapter 34 of this volume.

2 Relevant considerations

In defining childhood, there are important conceptual and legal considerations that must be borne in mind. Although we discuss these separately, we recognise that there are significant overlaps between them.

2.1 Conceptual considerations

Legal definitions of childhood often reflect social constructions of childhood and child development and the broader vision of society in which children find their place and fulfilment. The African Children's Charter invites us to consider such social conceptions and the circumstances in which children are born and raised in interpreting the rights and welfare of the child. In its Preamble, it takes note of 'the situation of most African children, [which] remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances' and asserts that 'the virtues of their cultural heritage, historical background and the values of the African civilisation ... should inspire and characterise their reflection on the concept of the rights and welfare of the child'.

Various conceptions of childhood have evolved and been recognised at different times and by different societies.⁹ For example, some currents of Western developmental psychology consider childhood as a linear development process; a period of innocence, dependence, play and learning, during which children need care, love and nurturing and protection from the demands of responsibility.¹⁰ This conception seems to correspond to that endorsed by the Convention on the Rights of the Child (CRC) Committee in General Comment 7:¹¹

A shift away from traditional beliefs that regard early childhood as a period of socialisation of the immature human being towards mature adult status is required. The Convention requires that children, including the very youngest children, are respected as persons in their own right. Young children should be recognised as active members of families, communities and societies, with their own concerns, interests and points of view. For the exercise of their rights, young children have particular requirements for physical nurturance, emotional care and sensitive guidance, as well as for time and space for social play, exploration and learning.

The conception of childhood presented above differs markedly from that attributed to some African societies. According to Rwezaura, '[c]hildhood has always been viewed in Africa as the time to learn, to build a character and to acquire the social and technical skills necessary to perform the future roles of adulthood'.¹² This conception sees childhood as a period during which children are not only 'trained in production techniques', but is also a period during which the child is 'taught good manners and encouraged to develop a character and good personality', to play an 'economic and social role ... in the family and in the wider community', including to 'represent lineage continuity and the material survival of families and the community at large'.¹³

9 See eg W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in East and Southern Africa* (1998) 11-27; A Skolnick 'The limits of childhood: Conceptions of child development and social context' (1975) 39 *Law and Contemporary Problems* 38-77; AR Appell 'Accommodating childhood' (2013) 19 *Cardozo Journal of Law and Gender* 715-779; JL Dolgin 'The age of autonomy: Reconceptualisations of childhood' (1999) 18 *Quinnipiac Law Review* 421-450.

10 See eg DJ Welsh 'Developmental theory and early childhood education: Necessary but not sufficient' in N Yelland (ed) *Critical issues in early childhood education* (2005) 40, 41-43.

11 CRC General Comment 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, 20 September 2006 para 5.

12 B Rwezaura 'Competing "images" of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253, 255.

13 Rwezaura (n 12) 256.

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has recognised and accepted that the way childhood is conceptualised in Africa is unique. It has stated, for example:¹⁴

Childhood in the African context is not understood as a period of total dependence in the sense that children are expected to progressively assume responsibilities towards the family or household from an age or time when the child could function independently. Children are expected to take part in productive activities for the sustenance of the family, such being viewed as an opportunity to learn, grow and develop the capacity to assume greater responsibilities in the larger society. Thus, children taking responsibility for aspects of family and communal life is considered to be an element of the care and protection of children.

All conceptions of childhood and child development are highly contested. Despite these contestations, the literature shows at the very least that childhood and child development are not exclusively biological processes, but are also shaped by the social environment in which children are raised.¹⁵ Thus, what may appear to be normal treatment of children of a particular age may actually not be universal for all children of that age and for all time. Also noteworthy is that, irrespective of the varied contexts in which they live, children share certain features, such as their reduced or lack of thinking capacity and physical underdevelopment, their dependence on parents or others for their upbringing, and their need for nurture, care, love, support and protection.¹⁶

Although social conceptions of childhood are important, some of these may operate to undermine the autonomy and physical and mental development of the child. For example, the African conception of childhood described by Rwezaura could lead to policy makers emphasising the role of children to contribute to the socio-economic well-being of their families and societies through work and participation in family and community affairs and learning by apprenticeship at the expense of aspects of children's rights concerning protection and formal education.¹⁷ By contrast, the development theory of childhood described earlier could curtail child involvement in work or reduce children's role in family and social affairs while emphasising protective and provision dimensions of children's rights.

Recognising these risks, the African Children's Committee has cautioned that African conceptions¹⁸ of childhood should not be interpreted to justify imposing undue responsibilities on children, or cultural practices that discriminate against some children or constitute child abuse or exploitation. It has thus clarified that '[w]hile recognising the role of the child in contributing towards the advancement of his or her family environment (including in alternative care) in various ways ... whatever responsibilities are expected of a child ... shall not be interpreted in a way that precludes the child from enjoying his or her rights as provided in the Charter',¹⁹ and that 'no state party is permitted to place an obligation

14 African Children's Committee General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on 'The responsibilities of the child' (2017) para 28.

15 See Archard (n 3) 31, arguing: 'Rather than present childhood as either a natural kind or a social kind term, as being defined either by biology or social facts, it makes better sense to understand it as a hybrid of both.'

16 See CRC General Comment 7 (n 11) para 6.

17 Indeed, Rwezaura shows how 'the traditional view of childhood has led, under modern conditions, to the exposure of children to various forms of abuse and exploitation'. See Rwezaura (n 12) 260.

18 Imoh and others have stressed the importance of illuminating 'the multiplicity or the plurality of childhood experiences on the continent' in order to 'facilitate the process of moving beyond a one-dimensional understanding of childhoods and children's lives in the region'. See AT Imoh, PM Tetteh & GY Oduro 'Searching for the everyday in African childhoods: Introduction' (2022) 10 *Journal of the British Academy* 1-11.

19 African Children's Committee General Comment on Article 31 (n 14) para 32.

on children to undertake work that would amount to child labour in the guise of “responsibilities”²⁰ or ‘to impose on children responsibilities that perpetuate any of the harmful and exploitative practices’.²¹

2.2 Legal considerations

The African Children’s Committee has endorsed the view that children’s rights in the African Children’s Charter are underpinned by, and must be interpreted in the light of, four principles, namely, non-discrimination; the best interests of the child; child participation; and the right to life, survival and development.²² These principles are important because they reflect the multifaceted nature, indivisibility and interrelatedness of all children’s rights, interests and needs. They also serve as anchors to four broad domains of children’s rights: protection, prevention, provision and participation.²³ Although they reinforce and complement one another, these domains often also work in binary opposition. For example, protection rights and measures often operate to limit the participation rights of children, while participation rights can jeopardise the fulfilment of the provision rights. The general definition of childhood must thus aim to ensure that children are guaranteed the broadest possible spectrum of rights without exposing them to circumstances that limit their life, survival and development. In turn, theme-specific definitions must similarly be couched in a way that best reconciles the demands of protection, prevention, provision and participation.

The four principles have much to offer by way of a framework for crafting appropriate general and specific definitions of childhood. For example, described by the African Children’s Committee as ‘a cardinal principle of the African Children’s Charter’,²⁴ article 3 of the Charter, which guarantees all children the enjoyment of the rights provided in the Charter without discrimination, means at the very least that no state may adopt a definition of childhood that endorses, perpetuates or reproduces discrimination on any of the prohibited grounds.

The African Children’s Committee has also stated that the best interests principle enshrined in article 4 of the African Children’s Charter ‘aims at safeguarding the realisation of children’s rights effectively and contributing to their holistic development’.²⁵ This principle recognises both the bodily and psychological independence of the child whose interests and needs must count for the sake of the child, and not that of any others such as parents, society or the state. It demands, most of all, that where circumstances justify curtailing the exercise of certain rights by children, those justifications can only be based on fulfilment of the child’s best interests. Protective measures for children thus have to be designed and implemented in compliance with this principle.²⁶

20 African Children’s Committee General Comment on Article 31 (n 14) para 26.

21 African Children’s Committee General Comment on Article 31 (n 14) para 23.

22 See eg African Children’s Committee General Comment 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection (2018) 9-14; African Children’s Committee General Comment 7 on article 27 of the African Children’s Charter ‘Sexual exploitation’ (2021) paras 35-55.

23 See Van Bueren (n 1) 15.

24 *Institute for Human Rights and Development in Africa & Another v Cameroon* Communication No 6/Com/002/2015 No 001/2018, May 2018, para 59 (*Cameroonian Child Rape*). At paras 58-66 the African Children’s Committee found Cameroon liable for violating the non-discrimination clause by failing to investigate the crime of rape perpetrated against a minor. See also *Minority Rights Group International and SOS-ESCLAVES on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No 7/Com/003/2025 (*Mauritanian Enslaved Brothers*), where two boys born to a slave mother were treated differently by a Mauritanian family from other children in that family and the state was found to have failed to protect them from discrimination.

25 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l’Homme v Senegal* No 3/Com/001/2012 (*Senegalese Talibés*) para 34.

26 Eg, the African Children’s Committee has stated: ‘Applying the principle of the best interests of the child, states parties must adopt and enforce legislation that sets the minimum age of marriage at 18 for both boys and girls. The principle also requires the adoption of effective prevention and redress measures to address those at risk and those already affected by child marriage.’ See Joint General Comment of the African Commission and the African Children’s Committee on ending child marriage (2017) para 9.

Not only are such protective measures to be taken and implemented in compliance with the best interests principle, but they must also be justified by reference to the child's right to life, survival and development. As the African Children's Committee has aptly observed, this right serves as 'a general principle' that reinforces 'the *raison d'être* of each right enshrined in the Charter'.²⁷ Particularly relevant rights linked to it include 'the child's rights to health, food, shelter, education and adequate standard of living', all of which are 'fundamental to the child's development into a responsible and informed citizen, capable of defending his or her rights'.²⁸

Lastly, the principle of child participation, enshrined in articles 4(2), 7, 8, 9 and 12 of the African Children's Charter, underlines the autonomy of the child as a subject of rights and duties. Where measures aimed at protecting the best interests of the child are to be taken, due consideration should be given to their impact on the autonomy and free choice of the affected children and to their views depending on their evolving capacities.²⁹

3 General definition of a child

Article 2 of the African Children's Charter states that a child 'is every human being below the age of 18 years'. Thus, like CRC, the African Children's Charter does not specify the beginning of childhood. It could be argued that such vagueness was meant to avoid the debate about abortion and to eschew the controversies which that debate generates. The African Children's Charter thus left it to states to decide whether childhood begins at conception, or at some point between conception and birth, or at birth.

However, when read together with article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol),³⁰ article 2 of the African Children's Charter carries a more definite meaning. Articles 14(1)(a) to (b) of the Maputo Protocol obligates state parties to ensure the protection and respect for the sexual and reproductive rights of women, including the right 'to control their fertility' and to 'decide whether to have children, the number of children and the spacing of children'. More specifically, article 14(2)(c) of the Maputo Protocol provides that states shall take 'appropriate measures to' '[p]rotect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'. These provisions suggest that childhood commences at conception and, therefore, that abortion should be permitted on the limited grounds specified under article 14(2)(c). Another way of looking at this is that since article 14(2)(c) obligates states to take positive measures to make the specified medical services available, it may not be interpreted to limit the twin rights of women to control their own fertility and to decide whether to have children. If this interpretation is accepted, then the mark of the beginning of childhood as reflected in the Maputo Protocol is conception unless the mother of the child elects to terminate the pregnancy pursuant to her right to control her fertility or to decide to have the child.³¹

Given the foregoing provisions of the Maputo Protocol and that article 2 of the African Children's Charter states that any human being below the age of 18 years is a child, it is very unlikely that any

27 *Senegalese Talibés* (n 25) para 41.

28 General Comment 1 on article 30 of the African Charter on the Rights and Welfare of the Child on 'Children of incarcerated and imprisoned parents and primary caregivers' (2013) para 26.

29 Eg, in General Comment 7 (n 22) para 50 the African Children's Committee acknowledged the fact that many African states had introduced legislation allowing adolescents to engage in sexual acts amongst each other reflected a recognition by these states of the principle of the evolving capacities of the child.

30 Adopted by the 2nd ordinary session of the Assembly of the Union, Maputo, Mozambique, CAB/LEG/66.6, 13 September 2000, reprinted in (2001) 1 *African Human Rights Law Journal* 40, entered into force 25 November 2005.

31 This view is also supported by art 4(2)(j) of the Maputo Protocol, which obligates state parties to take 'appropriate and effective measures to ... [e]nsure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women'. This provision indirectly protects the unborn child from the time of conception.

margin of discretion is reserved for states to mark the beginning of childhood at any time beyond immediately after birth. Cultural practices that consider a child not a full person until some rituals, such as the naming ceremony, cutting of the umbilical cord, baptism or circumcision, have been conducted thus are highly unlikely to be considered consistent with the general definition of a child under article 2 of the African Children's Charter.

Unlike the CRC, the African Children's Charter is clearer about the end of childhood. Every human being who reaches 18 years ceases to be a child and gains majority status.³² As far as the end of childhood is concerned, age thus is the singular and absolute marker for childhood. This means that other markers such as puberty, circumcision, pregnancy, marriage or parenthood can no longer be used in determining who is a child or an adult.³³

Given that the African Children's Charter sets a clear age-linked marker for the end of childhood, it is also unlikely that the African Children's Committee will condone general childhood definitions that fall below 18 years. It therefore is not surprising that in *Malawian Amicable Settlement*³⁴ the African Children's Committee accepted a settlement agreement in terms of which Malawi agreed to amend its Constitution and laws to extend the end of childhood from 16 to 18 years. Condonation of below-age 18 definitions of childhood will particularly be difficult to justify in cases where the child's right to life, survival and development and the best interests of the child are at stake, such as in relation to early marriage,³⁵ prostitution,³⁶ use in pornography³⁷ or recruitment and participation in hostilities.³⁸

4 Minimum ages

The general definition of childhood determines the subject to which all children's rights apply. However, some aspects of these rights require the state to take measures to protect children from harm. Such measures often take the form of legislation that sets minimum ages for children to be considered mature enough to commit certain acts or to be involved in certain activities. When such minimum ages fall below the end of childhood as defined generally, they have the effect of limiting the freedom of children to enjoy their rights. Thus, for the state to justify them, it must show that such measures are necessary, at the very least, to advance the best interests of the child and the child's right to life, survival and development. In considering the justification of such measures, the consistency with which the state prescribes minimum ages for comparable or related activities will be relevant. The more the stipulated minimum ages are not rationalised or are inconsistent, the more difficult they will be to justify.

It can be stated in general that states would be justified in setting a higher minimum age in respect of activities that pose a high risk of bodily and psychological harm, abuse and exploitation to children, even though those activities could in some way advance their other rights such as their autonomy and ability to decide for themselves. Conversely, states would be justified in setting a lower minimum age with respect to activities that greatly advance and enhance the child's autonomy and the enjoyment of

32 Under art 1 of CRC the age of 18 years is subject to domestic law such that it is possible for states to bring down end of childhood to below 18.

33 Eg, the African Children's Committee has found Tanzania to be in violation of the right to non-discrimination because of its policy of expelling pregnant and married girls from school and denying them re-entry due to their marital status or pregnancy. See *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* No 12/Com/001/2019 (*Tanzanian Girls*) paras 50-59.

34 *Malawian Amicable Settlement* (n 8).

35 Joint General Comment of the African Commission and the African Children's Committee (n 26) para 9.

36 African Children's Committee General Comment 7 (n 22) paras 73-75.

37 African Children's Committee General Comment 7 (n 22) paras 77-82.

38 African Children's Committee General Comment on responsibilities of the child (n 14) paras 45-47.

their participation and provision rights, but which do not incur a high risk to their best interests and their life, survival and development.

The parts below analyse and comment on the provisions of the African Children's Charter that specify or can be interpreted as requiring or expecting states to set minimum ages in particular domains. These include criminal responsibility; marriage; sexual consent; recruitment or participation in hostilities; and admission to employment.

4.1 Minimum age of criminal responsibility

The African Children's Charter provides that there shall be 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'.³⁹ This provision is meant to protect children from the dangers associated with the criminal justice system. It is also based on the belief that children of a certain age may not have a full appreciation of the consequences of their actions. However, the Children's Charter does not specify the actual minimum age of criminal responsibility, leaving it to be determined by states. Regrettably, state practice in Africa displays a lack of uniformity on the minimum age of criminal responsibility, with some states electing to set such a low minimum age as 10 years and others as high as 16 years.⁴⁰ Furthermore, some states have maintained a bifurcated system consisting of a minimum age of unqualified criminal incapacity and the age to which a rebuttable presumption of criminal incapacity applies.⁴¹

The African Children's Committee has urged states to set the minimum age of criminal responsibility that is not 'lower than 12 years of age' and encouraged states to 'endeavour to raise this minimum progressively to at least 15 years of age'.⁴² Relying on scientific evidence on child development and neuroscience, which demonstrates that 'maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing' and, therefore, that children are 'unlikely to understand the impact of their actions or to comprehend criminal proceedings', the CRC Committee has similarly encouraged states to increase their minimum age to at least 14 years, while commending state parties that have set a higher minimum age of 15 or 16 and urging them not to reduce such high minimum age under any circumstances.⁴³

Setting the minimum age of criminal responsibility means that no child under that age can be subjected to any criminal measures and sanctions irrespective of the seriousness of the criminal offence in question. Such child may be dealt with through counselling, education, care and support, or alternative care. Children above the minimum age of criminal responsibility, on the other hand, are

39 Art 17(4).

40 Eg, Cameroon has set 10 years as the minimum age of criminal responsibility, while Burundi and Cape Verde have set it at 15 and 16 years respectively. See sec 80(1) Code Penal of Cameroon, 16 July 2016; art 28 of Code Pénal du Burundi, Loi No 1/27 du 29 Décembre 2017 portant révision du Code Pénal; art 17 Legislative Decree 4/2003 of 18 November 2003 of Cape Verde.

41 See eg Tanzania and Botswana, where a child under 10 and eight has no criminal capacity but a rebuttable presumption applies for children aged 10 to 12 and eight to 14 respectively. For Tanzania, see sec 15 of the Penal Code, ch 16 of the Laws of Tanzania; for Botswana, see sec 82(1) of the Children's Act 8 of 2009, ch 28.04 of the Laws of Botswana and sec 13 Penal Code, ch 28.04 of the Laws of Botswana.

42 African Children's Committee General Comment 5 (n 22) 25.

43 CRC General Comment 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para 22.

entitled to all the substantive and procedural protections of child justice espoused under articles 5(3) and 17 of the African Children's Charter.⁴⁴

4.2 Minimum age of marriage

Article 21(2) of the African Children's Charter provides that 'child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislative measures, shall be taken to specify the minimum age of marriage to be eighteen years'. This article clearly establishes 18 years as the minimum age of marriage for both girls and boys, and is reinforced by the Maputo Protocol which also provides that the 'minimum age of marriage for women shall be 18 years'.⁴⁵ By setting such a minimum age, both instruments discount the possibility of any consensual or lawful marriage with any person, or between any persons, younger than 18 years. The African Children's Charter is particularly notable for not creating any differentiated minimum age for marriage for boys and girls.⁴⁶ Furthermore, the African Children's Committee has stated that article 21(2) of the African Children's Charter 'precludes any exceptions to the minimum age of 18 for betrothal and marriage', and that it covers 'all forms of betrothal and marriage under all forms of law'.⁴⁷

By setting the minimum age of marriage at 18 years, the presumption is that all children under that age have no capacity to give consent to marriage. This is understandable given the well-documented adverse effects of child marriage on children's rights to life, survival and development.⁴⁸ These include premature deaths; denial of access to education; and exposure to HIV infections and other sexually-transmitted diseases, gender-based violence and exploitation. According to the African Children's Committee:⁴⁹

Child marriage is correlated with early and frequent pregnancy, which in turn is associated with significantly higher rates of maternal morbidity, maternal mortality and infant mortality. Child marriage also curtails the right to development, as those who marry young are often forced to drop out of school or are precluded from participating in economic, political, social and other activities. Child marriage is also connected with increased exposure to the risk of domestic violence and because child marriage frequently results in social isolation, the protection needs of children and women in a child marriage often are not readily detected or met.

44 These include the prohibition on the use of the death sentence and torture, inhuman or degrading treatment or punishment; detention as a measure of last resort; separate detention or imprisonment; legal assistance and representation; and reformation, reintegration and social rehabilitation as primary aims of their punishment.

45 See art 21(2) African Children's Charter and art 6(c) of the Maputo Protocol.

46 Eg, sec 13(1) of the Law of Marriage Act, ch 29 of the Laws of Tanzania, provides for 18 years as the minimum age of marriage for boys and 15 years for girls. This section was successfully challenged in *Rebecca Gyumi v Attorney General* Misc Civil Cause 5 of 2016. On appeal, the Court of Appeal of Tanzania ordered the government to enact the age of marriage for girls at 18. See *Attorney General v Rebeca Gyumi* Civil Appeal 204 of 2017; 2019 TZCA 348.

47 Joint General Comment of the African Commission and the African Children's Committee on ending child marriage (n 26) para 16. See also *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs* CC 12 of 2015; Constitutional Application 79 of 2014, [2016] ZWCC 12, 20 January 2016, in which the Constitutional Court of Zimbabwe held that sec 22(1) of the Marriage Act, ch 5:11, was unconstitutional and invalid to the extent that it set the minimum age of marriage below 18 years. The new Marriage Act has now set 18 as the minimum age of marriage. See sec 3 of the Marriage Act, 2022, ch 5.15 of the Laws of Zimbabwe.

48 See eg NM Nour 'Health consequences of child marriage in Africa' (2006) 12 *Emerging Diseases* 1644-1649; L Mwambene & O Mawodza 'Children's rights standards and child marriage in Malawi' (2017) 17 *African Studies Quarterly* 21-44.

49 Joint General Comment of the African Commission and the African Children's Committee on ending child marriage (n 26) para 12.

The CRC Committee and the CEDAW Committee have similarly remarked that girl children involved in child marriages are susceptible to early and frequent pregnancies and childbirth, resulting in higher-than-average maternal morbidity and mortality rates.⁵⁰ Given these realities, it cannot be presumed that any human being under the age of 18 has an appreciation of the full implications of entering into marriage. Thus, the state's obligation to protect the child's best interests and ensure their life, survival and development ought to take precedence over any conceivable benefit that the child could possibly derive from a child marriage.

4.3 Minimum age of sexual consent

Capacity to give consent to marriage should not be conflated with capacity to give consent to a sexual act. To be sure, neither article 21(2) of the African Children's Charter nor article 6(c) of the Maputo Protocol setting the minimum age of marriage at 18 years can be interpreted to mean that the minimum age of sexual consent is also 18 years. This does not mean that these treaties sanction sexual relations between adults and children. On the contrary, the provisions prohibiting child abuse, torture, harmful social and cultural practices, and sexual abuse and exploitation could be interpreted as requiring states to take legislative measures to prohibit such sexual relations and activities.⁵¹

While adolescent sexual behaviour is highly controversial from various fronts – religious, cultural or scientific – it is important that considerations that inform the adoption of appropriate protective measures are only those that advance the best interests and other rights of the child. It is relevant to consider, as the African Children's Committee has done, the fact that '[g]lobally, at least half of all adolescents are sexually active before turning 18 and in Africa, most adolescents engage in sexual intercourse for the first time between the ages of 15 and 18',⁵² and that 'sexual activity between adolescents is not as ... harmful, as long as both adolescents give informed consent and have access to sexual and reproductive information and services'.⁵³ Indeed, such adolescent sexual behaviour should be considered an important part of their learning and development.

Another relevant consideration is that adolescents are prone to abuse and exploitation by adults due in part to the power and socio-economic differentials between them. Setting the minimum age of sexual consent thus is a function of ensuring that children under a certain age are considered incapable of giving consent to sex under any circumstances; of empowering adolescent children, subject to their evolving capacities, to explore their sexuality and give consent to sexual acts with fellow adolescent children; and of protecting all children from sexual abuse and exploitation by adults.⁵⁴ For its part, the CRC Committee has offered the following pertinent guidelines: 'State parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when

50 Joint General Recommendation 31 of the Committee on the Elimination of Discrimination against Women and General Comment 18 of CRC (2019) on harmful practices, CEDAW/C/GC/31/REV.1–CRC/C/GC/18/Rev.1, 8 May 2019, para 22.

51 See arts 16, 21 and 27 of the African Children's Charter.

52 African Children's Committee General Comment 7 (n 22) para 47. See also UNFPA 'Harmonisation of minimum ages adolescent sexual and reproductive and reproductive health services: Consent to sex, marriage, and access to sexual and reproductive health services in East and Southern Africa', https://esaro.unfpa.org/sites/default/files/pub-pdf/late_technical_brief_harmonization_2.pdf (accessed 8 February 2024); BO Ahinkora and others 'The missing link between legal age of marriage in sub-Saharan Africa: Implications for sexual and reproductive health and rights' (2021) 18 *Reproductive Health* 128.

53 African Children's Committee General Comment 7 (n 22) para 50.

54 See African Children's Committee General Comment 7 (n 22) para 47, commenting that the 'establishment of an age of consent relates, to protective goals, recognising that very young children are incapable of consenting to sexual acts (below the age of maturity), and that older adolescent children must be protected from predatory adults'.

determining the legal age for sexual consent. States should also avoid criminalising adolescents of similar ages for factually consensual and non-exploitative sexual activity.’⁵⁵

Applying these guidelines and relying on state practice, which shows that many states have set the age of sexual consent between 14 and 16 years,⁵⁶ the African Children’s Committee has recommended that state parties should ‘decriminalise consensual, non-abusive and non-exploitative sexual activities among child peers’.⁵⁷ This means, for example, that if the minimum age of sexual consent is 14, adolescents aged between 14 and 18 years can engage in consensual sexual activities among themselves, not with any other human beings outside that age range. Such a minimum age of sexual consent should also be harmonised with the minimum age of criminal responsibility.

The African Children’s Committee has also recommended that states should prohibit adults from engaging in sexual activities with children below that age ‘under all circumstances regardless of the consent of the child’.⁵⁸ This means that no one above 18 years could engage in sexual activities with anyone below 18 years. This recommendation is only helpful in cases of adults of older age involved with adolescents but not in cases of young adults who have just emerged from adolescence. It is important that appropriate exceptions are made at the end of the adolescence spectrum, consistent with the evolving capacities of the child, so that absurd results do not occur.⁵⁹

4.4 Minimum age of recruitment and participation in hostilities

Article 22(2) of the African Children’s Charter provides that states ‘shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child’. This provision is meant to prevent various forms of harm to children arising from direct and indirect participation in armed conflict, hostilities or recruitment into armed forces.⁶⁰ It is important to note that article 22(2) draws no distinction between child participation in hostilities and recruitment. The general definition of the child applies to both, meaning that any human being below the age of 18 years can neither be recruited nor be involved in hostilities. The African Children’s Committee has also interpreted it to apply to both state and non-state actors:

The Committee expects state parties and armed groups to refrain at all times from engaging children in conflict situations. To this end, no child shall be obliged in any circumstance to carry military equipment or engage in other activities linked to armed conflicts. It is in the interests of children that they are not exposed, directly or indirectly, to armed conflicts. To this end, the interpretation of article 22 of Children’s Charter shall include the banning of children from undertaking military training, keeping children in military camps or other premises that expose them to direct armed conflict or activities related to armed conflict, unless they are at risk of being attacked if they are placed separately from soldiers.⁶¹

55 CRC General Comment 16 on the rights of the child during adolescence’ para 40.

56 African Children’s Committee General Comment 7 (n 22) para 49.

57 African Children’s Committee General Comment 7 (n 22) para 50.

58 African Children’s Committee General Comment 7 (n 22) para 52.

59 Eg, adolescents who are involved in a sexual relationship and one of them turns 18 would have to end or put it on ice until the other adolescent also turns 18, or risk being criminalised for the same activities allowed by law when both were under 18. Similar absurdities led to the Constitutional Court of South Africa to invalidate secs 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. See *Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and National Director of Public Prosecutions* 2013 (12) BCLR 1429 (CC).

60 See eg the Report of the Special Representative of the Secretary-General for Children and Armed Conflict (2023) para 18, showing that children are subjected to multiple human rights violations.

61 African Children’s Committee General Comment on responsibilities of the child (n 14) para 46.

Clearly, article 22(2) of the African Children's Charter represents a higher standard of protection for children than that reflected in international humanitarian law and international criminal law. Additional Protocols I⁶² and II⁶³ to the Geneva Conventions and the Rome Statute of the International Criminal Court⁶⁴ set 15 years as the minimum age of both recruitment and participation in hostilities. The CRC Committee adopted this definition,⁶⁵ but the Optional Protocol to CRC on the Involvement of Children in Armed Conflicts⁶⁶ increased the age of involvement of children in hostilities to 18 years⁶⁷ and also required states to ensure that children under 18 are 'not compulsorily recruited' into their armed forces.⁶⁸

By contrast, the African Children's Charter prohibits not only the participation or use of children in hostilities, but also proscribes the recruitment of children whether such recruitment is voluntary or compulsory. It is understandable why the Charter adopted a higher minimum age for these activities. The continent has seen too many armed conflicts in which many children have been recruited and used in hostilities, exposing them to untimely deaths, abuse, loss of limbs, poverty, exploitation and other forms of harm.

4.5 Minimum age of admission to employment

Child labour is a hugely controversial topic in Africa due in part to the fact that children are expected to play a role in the socio-economic well-being of their families and that of their own. The African Children's Charter itself imposes a duty on the child 'to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need'.⁶⁹ According to the International Labour Organisation (ILO) and the United Nations Children's Fund (UNICEF):⁷⁰

Child labour prevalence stands at 24 per cent in sub-Saharan Africa, three times that of Northern Africa and Western Asia, the region with the second highest prevalence. In absolute terms, the nearly 87 million children in child labour in sub-Saharan Africa are more than in the rest of the world combined.

Article 15(1) of the African Children's Charter requires states to protect children from 'all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with

62 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by states on 8 June 1977 and entered into force on 7 December 1978, of which article 77 (2) provides: 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.'

63 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted by states on 8 June 1977 and entered into force on 7 December 1978, of which article 4(2)(c) states: 'Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.'

64 A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. See art 8(2)(b)(xxvi), which lists 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities' as an element of war crimes.

65 See arts 38(2)-(3).

66 GA Res A/RES/54/263 of 25 May (2000), entered into force 12 February 2002.

67 Art 1.

68 Art 2 of the Protocol.

69 Art 31 of the African Children's Charter.

70 ILO & UNICEF 'Child labour: Global estimates 2020, trends and the road forward' (2021) 21, https://www.cocoinitiative.org/sites/default/files/resources/ILO-UNICEF-Global-Estimates-report_June-2021_ICI-summary-1.pdf (accessed 28 June 2024).

the child's physical, mental, spiritual, moral, or social development'. To ensure that child labour does not take place in both 'the formal and informal sectors of employment', article 15(2)(a) of the African Children's Charter requires state parties to 'provide through legislation, minimum ages for admission to every employment'.

Two issues arise from these provisions. The first is that child labour needs to be clearly defined in order to draw a distinguish between what is permissible involvement of children in work and what is not. The second issue pertains to establishing the minimum age for employment. With regard to the first issue, the ILO and UNICEF have defined child labour as 'work that children are too young to perform and/or work that, by its nature or circumstances, is likely to harm children's health, safety or morals'.⁷¹ Thus, child labour does not include 'work that is not classified as among the worst forms of child labour, particularly as hazardous work, for children above the general minimum working age'.⁷² Child labour is to be contrasted with permissible 'light work' which article 7 of ILO Convention 138⁷³ defines as 'the employment or work of persons 13 to 15 years of age ... which is (a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes'. According to these definitions, light work is only permissible for children who are at least 13 years old, but child labour is prohibited for all children.

The African Children's Committee is yet to draw such a distinction between child labour and permitted light work. However, it is clear from article 15(2) of the African Children's Charter that two forms of work by children are prohibited. The first is work that constitutes 'economic exploitation'. The second is work that 'is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development'. Both forms of work constitute prohibited child labour from which all children must be protected. However, work that is not exploitative or does not pose a danger to the child's development could be deemed permissible 'light work' as defined by ILO Convention 138.

It can thus be stated that article 15(2)(a) of the African Children's Charter requiring states to set the minimum age of employment seeks to prevent any involvement of children in any form work – light or not – before they reach the minimum age. In other words, both light work and child labour are prohibited for all children under the minimum age. Children above the minimum age, however, may be involved in light work, but not child labour.

5 Conclusion

The definition of a child is critical as it helps identify all beneficiaries of children's rights and all subjects of child responsibilities. In turn, this helps states to apply and implement children's rights consistently to all children. However, defining a child is a difficult task, complicated by differences in social conceptions and constructions of childhood and social conditions and circumstances in which children are raised. The African Children's Charter has helped to resolve this difficulty by providing a general definition of childhood and identifying areas where minimum ages of capacity to do certain things or to be held responsible for certain wrongs are needed.

However, as with all definitions, the risk of exclusion or over-inclusion is always present. This chapter has helped to elucidate the legal and conceptual considerations that should be borne in mind when interpreting the definitions contained in the Charter. With regard to the general definition, it has shown that the African Children's Charter has clarified the marker for the end of childhood but

71 ILO & UNICEF (n 70) 18.

72 ILO & UNICEF (n 70).

73 ILO Minimum Age Convention 1973 (No 138).

left vague the beginning of childhood. By reading the Charter together with the Maputo Protocol, it could be argued that childhood starts at conception unless a pregnant woman elects to terminate the pregnancy on any of the grounds listed in the Maputo Protocol or in her exercise of the right to decide to have children. The African Children's Charter has also expressly or impliedly identified at least five domains in which it requires or expects states to adopt minimum ages of capacity for children. In some cases, it has stipulated the minimum ages concerned; in others, it has left it to states to do so. As this chapter has shown, setting minimum ages requires a careful balancing exercise to ensure that the child enjoys both protection and provisions rights as well as participation and non-discrimination rights.