

Chapter 21

Article 20

Parental responsibilities

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1. Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:
 - (a) to ensure that the best interests of the child are their basic concern at all times;
 - (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
 - (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.
2. State parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;
 - (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
 - (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
 - (c) to ensure that the children of working parents are provided with care services and facilities.

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1 Introduction

Article 20 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) gives credence to the African proverb that it takes a village to raise a child,¹ as it explains that the duty not only befalls parents but also state parties to perform this task. The mutually-supportive relationship that the Charter imposes appears to be born from the traditional notion of African solidarity that 'requires that a variety of persons exercise different and varying functions over children'.² Although the provision does not deliver a clear list or a definition of what parental responsibilities entail, it offers the parameters of the obligations imposed upon 'parents' and 'other persons responsible for the child',³

1 The origin of this proverb has been ascribed to the Kenyan phrase *omwana ni wa bhone*, which is translated as 'regardless of a child's biological parent(s) its upbringing belongs to the community'. TA Cooper 'Racial bias in American foster care: The national debate' (2013) 97 *Marquette Law Review* 215, 273.

2 A Armstrong and others 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 *International Journal of Children's Rights* 333, 342.

3 See art 20(1).

and upon member states to the Children's Charter.⁴ Whereas, from a historical perspective, the state did not interfere in the private domain of telling parents how to raise their children, international law now prescribes that the state has the duty to intervene in some instances. Parents, or other persons responsible for the child, still 'have the primary responsibility for the upbringing and development of the child', in a manner that takes into account the humanity and dignity of the child, and if they do not or cannot do so, state parties must 'provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing'. As a result, no child should go hungry or be cold if their parents cannot take care of them.⁵

Yet, it is estimated that, on average, approximately 42 per cent of African children find themselves in households where members live below a poverty line of US \$1,90 a day, based on 2011 purchasing power parity.⁶ In fact, in monetary terms, 66 per cent of the world's extremely poor children live in Africa, and projections are that by 2030, 305 million children on the continent may be living in extreme monetary poverty, while 66 per cent of the world's extremely poor children currently live in Africa.⁷ Data for 2021 reveals that, of the more than 14,9 million children worldwide who have had lost one or both parents due HIV/AIDS-related deaths, more than three-quarters (11,2 million) live in sub-Saharan Africa.⁸ Studies also show that, while such children living in HIV/AIDS-affected households are more vulnerable to hunger and malnutrition,⁹ social protection coverage for children in Africa is the lowest in the world, with only approximately 15 per cent of children in the region receiving child and family benefits from the state.¹⁰ It is further argued that corporal punishment, which is also inflicted by parents on the African continent, is the most common form of violence faced by children.¹¹ Due to the private nature of this form of violence against predominantly young children, accurate statistics as to its prevalence are not available.

The alleviation of these levels of poverty and the abolishment of this form of violence are high on the list of priority areas set by the African Union (AU) in its Agenda 2063 Goals.¹² Likewise, for the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), these aims are essential, since five of the ten aspirations that it has set for itself in its Africa's Agenda for Children 2040 undoubtedly are linked to the obligations imposed by article 20 of the African Children's Charter.¹³ The African Children's Committee also reiterated that its Agenda 2040 and, consequently, the fulfilment of the obligations imposed by article 20 of the African Children's Charter, depend on its effective implementation by a range of stakeholders, including the AU political organs, states, relevant

4 See art 20(2).

5 Armstrong and others (n 2) 342.

6 African Child Policy Forum (ACPF) 'The African report on child well-being 2023: Justice not charity: African governments must end child poverty' 17, <https://africanchildforum.org/index.php/en/sobipro?sid=284> (accessed 10 January 2024).

7 ACPF (n 6) 18.

8 ACPF (n 6) 28.

9 As above.

10 UNICEF Data and Analytics Section: Division of Data, Analytics, Planning and Monitoring 'One billion strong – Protecting children's rights in Africa today and tomorrow' (January 2020) 28, <https://data.unicef.org/resources/one-billion-strong-protecting-childrens-rights-in-africa-today-and-tomorrow/> (accessed 9 March 2024).

11 S Vohito 'The African Children's Charter and ending corporal punishment of children in Africa: A work in progress' (2021) 21 *African Human Rights Law Journal* 75, 77.

12 African Union 'Agenda 2063: The Africa we want', <https://au.int/en/agenda2063/overview> (accessed 10 March 2024). See, eg, Aspiration 1: A prosperous Africa based on inclusive growth and sustainable development; and Goal 18: Engaged and empowered youth and children; <https://au.int/en/agenda2063/aspirations> (accessed 10 March 2024). The goals and priority areas are set out at <https://au.int/en/agenda2063/goals> (accessed 10 March 2024).

13 African Children's Committee 'Africa's Agenda for Children 2040: Fostering an Africa fit for Children' (2016), <https://www.acerwc.africa/en/page/agenda-2040#:~:text=Agenda%202040%20establishes%20aspirations%20for,the%20priorities%20in%20this%20Agenda> (accessed 8 March 2024). See, in particular, Aspirations 4, 5, 6, 7 and 10, as referred to below at 4.2.

government ministries of state parties, civil servants, parents, children, families, teachers, civil society organisations, religious and community leaders, communities and the media.¹⁴

Notwithstanding the crucial measures of protection and support that article 20 imposes, the far-reaching implications of this provision of the African Children's Charter have not been sufficiently recognised. It is submitted that the article is underutilised and its potential impact has not yet been explored.

2 Links to other Charter articles

Article 20 provides a summary of the African Children's Charter's approach to parental responsibilities, and article 20(1)(b) is specific to the implementation of children's socio-economic rights. It creates obligations that are pronounced in strong terms such as 'shall take' and 'to ensure' and, effectively, these are indistinguishable from those imposed in relation to other rights of protection.¹⁵ These are immediate obligations, and for which parents have the primary responsibility, but for which the state must provide guidance and support. As a result, article 20 not only repeats the call of article 4 of the African Children's Charter, reminding parents and 'other persons responsible for the child' that their primary concern is to endorse their children's best interests at all times, but also those raised by, among others, articles 5,¹⁶ 10,¹⁷ 11,¹⁸ 13,¹⁹ 14,²⁰ 16,²¹ 18,²² 19,²³ 21²⁴ and 25.²⁵ The terminology used in these provisions, in relation to the obligations imposed upon the state, varies.²⁶ Further, while article 1 of the African Children's Charter enjoins states to take the 'the necessary steps, in accordance with their *constitutional processes* and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter', article 20(2) beseeches 'appropriate measures' by state parties to assist parents and others within '*their means and national conditions*'.²⁷ It is submitted that the wording of article 20 cited here is more in line with the traditional and restrictive terminology used in relation to the implementation of socio-economic rights in other international treaties.²⁸ Nevertheless, it can also be argued that due to the inclusion of 'material assistance' in the wording, article 20(2) provides children with a right to social security,²⁹ one

14 African Union 'Agenda 2063: The Africa we want' (n 12) 29.

15 J Sloth-Nielsen 'The protection of children's economic, social and cultural rights under the African Children's Charter' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 155, 160.

16 Providing for the child's right to survival and development.

17 Protection of privacy.

18 Promoting the child's right to education.

19 Protecting the rights of 'handicapped children', including their 'physical and moral needs'.

20 Enshrining the child's right to health and health services.

21 Protection against child abuse and torture.

22 Protecting the family.

23 Promoting the child's right to parental care and protection.

24 Protection against harmful social and cultural practices.

25 Provision for instances of separation from parents.

26 Sloth-Nielsen (n 15) 158; and see also other discussions in this respect in this *Commentary*.

27 My emphasis.

28 Such as the wording found in art 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) where state parties are bound to implement rights 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant' (my emphasis).

29 Sloth-Nielsen (n 15) 164.

that is being implemented to a limited extent by an increasing number of the continent's states through various means of social security initiatives.³⁰

Regrettably, as explained above, the fulfilment of key obligations, such as providing children with sufficient and nutritious food to enable their survival and development, is not progressing fast enough. The African Children's Committee has admitted that the implementation of several of the Agenda 2040 goals 'is halting, uneven and sometimes slow or stagnant, with many state parties failing to prioritise the implementation of children's rights and devote sufficient resources to their fulfilment'.³¹

Article 20 further finds a link to article 11 of the African Children's Charter in that it provides instruction as to how parental discipline is to be administered. These two provisions of the Charter prescribe that both in school and at home, the discipline to be meted out should be in a manner that takes the child's humanity and inherent dignity into account. Read with article 16 of the African Children's Charter, this has been interpreted to mean that the physical punishment of children can never be tolerated. Corporal punishment is discussed extensively in relation to article 16 (protection against abuse and torture) of the Charter in this *Commentary*. The provision is also underscored by the four general principles, in particular the child's best interests, which is expressly referred to in article 20(1)(a), and the child's right to survival, protection and development.

3 Links to other human rights treaties

In general, the essence of article 20 is the same as that of article 18, read with article 27 of the Convention on the Rights of the Child (CRC) in that it bestows the responsibility of the upbringing and development of a child primarily upon the parents, bearing the child's best interests in mind as their basic concern, and with appropriate guidance to be provided by the state in assisting parents and others in the performance of these duties. In this way, these provisions endorse the important status of the family as enshrined by article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and articles 23 and 24 of the International Covenant on Civil and Political Rights (ICCPR).

Both articles 20 of the African Children's Charter and 18 of CRC include a clause in which state parties commit themselves to assisting working parents with childcare services and facilities.³² The CRC Committee has explained that article 18(3) obligates states to

create employment conditions within business enterprises which assist working parents and caregivers in fulfilling their responsibilities to children in their care such as the introduction of family-friendly workplace policies, including parental leave; support and facilitate breastfeeding; access to quality childcare services; payment of wages sufficient for an adequate standard of living; protection from discrimination and violence in the workplace; and, security and safety in the workplace.³³

30 See the examples of South Africa, Namibia, Tanzania and Mozambique, where cash transfer schemes are paid to the most vulnerable children and their families, as discussed by Sloth-Nielsen (n 15) 174-175, and the sources cited there at fn 71. See also J Sloth-Nielsen 'A developing dialogue – Children's rights, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes' (2008) 12 *Electronic Journal of Comparative Law* 1-17.

31 One of the key findings from the African Children's Committee '2040 Agenda – Fostering an Africa fit for children: Assessment of the first phase of implementation (2016-2020)' V, March 2021, https://www.acerwc.africa/sites/default/files/2022-10/Agenda2040-Assessment%20of%20the%20first%20phase%20of%20implementation%202016-2020_0.pdf (accessed 15 February 2024).

32 Art 20(2)(c) African Children's Charter and art 18(3) CRC.

33 General Comment 16 (2013) on state obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16: 17 April 2013 para 54, <https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.16.pdf> (accessed 3 September 2014).

Since these obligations are repeated in article 11(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Labour Organisation (ILO)'s Convention 156,³⁴ the provisions of the two children's treaties are not often employed in instances where the plight of parents, who have to cope with demands from their work spaces and caring for especially young children, are to be improved.

Some subtle differences between article 20 of the African Children's Charter and article 18 of CRC may be pointed out: Whereas article 18 includes reference to 'legal guardians' and *both* parents as the persons who have the primary responsibilities, the African Children's Charter seemingly does not require persons to possess guardianship in this context and does not explicitly refer to two parents having primary responsibilities. This creates the impression that the African Children's Charter recognises and supports the fact that cultural and religious beliefs, which are incorporated into national legislation, often do not automatically endow mothers and fathers with equal and automatic parental responsibility. Such a notion seems to run contrary to the obligations imposed by CEDAW, and in particular articles 16(1)(d) and (f) thereof, which call for women and men to have the 'same rights and responsibilities as parents, irrespective of their marital status' and equality in respect of 'guardianship, wardship, trusteeship and adoption of children'. As will be explained below at 4.2, the interpretation that the African Children's Committee has attached to article 20 is one that promotes parity of parental responsibilities. This interpretation aligns with the obligation imposed by article 18(2) of the African Children's Charter, requiring state parties to take appropriate steps that 'ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution', as well as article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Further, whereas both treaties provide for children to be placed in alternative care in certain circumstances,³⁵ article 20 of the African Children's Charter embraces the concept of a collective responsibility towards such a child to a greater extent than is the case with article 18 of CRC. CRC includes this collective responsibility in its article 5, where it obliges state parties to 'respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child'.

However, this obligation for States to respect for parental responsibilities is not included in the African Children's Charter, nor does it make mention of the child's evolving capacities that, in terms of article 5 of CRC, must be considered by parents and others while they provide children with guidance and direction.

Article 27(2) of CRC includes a reference to 'others responsible for the child',³⁶ similar to article 20's 'other persons responsible for the child', who must 'secure, within their abilities and financial capacities, the conditions of living necessary for the child's development'. In relation to state parties' obligations, there is some leeway in offering an objection when they are tasked with providing material assistance and support programmes to parents, since they should do so 'in accordance with national conditions and within their means', as is the case with article 20 of the African Children's Charter.³⁷ Article 20 of the Children's Charter does not contain the obligation imposed upon states in respect of the recovery of maintenance that is found in article 27(4) of CRC, although provision is made for

34 Workers with Family Responsibilities Convention, 1981, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156 (accessed 9 April 2024).

35 Art 25 African Children's Charter and arts 20 & 25 CRC.

36 See also the discussion below as to how this phrase is to be understood in the context of child-headed households.

37 Art 27(3) CRC. See also the reference above at 2, in respect of the limitation placed upon the obligation, provided by this particular word choice.

‘the necessary protection of the child’³⁸ upon dissolution of a marriage, and maintenance payments regardless of the child’s parents’ marital status.³⁹

Although the essential elements of article 20 are found in several provisions of CRC, a unique feature of this provision is that article 20(1)(c) describes the way in which parents, and other persons responsible for the child, are to administer domestic discipline towards a child. Article 28(2) of CRC provides similar direction to that of article 11(5) of the African Children’s Charter since it prescribes that ‘school discipline is [to be] administered in a manner consistent with the child’s human dignity’, but there is no explicit direction in CRC as to how parental discipline is to be conducted.⁴⁰ It could be argued that this is a positive attribute of the Charter in comparison to CRC. As will be discussed below, the full extent to which article 20(1)(c) can be used to support the argument that corporal punishment should be prohibited, also in the home, has not yet been explored.⁴¹

4 Legal interpretation

4.1 Definitions of key concepts

While international treaties and national legislation usually provide a definition of the term ‘child’, such clarification is not found for the concept of a ‘parent’, and this is also true for the African Children’s Charter. If one turns to dictionary definitions, there is recognition of two contexts – biological and social – within which parenthood can exist. Thus, the *Oxford English dictionary*, for example, defines a ‘parent’ as a person who is one of the progenitors of a child; a father or mother; also, in extended use: a woman or man who takes on parental responsibilities towards a child, for instance, a stepmother, an adoptive father.⁴²

A parent may include someone who steps into the role on a temporary basis, such as a grandparent, foster parent or a carer in a place of alternative care, and the lines can become blurred when ‘other persons responsible for the child’, such as teachers or sport coaches, are expected to perform certain parental responsibilities.

A recent study of 43 countries in five regions in Africa estimates that 35 million children live without parental care.⁴³ This number includes children who have lost one or both parents predominantly due to HIV/AIDS, natural disasters and armed conflict.⁴⁴ Consequently, it is a reality for many children on the continent that they are being cared for by other members of their family than their biological parents,⁴⁵ including by grandparents, their parents’ siblings, and their own (older) siblings.

38 Art 18(2) African Children’s Charter.

39 Art 18(3) African Children’s Charter.

40 Although the CRC Committee has repeatedly opined, including in two General Comments, that all forms of corporal punishment are contrary to art 19 of CRC.

41 See below at 5.

42 *Oxford English dictionary* ‘parent, n and adj’, <https://www.oed-com.ez.sun.ac.za/view/Entry/137816?rskey=wrUk6i&result=1#eid> (accessed 18 January 2021).

43 African Children’s Committee ‘Children without parental care in Africa’, https://www.sos-childrensvillages.org/getmedia/fd3c7402-08f2-42f7-8f7a-1171052081a1/Continental-Study-on-Children-Without-Parental-Care-in-Africa_Final.pdf (accessed 2 July 2024).

44 C Phillips ‘Child-headed households. A feasible way forward, or an infringement of children’s right to alternative care?’ PhD thesis, Leiden University, 2011 101, [https://www.researchgate.net/publication/295920616_Child-headed_households_a_feasible_way_forward_or_an_infringement_of_children's_right_to_alternative_care#:~:text=Phillips%20\(2011\)%20suggests%20that%20the,fear%20of%20being%20exploited%20by](https://www.researchgate.net/publication/295920616_Child-headed_households_a_feasible_way_forward_or_an_infringement_of_children's_right_to_alternative_care#:~:text=Phillips%20(2011)%20suggests%20that%20the,fear%20of%20being%20exploited%20by) (accessed 12 April 2024).

45 See, eg, the African Children’s Committee’s concern over the fact that in Rwanda, ‘children who are deprived of their family environment are mostly catered for through kinship care as opposed to foster care or residential care. The Committee, however, is concerned with the lack of data on the status of children in kinship care; the Committee also notes

In its Recommendations and Observations on the Initial Implementation Report of the African Children's Charter in Uganda, the African Children's Committee noted that another reason is that 'certain discriminations based on gender ... lead girls to stay at home to look after their little sisters and brothers'.⁴⁶ Child-headed households, in which children take up the majority of care and parental responsibilities, due to no or incapacitated adult carers, is a phenomenon that is not unique to the sub-Saharan region,⁴⁷ but the large numbers of children living in such family structures here⁴⁸ have been recognised as particularly high and as a vulnerable group due to the increased difficulties that they may experience in accessing services.⁴⁹ As a result, it is imperative that the assistance that article 20(2) imposes upon state parties to 'other persons responsible for the child' is offered in particular to these family structures as well.⁵⁰ Unfortunately, the United Nations Children's Fund (UNICEF) reports that regions with larger proportions of children invest less in social protection programmes⁵¹ and children are unlikely to hold the government to account in fulfilling its obligations.

The concept of parental responsibilities is another that is not clearly defined, and whereas the African Children's Charter at least does not include a reference to parental rights,⁵² the notions of care and protection are associated therewith as the main duties to be performed.⁵³ 'Child-rearing', the term used in article 20(2)(b) and understood to be the 'process of bringing up a child or children'⁵⁴ or 'the work of taking care of children until they are old enough to take care of themselves',⁵⁵ is best left to parents, but states must assist and provide 'institutions responsible for providing care of children'. Article 20 describes the role of parents within these parameters of providing for the needs of children, to nurture their growth and development, and to care for and protect the child on a daily basis. While acknowledging parents' freedom of choice in making the decisions as to the daily methods of care

reports, with concern, that indicate children taken care by elderly kin are disproportionately economically disadvantaged.' 'Concluding Observations and recommendations by the African Children's Committee on the second periodic report of the Republic of Rwanda on the status of implementation of the ACRWC', 33rd ordinary session, September 2019 para 27, https://www.acerwc.africa/sites/default/files/2022-09/Rwanda%20CO%202nd%20periodic%20report_0.pdf (accessed 20 November 2023). See art 25 discussed elsewhere in this publication.

46 African Children's Committee 'Recommendations and observations sent to the government of the Republic of Uganda on the initial implementation report of the ACRWC 15th ordinary session' 2, https://www.acerwc.africa/sites/default/files/2022-09/CO_Uganda_eng_0.pdf (accessed 12 October 2023).

47 Phillips (n 44) 15.

48 Phillips (n 44) 10 cites Mbugua as estimating that 80% of all child-headed households are located in sub-Saharan Africa.

49 J Sloth-Nielsen 'Of newborn and nubiles: Some critical challenges to children's rights in Africa in the era of HIV/AIDS' (2005) 13 *International Journal of Children's Rights* 73, 78.

50 See further G Ritchie 'The legal capacity of child-headed households' (2003) 47 *Amicus Curiae* 7-12; J Sloth-Nielsen 'Too little – too late – The implications of the *Grootboom* case for state responses to child-headed households' (2003) 7 *Law, Democracy and Development* 113-136; S Mirza 'Childhood bypassed: Rwanda's youth-headed households' (2006) 26 *SAIS Review of International Affairs* 179-180; H Kruger 'The legal recognition of child-headed households: Is our focus where it should be?' (2014) 25 *Stellenbosch Law Review* 126-142; African Children's Committee 'Concluding Observations and Recommendations on the Republic of Gabon Report on the Status of Implementation of the ACRWC' 26th ordinary session para 27, https://www.acerwc.africa/sites/default/files/2022-09/Concluding_Observations_Gabon.pdf (accessed 20 November 2023).

51 The organisation estimates that by 2050, half of the population of Africa will be aged younger than 18 years and that by the end of the century 1 billion children will be living on the continent. UNICEF (n 10) 29.

52 The notion of 'parental rights' has been described as 'confusing' already in 1988 by the English Law Commission in its 'Review of child law: Guardianship and custody' 5-6, <https://assets.publishing.service.gov.uk/media/5a7c11b5ed915d1c30daa606/0594.pdf> (accessed 4 October 2014), confirming the approach proposed by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 1 AC (HL) 112, where, at 184B, Lord Scarman declared that 'parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child'.

53 See the heading of art 19: Parental care and protection.

54 *Oxford English dictionary* 'child-rearing', https://www.oed.com/dictionary/child-rearing_n?tl=true (accessed 18 March 2024).

55 *Cambridge dictionary* 'child rearing', <https://dictionary.cambridge.org/dictionary/english/child-rearing> (accessed 18 March 2024).

of their children, the most important and general of the duties of parents and other care givers of children is that of promoting the best interests of the child.⁵⁶ This includes that domestic discipline be ‘administered with humanity and in a manner consistent with the inherent dignity of the child’.⁵⁷

4.2 Interpretation by the African Children’s Committee

Although the African Children’s Committee has not provided a General Comment in relation to article 20, it has often provided interpretative guidance in its responses to state party reports. Thus, for example, it has criticised state parties for failing to recognise that both parents – mothers and fathers – must have equal and equally-acquired parental responsibilities. In response to Algeria’s initial report, the Children’s Committee expressed concern that the state party recognises a father to be the guardian over a child, but that a mother can become a guardian only upon the death of the father.⁵⁸ The Committee has also commented on the unequal status of parents and the effect of their marital status upon children in Egypt,⁵⁹ Eritrea,⁶⁰ Lesotho⁶¹ and Eswatini.⁶² However, as noted above, and while the African Children’s Committee undoubtedly is correct in its criticism of the legal position in these jurisdictions, it must be pointed out that article 20 of the African Children’s Charter does not explicitly explain who, and in which circumstances, should be regarded as parents of a child. It is submitted that some of the ways in which many states allow for the acquisition of different types of parental responsibilities do not promote sex equality.⁶³

The African Children’s Committee’s Agenda for Children 2040 aligns with several of the obligations set by article 20. For example, it is stated in Aspiration 4 that the goal is to let every child survive and to have a healthy childhood. Aspiration 5’s objective is to have every child grow up well-nourished and with access to the basic necessities of life; Aspiration 6 seeks to let every child benefit fully from quality education, while Aspiration 7 aims to protect every child against violence, exploitation and abuse.

56 L Mills & S Thompson ‘Parental responsibilities and rights during the “Gender reassignment” decision-making process of intersex infants: Guidance in terms of article 5 of the Convention on the Rights of the Child’ (2020) 28 *International Journal of Children’s Rights* 547, 555.

57 Art 20(1)(c).

58 Concluding Observations and Recommendations by the African Children’s Committee on the Peoples’ Democratic Republic of Algeria Report on the Status of Implementation of the African Children’s Charter, 26th ordinary session para 15, https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observations_Algeria.pdf (accessed 20 November 2023).

59 Concluding Observations and Recommendations by the African Children’s Committee on the Arab Republic of Egypt Report on the Status of Implementation of the African Children’s Charter, 12th ordinary session para 11, https://www.acerwc.africa/sites/default/files/2022-09/CO_Egypt_Eng.pdf (accessed 20 November 2023).

60 Concluding Observations and Recommendations by the African Children’s Committee on the State of Eritrea on the Status of Implementation of the African Children’s Charter, 28th ordinary session para 14, https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observations_Eritrea.pdf January 2017 (accessed 20 November 2023).

61 Concluding Observations and Recommendations by the African Children’s Committee to the Government of Lesotho on the Status of Implementation of the African Children’s Charter, 26th ordinary session para 31, https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observation_Lesotho.pdf (accessed 20 November 2023).

62 Concluding Observations and Recommendations by the African Children’s Committee on the Initial Report of the Republic Kingdom of Eswatini on the Status of Implementation of the ACRWC, 33rd ordinary session July 2019 para 25, https://www.acerwc.africa/sites/default/files/2022-06/Eswatini_Concludig_Observation.pdf (accessed 20 November 2023).

63 Some of these arguments are advanced by A Louw ‘The constitutionality of a biological father’s recognition as a parent’ (2010) 13 *Potchefstroom Electronic Law Journal* 156-206; J Sloth-Nielsen, L Wakefield & NL Murungi ‘Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries’ (2011) 55 *Journal of African Law* 203-229; L Mills ‘Born from bad memories: The best interests of children born from rape and incest’ (2023) 48 *Journal for Juridical Science* 111-144.

It is submitted that Aspiration 10 also draws from article 20 since it pronounces that African children's views matter, also in the 'culture of inclusive participation at family level'.⁶⁴

The African Children's Committee is fulfilling its mandate in relation to the interpretation and implementation of children's socio-economic rights, some of which are protected by article 20, by regularly recommending improvements in relation to the allocation of resources in respect of health care, nutrition and sanitation, education, and assistance to parents, to state parties in response to their submitted reports.⁶⁵ In response to some of the communications it has received, the Committee further promoted the spirit and purport of article 20. In *Children of Nubian Descent*⁶⁶ the African Children's Committee found that, among others, the rights to education and health care of children of Nubian descent in Kenya were violated,⁶⁷ whilst in *Senegalese Talibés*⁶⁸ these rights and the right to survival and development of *talibés* were ignored when they were sent away to religious schools. In paragraphs 62 to 68 of the decision, the African Children's Committee discussed the beatings that the children had to endure, reaching the conclusion that this corporal punishment violated not only the Senegalese Penal Code, but also article 16 of the African Children's Charter, and possibly the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In *Tanzanian Girls*⁶⁹ the Children's Committee recommended that the government of Tanzania undertake concrete steps for, among other things, the continuation of the education of pregnant girls at schools, to ensure that their right to health care is being fully implemented, and that child-friendly sexual reproductive education be provided.

Finally, the African Children's Committee has been clear and emphatic in repeatedly denouncing the practice of using physical punishment in the school and home environment,⁷⁰ whilst praising the abolishment of all forms of corporal punishment in all settings in 12 African states, in its Concluding Observations and recommendations to state party reports.⁷¹ In its decision in *Mauritanian Enslaved Brothers* the Committee explicitly pronounced that it 'is of the view that all forms of corporal punishment should be abolished, either in the home or any other setting'.⁷² In Aspiration 7 of Agenda

64 African Children's Committee 'Agenda 2040: 10 aspirations for an Africa fit for children' 67, https://www.acerwc.africa/sites/default/files/2022-11/Agenda%202040_For_An_Africa_Fit_4_Children.pdf (accessed 8 March 2024).

65 See, eg, 'Concluding Observations and Recommendations', <https://www.acerwc.africa/en/states-parties/reporting/overview> (accessed 5 February 2024) made in respect of the country reports by Cameroon (January 2017): paras 13, 19 and 20; Angola: paras 32-42 and Gabon: paras 8, 19, 20, 27, 33-43.

66 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of Children of Nubian Descent in Kenya) v Kenya* No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), <https://www.acerwc.africa/en/communications/institute-human-rights-and-development-africa-ihrda-and-open-society-justice> (accessed 9 April 2024) (*Children of Nubian Descent*).

67 See chs 12 & 15 of this *Commentary*.

68 *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, 15 April 2014 (*Senegalese Talibés*), <https://www.acerwc.africa/en/communications/centre-human-rights-university-pretoria-and-la-rencontre-africaine-pour-la-defense> (accessed 9 April 2024).

69 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* No 12/Com/001/2019 (*Tanzanian Girls*), <https://www.acerwc.africa/en/communications/legal-and-human-rights-centre-and-centre-reproductive-rights-behalf-tanzanian-girls> (accessed 9 April 2024).

70 See, eg, the Concluding Observations and Recommendations made in respect of the country reports by Nigeria (December 2019) paras 22 & 26; Uganda (May 2022) paras 25-26; and Botswana (September 2023) paras 29, 30, 33, 46 & 49. In some of these instances the African Children's Committee also had to condemn the practice from still being used by the state as part of the criminal justice system. See also ch 17 of this *Commentary* for a discussion on this topic in the context of art 16 of the African Children's Charter.

71 See, eg, the Concluding Observations and Recommendations made in respect of the country reports by Benin (September 2019) paras 3 & 23; Guinea: para 24; and Kenya (1st periodic report) para 30.

72 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No 7/Com/003/2015, (2017) AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*), https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20DECISION%20ON%20COMMUNICATION%20No_007_Com_003_2015%20English_0.pdf (accessed 9 April 2024).

2040, the African Children's Committee specifically envisages that '[n]o child is [to be] subjected to corporal punishment' by 2040.⁷³ Although the Committee acknowledges that the 2020 benchmarks that it set for itself in this regard have not been reached, it explains in its Assessment of the first phase of implementation (2015-2020)⁷⁴ report how great inroads have been made in achieving this goal, and countries such as Rwanda and Namibia 'are inching towards prohibition'.⁷⁵

At the launch of the 2017 Day of the African Child, the Africa Project of the Global Initiative to End All Corporal Punishment of Children briefed delegates on how its aim ties in with this aspiration by the African Children's Committee, as well as Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development 'in which every child grows up free from violence and exploitation'.⁷⁶ It called for stronger advocacy, including legal advocacy, and 'direct application of the CRC and other relevant instruments in national courts'⁷⁷ but failed to refer to article 20(1)(c) in particular. In 2018 in its General Comment 5 the African Children's Committee made specific reference to article 20(2) in reference to the matter of 'child protection legislation', reaffirming the position that the 'state should support parents who are unable to fulfil their parental responsibilities'.⁷⁸ In the paragraph preceding this one, the Committee recalled how it has stressed that legislation must be adopted to prohibit corporal punishment in all settings, and added that such legislation may need to be made sector-specific, in order to be effective.⁷⁹ Again, the instruction provided by article 20(1)(c) was not used in support of this call.

5 Domestication of article 20 in national legal systems

In 2007 Togo became the first country on the African continent to prohibit corporal punishment in all settings. At present, this is also the case in Benin, Cabo Verde, the Republic of the Congo, Guinea, Kenya, Mauritius, the Seychelles, South Africa, South Sudan, Tunisia and Zambia.⁸⁰ South Sudan and Tunisia, however, have not ratified the African Children's Charter,⁸¹ and it would appear that article 20(1)(c) has not played a significant role in persuading jurisdictions to abolish the practice in the home. Thus, for example, there was no mention of this provision, or even of the African Children's Charter or CRC, in the South African Constitutional Court ruling, confirming the declaration of constitutional invalidity of the defence of 'reasonable chastisement', thus abolishing the practice of domestic corporal punishment in this country.⁸² Although the Court reasoned that this form of discipline infringes

73 African Children's Committee AC (n 61) 30.

74 African Children's Committee (n 31) 114.

75 African Children's Committee (n 31) 47-49.

76 Global Initiative to End All Corporal Punishment of Children 'Day of the Child briefing 2017' 2, <https://endcorporalpunishment.org/resources/regional-progress-publications/day-of-the-african-child-briefing-2017/> (accessed 9 April 2024).

77 Global Initiative (n 76) 4.

78 General Comment 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child (art 1) and Systems Strengthening for Child Protection 21, https://www.acerwc.africa/sites/default/files/2022-09/GENERAL_COMMENT_ON_STATE_PARTY_OBLIGATIONS_UNDER_ACRWC_%28ARTICLE%20%29_%26_SYSTEMS_STRENGTHENING_FOR_CHILD_PROTECTION_0.pdf (accessed 16 September 2024).

79 General Comment 5 (n 78) 20-21.

80 End Corporal Punishment 'Progress in Africa', <https://endcorporalpunishment.org/africa/> (accessed 5 February 2024). For details of the relevant legislative provisions, see also African Children's Committee (n 31) 47-49, and Vohito (n 11) 83-86, 89-90. For further perspectives on the legal position in selected African jurisdictions, see J Sloth-Nielsen 'Southern African perspectives on banning corporal punishment – A comparison of Namibia, Botswana, South Africa and Zimbabwe' in BJ Saunders, P Leviner & B Naylor (eds) *Corporal punishment of children: Comparative legal and social developments towards prohibition and beyond* (2019) 245-265.

81 Ratification Table, <https://www.acerwc.africa/en/member-states/ratifications> (accessed 10 February 2024).

82 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* 2020 (1) SA 1 (CC).

upon the child's right to dignity,⁸³ and the freedom and security of the person,⁸⁴ it only relied on the constitutional imperatives that it receives in terms of sections 10, 12 and 28 of the Constitution of the Republic of South Africa, 1996, and not from the instruction provided by article 20(1)(c) of the African Children's Charter.⁸⁵ In the High Court decision⁸⁶ that preceded this Constitutional Court hearing, the Court made reference to the African Children's Committee's Concluding Observations and recommendations to the country, urging it to prohibit corporal punishment also in the home,⁸⁷ but relied more extensively upon the CRC Committee's General Comment, calling for children's protection against all forms of corporal punishment.⁸⁸ This General Comment by the CRC Committee likewise did not draw from article 20's instruction that domestic discipline must be administered with humanity and in a manner consistent with the inherent dignity of the child, nor did it mention the African Children's Charter.

So too did the Zimbabwean High Court in 2017 fail to reference article 20 in its granting of a declaratory order that corporal punishment in school and in the home violates the rights of children as set out in sections 51, 53 and 81 of the Constitution of Zimbabwe.⁸⁹ Admittedly, the Court did not provide reasons for its decision, other than stating that the application was 'not frivolous or vexatious', or 'without merit', since the Attorney-General did not oppose the application. As all declarations of constitutional invalidity must be confirmed by the Constitutional Court, the matter was referred to it in terms of sections 175(1) and (5) of the Constitution. However, to date, no such confirmation has been made by the Constitutional Court. This in turn, led to a Zimbabwean mother literally getting away with murder, in a matter that was decided in 2023: In *S v Mutero* the accused, with the assistance of her brother, beat her 13 year-old son with 'a mulberry stick and a fan belt', chastising him for not obeying her.⁹⁰ The pathologist concluded that the boy died from head injuries, but the mother's defence was that she only hit him 'on the buttocks and the thighs'.⁹¹ She did not foresee that her assault could cause the death of her child. Ignoring the 2017 decision by its counterpart, and similar remarks made in other judgments,⁹² the High Court found that 'in cases of murder resulting from corporal punishment administered by a parent or other authorised person, it is not enough for prosecution to simply allege assault'⁹³ because the assault itself is not criminal in terms of section 241(2) of the Criminal Code. This law that provides that 'where moderate corporal punishment is administered upon a minor person by a parent, guardian or school-teacher within the scope of that authority, the authority shall be a complete defence to a criminal charge alleging the commission of a crime of which the administration of the punishment is an essential element' thus remains applicable in Zimbabwe.⁹⁴

83 Paras 45-50 & 67.

84 Paras 36-44. For a discussion of the decision, see B Clark "'Why can't I discipline my child properly?' Banning corporal punishment and its consequences' (2020) 137 *South African Law Journal* 335.

85 In terms of sec 39(1)(c) of the Constitution, a court must consider international law when interpreting the Bill of Rights.

86 *S v YG* 2018 (1) SACR 64 (GJ).

87 Para 57.

88 CRC Committee General Comment 8 (2006) 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19; 28, para 2; and 37, inter alia)' CRC/C/GC/8 (2 March 2007).

89 *Pfungwa and Justice for Children Trust v Headmistress Belvedere Junior Primary School, Minister of Education, Sport and Culture and Minister for Justice Legal and Parliamentary Affairs* (HH148-17 HC 6029/16) [2017] ZW HHC 148.

90 An unreported decision by the High Court of Zimbabwe, HH 178-23 CRB 82/22, 28 September 2022 and 9 March 2023 1, <https://www.jsc.org.zw/upload/Judgements/High%20Court/Harare/2023/HH%20178-23.pdf> (accessed 10 April 2024).

91 *Mutero* (n 90) 2.

92 *S v C* (a minor) Harare High Court review, December 2014, and *S v Mufema & Others*, 2015, as discussed by Sloth-Nielsen (n 80) 252-253.

93 *Mutero* (n 90) 11.

94 As above.

Another aspect of article 20 that is underutilised is that it imposes an obligation upon member states to 'ensure that the children of working parents are provided with care services and facilities'. It is not entirely clear whether states are to provide such facilities themselves or if, in line with the comment by the CRC Committee,⁹⁵ governments should work with the private sector employers and support the provision of such services. Nevertheless, the ILO reports that childcare services and facilities remain limited in much of the Global South where the concentration of workers in the informal economy is the highest.⁹⁶ A study by the World Bank's Women, Business and the Law project found that out of the 21 sub-Saharan economies measured, only 12 provide some form of regulation of childcare services, and for five of those, the provision of childcare services is regulated for the private sector only. There is no economy in the region where employers are mandated to assist by building day care facilities or nurseries, or to cover a part of childcare expenses incurred by their employees.⁹⁷

As mentioned above, article 20 places obligations upon state parties to assist parents materially, and does so in rather emphatic terms. These duties are discussed in part in chapter 6 of this *Commentary*, in terms of article 5 of the African Children's Charter.⁹⁸

6 Conclusion

Being a parent is hard work.⁹⁹ Parents are not only to provide food, shelter and other daily needs such as clothing, technology and transport to their children, but they also have to act as 'moral exemplars for their offspring'.¹⁰⁰ They have to guide and support their children, discipline them and teach them how to overcome challenges and celebrate successes. It is a tall order. The African Children's Charter acknowledges this fact and therefore calls upon states to assist parents and others in this task. As a result, article 20 of the African Children's Charter imposes a range of measures of protection of children, and obligations upon states, parents and others responsible for children. It is a provision that is crucial to the daily life of children. Like with much of the African Children's Charter, its aims are ambitious, noble and far-reaching but, unfortunately, its instructions have been implemented only to a limited extent. While the provision has been used to support and supplement recommendations made by the African Children's Committee and other non-governmental organisations (NGOs), the lived reality of too many children on the African continent falls short of the objectives article 20 set to achieve. Many of the aspirations and goals set by the African Children's Committee in its Agenda 2040 have failed to reach their medium-term targets and the likelihood of their eventual success is doubtful. Nevertheless, one cannot underestimate the normative and institutional significance of article 20. Where it has been implemented, it has been responsible for many interventions and much improvement in the daily lives of children and their parents.

Although there are similarities between article 20 and several of the provisions of the African Children's Charter, as well as other instruments of international human rights protection, it also has its own, unique contribution to make. It is the only provision that instructs parents to administer discipline in a way that considers children's humanity, dignity and best interests. Read with article 16 of the African Children's Charter, there can be no other argument than that children should not be disciplined

95 See above at 3. [part 3?]

96 The ILO and Women in Informal Employment: Globalising and Organising 'Extending childcare services to workers in the informal economy: Policy lessons from country experiences', https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/genericdocument/wcms_737555.pdf (accessed 9 April 2024).

97 Women, Business and the Law 2022 'Toward available, affordable, and quality childcare in sub-Saharan Africa', <https://documents1.worldbank.org/curated/en/099558107082233461/pdf/IDU03cd134270aeb104e140814408f7735a3ee47.pdf> (accessed 9 April 2024).

98 See further Sloth-Nielsen (n 15).

99 In the words of Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA 530 para 70.

100 Sachs J in *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) para 34.

through physical and bodily infringements. Yet, for whatever reasons, on numerous occasions, article 20 has been overlooked as a valuable instruction and aid in the global call to end corporal punishment in the home. The provision offers a useful opportunity to courts to develop African jurisprudence and for state parties to align their policies and legislation with international standards. Contrary to the other obligations imposed by article 20, this one will not cost much.