

Chapter 27

Article 26

Protection against apartheid and discrimination

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1. State parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under apartheid and in states subject to military destabilisation by the apartheid regime.
2. State parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practicing racial, ethnic, religious or other forms of discrimination as well as in states subject to military destabilisation.
3. State parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and apartheid on the African continent.

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1 Introduction

'Apartheid' is a South African neologism, coined by Afrikaner nationalists in the 1930s, which translates to 'apartness' or 'separateness'.¹ Beginning in the 1940s, it was used to refer to a legal, social and political policy used to implement discrimination and segregation – also with its origins in South Africa.² As Sitze phrases it, 'apartheid' is a synonym for racial separation or partition as well as a 'juridical order' which 'translated partition directly into the forms of rationally constituted law'.³ Ashforth notes that the word became part of the 'Afrikaner nationalist political orthodoxy and the ruling ideology of a governing party'.⁴ Essentially, apartheid is a system implemented for the strict regulation of discrimination and segregation – and laws related to discrimination and segregation. Apartheid entrenches discrimination and segregation. Although the system of apartheid relied heavily on the law to entrench discrimination and segregation, apartheid – strictly speaking – is not itself a legal term.

1 S Dubow *Apartheid, 1948-1994* (2014) 10.

2 As above; A Ashford 'The meaning of "apartheid" and the epistemology of evil' in WC Olsen & WEA van Beek (eds) *Evil in Africa: Encounters with the everyday* (2015) 366.

3 A Sitze 'The opposite of apartheid: Further notes on Mandela and the law' (2018) 40 *Discourse* 146.

4 Ashford (n 2).

This chapter contains five substantive parts. First, the subject of apartheid will be contextualised; second the chapter will offer a legal interpretation of article 26 of the African Charter on the Rights and Welfare of the Child (African Children's Charter); third, the link between article 26 and a selection of other provisions in the Charter will be explored; fourth, the links and similarities between article 26 and other treaties will be explored; finally, the state of the domestication of article 26 will be discussed.

2 Apartheid in context

In order to legally interpret article 26, the system of apartheid – which is a crime against humanity⁵ – must first be understood. It should be clarified here that, whenever reference is made to apartheid in this chapter, this is a specific reference to the term and system as it originated in South Africa.

Welsh has explained that apartheid 'was [a system] intended to shore up the supposedly eroding foundations of white domination'.⁶ In defining 'apartheid', Posel writes:⁷

Apartheid originated as a label for the system of *institutionalised racism and racial social engineering* inaugurated by the National Party after its election victory [in South Africa] in 1948. But the term has since been appropriated as a global signifier of *racialised separation, inhumanity and exploitation*. The champions of apartheid presented their cause as first and foremost the preservation of white racial political supremacy, as an essential requisite for perpetuating the supposed superiority of white 'civilisation'. Yet, as had been the case during the segregationism of preceding decades, the apartheid project was an attempt to sustain white political supremacy in ways that simultaneously promoted the case of white economic prosperity.

From the above, it becomes clear that, at the heart of apartheid, was racism – or 'racialised discrimination and subjugation'⁸ – and white economic empowerment at the expense of black prosperity, through the elimination of black competition.⁹ The apartheid system was implemented in order to sustain racism – against all people of colour, albeit at different levels and in different ways. It is worth mentioning that, unlike the Nazi state, for example, the apartheid regime was not an 'exterminationist project'.¹⁰ On the contrary, apartheid aimed to keep black people alive, albeit under conditions of continued discrimination, servitude and submission.¹¹ That it was not an 'exterminationist project' does not mean that the apartheid regime excluded notions of white supremacy and violence and brutalisation against the black population.¹² The black population was needed as a labour force, in order to further white development. Therefore, instead of being exterminated, the movement of the black population, especially into 'white country', was strictly controlled and closely monitored.¹³

Although one can blanketly refer to 'apartheid' or 'the apartheid project', the apartheid era lasted decades and was implemented through a number of different policies. Generally, authors note that

5 United Nations General Assembly *The policies of apartheid of the Government of the Republic of South Africa* A/RES/2307 Resolution 2202 A (XXI 1496th Plenary Meeting (16 December 1966); for discussion, see J Dugard 'Convention on the Suppression and Punishment of the Crime of Apartheid' (1973) *United Nations Audiovisual Library of International Law* 1.

6 D Welsh *The rise and fall of apartheid* (2010) 21.

7 D Posel 'The apartheid project, 1948-1970' in R Ross and others (eds) *The Cambridge history of South Africa (Volume II)* (2011) 319, 321 (my emphasis).

8 As above. Posel notes that the 'international précis of apartheid' is that it is 'the apogee of racism'. However, this perpetuates the idea that apartheid was a 'single, coherent, monolithic project' while, in truth, apartheid was more a collection of projects and efforts and morphed a number of times before being brought to an end; Posel (n 8) 319.

9 Welsh (n 6) 44. Posel writes: 'Apartheid's racism was predicated on a recognition of the fundamental economic interdependency of the races.' See Posel (n 7) 332.

10 Posel (n 7) 322.

11 As above.

12 As above.

13 Welsh (n 6) 20.

apartheid was implemented in three distinct stages: the 1950s or 1948 to 1959; the 1960s or 1959 to 1966; and the 1970s and beyond or 1966 to 1994.¹⁴ During the first phase, the focus was on discrimination,¹⁵ and the apartheid project was implemented through a cautious, pragmatic approach to racial and economic engineering.¹⁶ The second phase of apartheid was more vigorous and unyielding, especially regarding racial segregation, as there were more laws and regulations for everyday life (and more penalties for disobedience and movement), as well as security-related legislation and state-sanctioned violence – this phase is also responsible for the global image of apartheid being racism.¹⁷ During this time, the apartheid government implemented a ‘separate development’ and the ‘homelands’ system, in terms of which black people had to live in homelands outside the well-developed ‘country’ of South Africa in rural outskirts, which were demarcated according to tribes and peoples.¹⁸ In order to implement the system of homelands, the Minister of Interior introduced the Population Registration Act of 1950 and noted that ‘[t]he determination of a person’s *race* is of the greatest importance in the enforcement of any existing or future *laws* in connection with separate residential areas’.¹⁹ In the final phase, apartheid began to erode,²⁰ due largely to the rise of protests against the system of apartheid, which had not been seen in the first two phases of apartheid.²¹

Although it had three distinct phases, the defining feature of apartheid throughout its existence was the institutionalised racism. Apartheid regulated and executed racism in all facets of – public and private – life.²² The apartheid project was engineered to seep into every aspect of everyday life,²³ and it did so successfully by regulating everyday life through voluminous and ubiquitous legal regulation.²⁴

Indeed, Posel states:²⁵

Although the regulation of race was long-standing in modern Western and colonial states, the apartheid state went further in adopting an *explicit principle of systematic, legalised racial separatism and exclusion*. The institutionalisation of racism and racial discrimination permeated every facet of everyday life – from the most public through to the most intimate – in the name of a particular ideology of white supremacy and racial purity. Apartheid thus reiterated notions of race that had longer history in South African society. What distinguished the apartheid project from the segregationism that preceded it was the effort to harness well-established versions of racial common sense to *the most ambitious project of racial bureaucratisation and normalisation yet undertaken* – nationally and internationally. Across the population at large, every facet of experience would be subject to racial categorisation and surveillance.

14 Posel (n 7) 320; Welsh (n 6) 42.

15 Welsh (n 6) 42.

16 Posel (n 7) 320.

17 Posel (n 7) 320 & 346-347.

18 Posel (n 7) 349; Welsh (n 6) 42, 52.

19 Extraction from a speech by Minister of Interior, Dr TE Dönges, introducing the Population Registration Act on 8 March 1950 in EH Brookes *Apartheid: A documentary study of modern South Africa* (1968) 22.

20 Welsh (n 6) 42.

21 As above. The final phase of apartheid also coincided with the assassination of Verwoerd, known as the ‘architect of apartheid’, which marked the end of phase two. At this time there was more pushback against apartheid from within parliament as well. See Welsh (n 6) 60-61.

22 Apartheid was also mostly concerned with black life. Posel writes that ‘in the main, black life remained the condition, and the apartheid project proliferated myriad laws, regulations and proscriptions designed to sustain and regulate the conditions of black life accordingly’. See Posel (n 7) 322.

23 Welsh describes it as an ‘obsession with separation’ which ‘extended to virtually every sphere of society’. See Welsh (n 6) 44.

24 Posel (n 7) 347.

25 Posel (n 7) 331 & 334 (my emphasis).

The apartheid project was built on three pillars: Christianity (the Afrikaner religion) and the Christian theology of power;²⁶ racialised social and economic engineering (which was not created but reiterated by apartheid);²⁷ and spatial control and discrimination (through the implementation of laws such as the 1913 Land Act and 1923 Natives Act as well as treatment of black workers as migrants in a 'white country').²⁸ These three pillars reflected an outright violation of the rights of freedom of thought, conscience and religion,²⁹ freedom of expression,³⁰ protection of privacy,³¹ protection of the family,³² and family environment.³³

During the apartheid era, the race and ethnicity of South Africans were strictly defined and recorded through specified mechanisms, in a bid to establish, authorise and operationalise these racial differences in and through the law and everyday life.³⁴ This was done in order to determine which standard of rights realisation, if any, would be afforded to persons.³⁵ Practically, the obsessive separation of races resulted in separate public facilities, restaurants, transport and learned societies.³⁶ It also created greater competition for jobs, land, schools, houses and public services, as these were very limited in non-white areas.³⁷ It should be mentioned here for context that the apartheid government divided races into four separate racial groups – namely, 'black', 'coloured', and 'white' – 'Indian' was first regarded as a subcategory of 'coloured' and only later distinguished as its own racial group.³⁸ This was done officially through the enactment of the Population Registration Act.

As apartheid progressed, the human rights of the black population were increasingly violated. Apartheid was not short of laws, as each ideal was backed by an arsenal of legislation.³⁹ During apartheid, socio-economic rights of non-whites were regulated and, essentially, violated. In the case of the black population, for example, the government implemented Bantu education, which educated the black population only insofar as it would prepare them to become a labour force for the white population.⁴⁰ Mathebula adds that apartheid education was designed to socialise black students to accept apartheid, and the social relations of that time, whereby whites were viewed as superior and blacks as inferior, as though it was natural.⁴¹ Similarly, the healthcare system was divided along racial lines. As a result of this, the majority of the South African population – which was not white – did not have access to satisfactory health care, clean water or basic sanitation services.⁴²

26 Posel (n 7) 325.

27 Posel (n 7) 328 & 334.

28 Posel (n 7) 329.

29 Art 9 African Children's Charter.

30 Art 7 African Children's Charter.

31 Art 10 African Children's Charter.

32 Art 18 African Children's Charter.

33 Art 25 African Children's Charter.

34 Posel (n 7) 355.

35 M Langford 'Introduction: Civil society and socio-economic rights' in M Langford and others (eds) *Socioeconomic rights in South Africa: Symbols or substance?* (2013) 8.

36 Welsh (n 6) 44.

37 Welsh (n 6) 43-44.

38 Population Registration Act 30 of 1950. The new classification of 'Indian' was included in the 1959 amendment of the Act. See Y Erasmus & GTH Ellison 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science*; D Posel 'What's in the name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 59-60.

39 Welsh (n 6) 56.

40 P de Vos & W Freedman (eds) *South African constitutional law in context* (2021) 823-824.

41 T Mathebula 'Human rights and neo-liberal education in post-apartheid South Africa' (2018) 71 *Journal of Education* 100.

42 JA Singh and others 'South Africa a decade after apartheid: Realising health through human rights' (2005) 12 *Georgetown Journal on Poverty Law and Policy* 356, 359.

Especially during the second phase – the 1960s – civil and political rights were violated on a daily basis. The movement of black people, for example, was regulated extensively through the enactment of laws and regulations that dictated when, where and how (far) they could move.⁴³ This resulted in increased violence against, as well as increased detention – often without trial – of black people.⁴⁴ Many laws, and the violence perpetuated against black people, and them being treated as less than human beings, resulted in the violation of their right to dignity.⁴⁵

The system of apartheid, then, was a system of daily and continued segregation and discrimination, the result of which, as Sitze puts it, ‘criminalised the very existence of ordinary Africans’⁴⁶ and, although apartheid has formally ended, the consequences of the laws, policies and practices of discrimination, inequality and segregation practiced then are still evident today.⁴⁷

3 Legal interpretation of article 26 of the African Children’s Charter

The crux of article 26 of the African Children’s Charter is the protection of children against apartheid and the violation of their rights through a system such as apartheid. Through this, article 26 aims to shield children against the implementation of a cruel system in terms of which their rights to equality and non-discrimination, as well as access to other rights, would be violated.

In sub-article (1), the provision mandates state parties to prioritise the special needs of children living under apartheid.⁴⁸ Being guided by the discussion above, it is argued here that there is no way to protect the needs of children living under apartheid except to end such a regime. The case of South Africa shows that the system of apartheid is so meticulously legislated and implemented, and mandated by and in law, that only dismantling it can ensure the protection of the rights of its victims. Moreover, at the core of it, it is the rights to non-discrimination and equality which must (first) be protected, as the nature of an apartheid regime is such that it begins by discriminating and then legislates this discrimination in different ways, which manifest as the violation of civil, political and socio-economic rights.

Interestingly, the Children’s Charter does not include a clause on the right to equality; it only includes a provision on non-discrimination.⁴⁹ However, the notions of equality and non-discrimination are closely linked, as explained by Moeckli:⁵⁰

The terms ‘equality’ and ‘non-discrimination’ have often been used interchangeably and described as the positive and negative statement of the same principle: whereas the maxim of equality requires that equals be treated equally, the prohibition of discrimination precludes differential treatment on unreasonable grounds.

There lies upon states the obligation to respect, by refraining from taking discriminatory action, and protect, by preventing discrimination by non-state actors, the rights of the child.⁵¹ This means that the

43 Welsh (n 6) 43-44 & 48; Posel (n 7) 346.

44 Welsh (n 6) 57.

45 Welsh (n 6) 48.

46 Sitze (n 3) 149. See also Ashford (n 2) 375.

47 See, generally, De Vos & Freedman (n 40) 791-828; Dugard (n 5) 2; M Mariotti & J Fourie ‘The economics of apartheid: An introduction’ (2014) 29 *Economic History of South Africa* 113-114; Mathebula (n 41) 91-102; CK Adonis ‘Generational victimhood in post-apartheid South Africa: Perspectives of descendants of victims of apartheid era gross human rights violations’ (2017) 24 *International Review of Victimology* 1-11; Singh and others (n 42) 355-375; Posel (n 7) 50-71.

48 Art 26(1) African Children’s Charter.

49 The right to non-discrimination is found in art 3 of the African Children’s Charter.

50 D Moeckli ‘Equality and non-discrimination’ in D Moeckli and others (eds) *International human rights law* (2018) 149.

51 Moeckli (n 50) 161.

state must introduce comprehensive legislation that prohibits discrimination or the perpetuation of the violation of equality across fields such as employment, education, health care, housing and the provision of goods and services.⁵² Moreover, it has been noted that

[t]he right to equality and non-discrimination gives concrete expression to the basic idea which on the whole international human rights system is founded: that all human beings, regardless of their status or membership of a particular group, are entitled to the same set of rights.⁵³

The Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination have echoed the above sentiment by stating that '[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic principle relating to the protection of human rights'.⁵⁴ Therefore, central to the protection of the child against apartheid is the protection of the child against discrimination, especially on the grounds of race, ethnicity and religion.⁵⁵

Regarding sub-articles (2) and (3) of article 26 in terms of which state parties are to prioritise the special needs of children 'living under regimes practicing racial, ethnic, religious or other forms of discrimination'⁵⁶ and 'direct their efforts towards the elimination of all forms of discrimination and apartheid',⁵⁷ state parties are called upon to support children living under apartheid, even if they are outside of their territory. To wit, where a country is practising apartheid, other state parties are called upon to support the children therein through, perhaps, measures such as delivering aid to children in the affected areas.

The earlier discussion highlighted the ways in which apartheid violated the rights to not be discriminated against on the basis of race or ethnicity, the right to equality, regardless of race or ethnicity, and of equality before the law, also regardless of race or ethnicity. Clearly, the system of apartheid concerns itself with discarding equality and enforcing discrimination. More particularly, apartheid concerns itself with racial discrimination, the prohibition of which forms part of international law.⁵⁸ Distilled to its essence, then, this is the aim and purport of article 26 of the African Children's Charter, namely, to ensure that children across Africa are protected against the violation of their rights to equality and non-discrimination.

4 Links to other Charter articles

As discussed above,⁵⁹ the aims and outcomes of the system of apartheid are discrimination, along ethnic and racial lines, and the systemic violation of several rights. Thus, article 26, naturally, is linked to a number of other rights found in the African Children's Charter, the first of which being article 3, which is the prohibition of discrimination. The Charter prohibits discrimination against a child on multiple grounds, the most relevant grounds being the race, ethnic group, or colour of the child or

52 As above.

53 Moeckli (n 50) 151.

54 Human Rights Committee (HRC) 'CCPR General Comment No 18: Non-discrimination' CCPR/C/21/Rev.1/Add.1 (21 November 1989) para 1; Committee on the Elimination of Racial Discrimination (CERD Committee) 'General Recommendation XIX on article 3 of the Convention' (47th session 1995) 1.

55 Art 26(2) African Children's Charter.

56 As above.

57 Art 26(3) African Children's Charter.

58 Moeckli notes: 'That *race* is amongst [the] "suspect classification", is indicated by the general acceptance of the prohibition of racial discrimination as forming part of customary international law ... and the widespread ratification of the ICERD.' See Moeckli (n 50) 159.

59 See discussion under part 2.

child's parents or legal guardians. As mentioned earlier, apartheid was a system put in place for the legalisation and implementation of discrimination and segregation based on race, ethnic groupings and skin colour. Importantly, the non-discrimination clause found in article 3 of the Charter has a wider range of application, which goes beyond racial discrimination,⁶⁰ while article 26 offers a more limited protection against apartheid, which concerns itself – at least primarily – with racial or ethnic discrimination. Moreover, the non-discrimination clause is a 'catch-all' provision that protects against discrimination that may be deliberate or unintentional. Article 26, on the other hand, is something of a 'never again' clause that is aimed at providing protection against a very specific form of (racial or ethnic) discrimination – that is, apartheid.⁶¹ Article 26, therefore, is an enriching, not redundant, provision.

Similar to the Convention on the Rights of the Child (CRC),⁶² the African Children's Charter contains an article dedicated to the best interests of the child principle.⁶³ This universal,⁶⁴ complex, flexible and adaptable principle,⁶⁵ composed of different variables, guides the adjudication of all matters concerning the child and the child's welfare.⁶⁶ The best interests of the child principle is also a threefold concept, that is, an individual, substantive right, interpretative principle and rule of procedure.⁶⁷ Moreover, the consideration of the best interests of the child, in all matters dealing with the child, is in international law not discretionary, but compulsory.⁶⁸ Finally, the best interests of the child principle is one of the four general principles of the African Children's Charter.⁶⁹ Naturally, then, this provision flows throughout the Children's Charter and, thus, applies to all other rights contained therein.⁷⁰ Article 26, then, is undoubtedly also linked to article 4 of the Charter, wherein the best interests of the child principle is contained.

Closely linked to the best interests of the child principle, at least in the case of the African Children's Charter, is the right of the child to their 'survival, *protection* and development'.⁷¹ Apartheid distinguishes between children on one or more prohibited grounds of discrimination. Therefore, it leads to different levels of protection for different children and/or no protection of the rights of certain children, in line with the sanctioned discrimination. Referring back to the definition and scope of

60 Art 3 of the African Children's Charter reads: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

61 Dugard has noted that the Convention on the Suppression and Punishment of the Crime of Apartheid 'has its roots in the United Nation's opposition to South Africa's apartheid' – that is, the 'discriminatory racial policies of the South African government' from 1948 to 1990. See Dugard (n 5) 1. It is conceivable that the same can be said of the Committee's decision to include a provision protecting children against apartheid – having seen it happen somewhere in Africa, there was a need to ensure that it does not happen again.

62 Art 3 CRC.

63 Art 4 African Children's Charter.

64 C Breen *The standard of the best interests of the child: A Western tradition in international and comparative law* (2022) 1.

65 CRC Committee General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1) CRC/C/GC/14 (29 May 2013) para 32; G van Bueren 'Children's rights' in Moeckli and others (n 50) 330.

66 Breen (n 64) 1-2.

67 CRC Committee General Comment 14 (n 65) para 16; Van Bueren (n 65).

68 Van Bueren (n 65).

69 The four general principles of the Charter are non-discrimination; the best interests of the child; the right to life, survival and development; and the right to be heard. See Van Bueren (n 65) 329.

70 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 32; TN Khoza 'The Sen-Nussbaum diagram of article 11(3) of the African Charter on the Rights and Welfare of the Child: Facilitating the relationship between access to education and development' (2021) 21 *African Human Rights Law Journal* 5.

71 Art 5(2) African Children's Charter (my emphasis).

apartheid, or the system of apartheid,⁷² the implementation of the system, and systems, of apartheid led to the violation of all rights ordinarily enjoyed in all spheres of everyday life.⁷³ Therefore, there also is a clear link between article 26 and all the civil and political,⁷⁴ as well as social, socio-economic and cultural rights of the child.⁷⁵

5 Links to other human rights treaties

As evidenced by the discussion above, apartheid concerns the violation of a plethora of other rights. However, chief of the similar human rights treaties to article 26 is the Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).⁷⁶ The Apartheid Convention defines apartheid as a crime against humanity and confirms that ‘inhuman acts resulting from the policies and practices of apartheid ... [are] crimes violating the principles of international law’.⁷⁷ It further establishes that crimes of apartheid are ‘acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial groups of persons and systemically oppressing them’.⁷⁸ This Convention is important for the interpretation of article 26 because, although the African Children’s Charter protects children against apartheid, it does not define what apartheid is. Therefore, the Apartheid Convention assists one to understand what it is that article 26 shields children from.

There also is a link between article 26 and treaties protecting the rights to non-discrimination and equality. Regarding this, Moeckli has noted that ‘[t]he international human rights system is founded on the idea that all human beings have the same set of fundamental rights. Accordingly, almost all general human rights instruments guarantee the right to equality and non-discrimination’.⁷⁹

Once it has established itself as a system of racial or ethnic segregation, apartheid moves to discriminating based on race or ethnicity. Therefore, article 26 of the African Children’s Charter can be linked to a number of other treaties that include a provision guarding against non-discrimination and equality.⁸⁰ These treaties include the Universal Declaration of Human Rights (Universal Declaration);⁸¹ the African Charter on Human and Peoples’ Rights (African Charter);⁸² the International Covenant

72 See discussion under part 2.

73 Posel (n 7) 335; Welsh (n 6) 44; B Ngqulunga ‘Political inclusion without social justice: South Africa and the pitfalls of partial decolonisation’ (2023) 23 *Anthropological Theory* 404.

74 The civil and political rights of the child are found in art 3 and 5 through 10 of the African Children’s Charter. Regarding the links between apartheid and these rights, see Posel (n 7) 325, 329, 335, 346 & 348; Welsh (n 6) 44, 48 & 52. See also generally JL Grisinger ‘“South Africa is the Mississippi of the world”: Antiapartheid activism through domestic civil rights law’ (2020) 38 *Law and History Review* 843-841.

75 The socio-economic rights of the child are found in arts 11 to 14 of the African Children’s Charter. Regarding the links between apartheid and these rights, see Posel (n 7) 322; Welsh (n 6) 52, 56 & 58; Langford (n 35) 10-11; P Jones & N Chingore ‘Health rights: Politics, places, and the need for “sites for rights”’ in Langford and others (n 35) 226; B Goldblatt & S Rosa ‘Social security rights: Campaigns and courts’ in Langford and others (n 35) 255 & 258; S Terreblanche *A history of inequality in South Africa 1652–2000* (2002); J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2006); S Liebenberg & B Goldblatt ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution’ (2007) 23 *South African Journal on Human Rights* 335.

76 United Nations Convention on the Suppression and Punishment of the Crime of Apartheid (1973) A/RES/3068(XXVIII) (Apartheid Convention).

77 Apartheid Convention art I(1).

78 Apartheid Convention art II. The Convention goes on to list the manifestation of this oppression under arts II(a)-(f).

79 Moeckli (n 50) 148.

80 Moeckli (n 50) 152. It is worth noting here that the African Children’s Charter has a provision to guard against non-discrimination, which is found in art 3, but it does not have a general equality clause. However, the subject of apartheid includes discrimination and equality; therefore, art 26 can be linked to other provisions that protect the right to equality.

81 Universal Declaration of Human Rights (1948) Document 217 A (III) (UDHR) arts 2(1) & 7.

82 African Charter on Human and Peoples’ Rights (1981) CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) arts 2, 3, 18(3)-(4) & 26

on Civil and Political Rights (ICCPR);⁸³ the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁸⁴ the United Nations Convention against Torture (CAT);⁸⁵ and the CRC.⁸⁶ All these treaties include a provision protecting the right to equality, non-discrimination or both; thus, providing indirect protection against apartheid (by protecting against discrimination on the basis of race or ethnicity).

In addition to the treaties mentioned above, there is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁸⁷ which also explicitly refers to apartheid,⁸⁸ and mentions the concept of racial superiority – which it condemns⁸⁹ – and racial discrimination.⁹⁰ Interestingly, however, while ICERD contains a definition of ‘racial discrimination’, the Convention does not include a definition of ‘racism’.⁹¹ The Committee on the Elimination of Racial Discrimination has also clarified that, while the reference to ‘apartheid’ in the treaty may have been directed exclusively to South Africa, article 3 – which condemns apartheid – prohibits all forms of racial segregation in all countries.⁹² ICERD, then, plays a role similar to that of the Apartheid Convention, as it can assist with the interpretation and application of article 26 of the African Children’s Charter.

6 Domestication of article 26

Thus far, violations of article 26 have neither been raised nor documented by the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee).⁹³ In light of this, article 26(1), in terms of which state parties shall accord the highest priority to the special needs of children living under apartheid regimes, has not been (directly) implemented or tested by the Children’s Committee. However, as mentioned earlier, there exists an obligation in the current *status quo* to protect children against the violation of articles 26(2) and (3).⁹⁴ It is argued here that, though not directly, the Committee has been faced with the challenge of protecting against the violations envisioned in these provisions in some communications brought before it.

(African Charter).

83 International Covenant on Civil and Political Rights (1966) United Nations, Treaty Series Vol 999 171 arts 2(1) & 3 (ICCPR).

84 International Covenant on Economic, Social and Cultural Rights (1966) United Nations, Treaty Series, Vol 993 3 arts 2(2) & 3 (ICESCR).

85 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) United Nations, Treaty Series Vol 1465 85 art 16 (CAT).

86 Convention on the Rights of the Child (1989) United Nations, Treaty Series Vol 1577 3 arts 1 & 5 (CRC).

87 Barring Western Sahara and South Sudan, all African countries have ratified the International Convention on the Elimination of All Forms of Racial Discrimination (1965) United Nations, Treaty Series, Vol 660 195 (ICERD). See <https://indicators.ohchr.org> (accessed 1 April 2024). The adoption of ICERD was propelled by South African apartheid and American racism. See M Bell *Racism and equality in the European Union* (2008) 10.

88 In terms of art 3 of ICERD, ‘[s]tates parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction’.

89 Art 4 ICERD.

90 Arts 1 & 2 ICERD.

91 See generally ICERD. See also Bell (n 87) 13. It is also interesting to note here that, while ICCPR does not include a definition of ‘racial discrimination’, the Human Rights Committee has accepted the definition found in ICERD. See HRC (n 54) para 6.

92 CERD Committee (n 54) para 1.

93 The Committee has not published any documents on this provision, nor has it included Concluding Observations in relation to the article for any reporting country. It has only noted the continued impact of apartheid on the children in South Africa. See <https://www.acerwc.africa/en> (accessed 14 October 2024).

94 See discussion at part 4.

For example, the African Children's Committee has been seized with an application regarding the situation relating to children of Nubian descent in Kenya.⁹⁵ In this matter, the government of Kenya was found to have unfairly discriminated against children of Nubian descent through denying them their right to have their births registered and be assigned nationality at birth.⁹⁶ This, the Committee found, also resulted in the further violation of the children's other rights, such as education and health.⁹⁷

In a matter relating to Sudan,⁹⁸ a girl was denied nationality (of Sudan) because her father became classified as being of South Sudanese origin when the Sudan-South Sudan split occurred.⁹⁹ When the applicant attempted to apply for university in Sudan, she could not do so as she did not have a Sudanese identification number. When she then tried to apply for one, her application was rejected in terms of a law which stated that she, and others in a position similar to hers, would be stripped of their Sudanese citizenship on the basis of their fathers' now South Sudanese origin.¹⁰⁰ The African Children's Committee found that the government of Sudan arbitrarily discriminated against her on the grounds of her father's ethnicity, and that this discriminatory law resulted in the unfair stripping of her citizenship.¹⁰¹

In these two matters that have been brought to the attention of the African Children's Committee, violations similar to those carried out during apartheid are apparent. Furthermore, similar consequences can be seen. As under the apartheid system, children were profiled on their ethnicity and the rights they were deemed to deserve were decided on the basis of their ethnicity. This, in return, resulted in the violation of their civil, political and socio-economic rights.

In these same instances, particularly that of Kenya, the African Children's Committee has worked tirelessly to have the government domesticate article 26(2) through the implementation of its decisions.¹⁰² Efforts such as fact-finding missions are an effective and important method for the domestication of any provision of the African Children's Charter. In addition to this, the role of national human rights institutions (NHRIs) and civil society organisations (CSOs) in raising awareness regarding children's rights cannot be overstated.¹⁰³ NHRIs and CSOs are able to engage with parliament regarding laws, take matters of violations of rights to domestic courts as well as regional and international treaty bodies, and provide the Children's Committee with shadow reports. All of these are actions that can lead to the domestication of article 26. State parties also have the obligation to domesticate this provision through its incorporation into domestic laws. They can also do so by protecting against the violation of this right by the government or private actors.

95 *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), decided 22 March 2011 (*Children of Nubian Descent*).

96 *Nubian Children's case* paras 7, 37-54 and 69.

97 *Children of Nubian Descent* (n 95) paras 63-68, 59-62 & 69.

98 *African Centre of Justice and Peace Studies and People's Legal Aid Centre v Sudan*, No 5/Com/001/2015, decided May 2018 (*Sudanese Nationality*).

99 *Sudanese Nationality* (n 98) paras 13-16.

100 As above.

101 *Sudanese Nationality* (n 98) paras 53 & 104-105.

102 E Fokala 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) 54 *De Jure Law Journal* 487-490.

103 RM Welch 'National human rights institutions: Domestic implementation of international human rights law' (2017) 16 *Journal of Human Rights* 99-100; SLB Jensen and others 'The domestic institutionalisation of human rights: An introduction' (2019) 37 *Nordic Journal of Human Rights* 165; A Buyse 'Squeezing civic space: Restrictions on civil society organisations and the linkages with human rights' (2018) 22 *International Journal of Human Rights* 969; AE Etuvoata 'Towards improved compliance with human rights decisions in the African human rights system: Enhancing the role of civil society' (2020) 21 *Human Rights Review* 415.

7 Conclusion

Apartheid and the system of apartheid was a very specific project which, although it has been adopted internationally, was born in South Africa. The apartheid project concerns itself with doing away with equality and instead replacing it with systemic ethnic, racial and religious discrimination. It is more, and far more systemic and stringent, than segregation and discrimination. Through the apartheid project, children are discriminated against on the grounds of their own race, ethnicity and religion or that of their parents or guardians. In the African context, what has become apparent, particularly through communications brought before the African Children's Committee, is that, while no country can be said to be living in an apartheid era of its own kind or making, a number of African countries are implementing *apartheidesque* laws and practices, such as strategic statelessness,¹⁰⁴ refusals to grant or facilitate birth registration documents,¹⁰⁵ and the blanket violation of the civil and political and social, economic and cultural rights of certain peoples in a territory.¹⁰⁶ While the scattered children's rights violations in this way do not constitute an apartheid project, it is definitely something one ought not take lightly. After all, article 26 is a 'never again' provision, the implementation of which will ensure that we 'never again' see apartheid on the continent.

104 *Children of Nubian Descent* (n 95) para 49.

105 *Sudanese Nationality* (n 98) paras 14-16.

106 *Children of Nubian Descent* (n 95) paras 61-62; *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*) paras 3, 6 & 17.