

Chapter 4

Article 3

Non-discrimination

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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 or 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.

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1 Introduction

The origin of the principle of non-discrimination finds its historical narrative in the fact that vulnerable persons were not recognised in society. Children, in particular, were deemed by adults to be incapable of holding human rights in comparison to adults. In the seventeenth century they were regarded as persons who did not have self-discipline and control and had to be punished severely – a position that changed with more tolerance towards children in the eighteenth century.¹ Since then, and especially after the United Nations (UN) was established in 1945, non-discrimination has gained a strong footprint in international law. Indeed, there hardly is any international law treaty without a dedicated provision on discrimination.

1 J Brannan 'Childhood in the 18th century' (2021), <https://juliabrannan.com/historical-articles/childhood-in-the-18th-century/> (accessed 4 September 2024). See AF Bayefsky 'The principle of equality or non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 5. See also B Abramson 'Article 2: The right to non-discrimination' in T Liefwaard & J Sloth-Nielsen (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) 11, <https://brill.com/view/title/11624> (accessed 6 September 2024).

Regarding children, their protection against discrimination is crucial because in most cases, they are constantly exposed to one or other form of discrimination. As girls, they are frequently marginalised and undervalued; as children with disabilities, they are sometimes ignored; and as boys, in most cases when they are in conflict with the law, they are regarded as perpetrators even before they are tried in a court in law.²

Generally, the principle of non-discrimination is informed by the understanding of the concept of discrimination. According to the Human Rights Committee's General Comment on non-discrimination, discrimination is defined as

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.³

From this definition, two guiding principles come to the fore. First, discrimination exists where there is evidence of some form of restriction or exclusion of person(s) on account of a non-exhaustive list of various aspects, such as race, colour, sex, language and religion, among others.⁴ Second, the purpose of the restriction or exclusion is to lead to an unequal recognition or enjoyment of the rights and freedoms of a person or groups of people.⁵ From the foregoing definition, the yardstick for measuring discrimination is informed by the ability of a state to have a balance between promoting equality and upholding the principle of non-discrimination.⁶

In 1966 the adoption of subsequent international instruments on civil and political rights and socio-economic rights introduced binding provisions that give a description other than a definition of the principle of non-discrimination. For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) called on state parties to guarantee that the rights enunciated therein are exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷ In addition, state parties are called upon to recognise that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.⁸ This is an indication that the descriptive aspect of the provision shows an obligation on the state party to guarantee the exclusion of discrimination in the enjoyment of rights under ICESCR.

In addition, the International Covenant on Civil and Political Rights (ICCPR) provides instances where discrimination should not take place, such as derogation from the protection of human rights during public emergencies,⁹ and the prohibition of propaganda that incites discrimination during times of war.¹⁰ It then contextualises the promotion of non-discrimination by taking a thematic stand that

2 See, eg, S Besson 'The principle of non-discrimination in the Convention on the Rights of the Child' (2005) 13 *International Journal of Children's Rights* 433-434.

3 The UN Human Rights Committee CCPR General Comment 18 (1989) on non-discrimination para 7, CCPR/C/21/Rev.1/Add.1, <http://hrlibrary.umn.edu/gencomm/hrcom18.htm> (accessed 6 September 2024).

4 General Comment 18 (n 3) para 7.

5 As above.

6 See Bayefsky (n 1) 5. See also Abramson (n 1).

7 International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3, entered into force 3 January 1976 art 2(2) (ICESCR).

8 Art 10(3) ICESCR.

9 International Covenant on Civil and Political Rights (1966) 999 UNTS 171, entered into force 23 March 1976 art 4(1) (ICCPR).

10 Art 20(2) ICCPR.

inculcates children (other than adults or other vulnerable populations)¹¹ and calls for equal protection before the law.¹²

In 1989 the Convention on the Rights of Child (CRC) recognised the principle of non-discrimination.¹³ The challenge with the application of this article was in the CRC's definition of the 'child' as a person below 18 years of age or where 'majority is attained earlier'.¹⁴ On the other hand, the African Charter on the Rights and Welfare of the Child (African Children's Charter) defines a child as a person below the age of 18. Consequently, the protection of the child under CRC would be informed by national law, especially where the child may be below the age of 18. By implication, a person who, for instance, is between 16 and 18 years, yet is considered an adult, cannot benefit from national laws, policies and initiatives that promote and protect the rights of the child.¹⁵ The position is different under the African Children's Charter because of the straight-18 definition of a child.¹⁶ This informed the narrative to have a treaty that speaks to the African context, in terms of the added value and use of the child rights-based approach.

Statistics reveal that discrimination against children affects the well-being of the child, with over 40 per cent of adults having been discriminated against when they were children on account of their gender, ethnicity or religion, disability or habitation.¹⁷ Furthermore, a study by Save the Children that involved over 18 000 respondents across the globe established that 56 per cent of the participants were discriminated against as children in their countries and that this situation has not improved in the previous two decades.¹⁸ It was further established that 36 per cent were of the opinion that the situation had worsened.¹⁹ With a focus on Africa, the study further revealed that the highest levels of discrimination occur on the African continent, at 58 per cent.²⁰ This was because children were discriminated against on account of their vulnerabilities such as geography, gender, ethnicity, disability or armed conflict.²¹ Discrimination stifles some of the most vulnerable children from accessing life-saving services.²²

11 Art 24(1) ICCPR.

12 Art 26 ICCPR.

13 Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No. 49) 167 UN Doc A/44/49 (1989), entered into force 2 September 1990 art 3 (CRC).

14 Art 1 CRC.

15 UNICEF 'Timeline of child rights' (2024), <https://www.unicef.org/child-rights-convention/history-child-rights> (accessed 4 September 2024).

16 Art 1 African Children's Charter. See also BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 1-29.

17 Save the Children Global 'Four in ten adults worldwide claim their childhood blighted by discrimination' (2016), <https://www.savethechildren.net/news/four-ten-adults-worldwide-claim-their-childhoods-blighted-discrimination---new-research-save#> (accessed 6 August 2024).

18 P Marjanen, O Abigail & M Laura 'Determining holistic child well-being: Critical reflections on theory and dominant models' (2017) 10 *Child Indicators Research* 633-647.

19 As above.

20 While this study seems dated, it reflects the continuing situation. See Save the Children Global (n 17). This study is still referred to by Save the Children. See Save the Children 'Children's rights: Why measuring discrimination is essential to tackling it' (2023), <https://www.savethechildren.net/blog/children-s-rights-why-measuring-discrimination-essential-tackling-it> (accessed 6 November 2024).

21 According to the African Child Policy Forum, discrimination regardless of its classification is more profound when the children come from less-educated and economically-poorer populations. See African Child Policy Forum and African Platform to End Violence against Children 'Violence against children: A report on progress and challenges' (2023) 12, https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/violence_against_children_in_africa_a_report_on_progress_and_challenges.pdf (accessed 6 August 2024).

22 As above.

Article 3 of the African Children's Charter plays a critical role as one of the pillars of the child rights-based approach, together with the best interests of the child,²³ the right to life, survival and development,²⁴ and consideration of the views of the child.²⁵ In addition, these principles also cut across as rights and may as such play a dual role in the promotion and protection of the child.²⁶ This is one of the principles that is evident across all jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) such as General Comments and communications.²⁷ It should also be noted that this may be argued to be secondary because non-discrimination and other principles consistently feature in jurisprudence due to their international recognition as principles that inform the child rights-based approach.²⁸

This chapter looks at the legal interpretation of discrimination, linkages between other articles to article 3 of the African Children's Charter, other international instruments as well as selected jurisprudence of the African Children's Committee. It also looks at the domestication by state parties across Africa, followed by a conclusion and recommendations.

2 Selected grounds of discrimination against children

The interpretation of article 3 must take place in the context of discrimination, particularly on the listed grounds therein.²⁹ It has been stated that discrimination is a particular form of differentiation³⁰ on illegitimate listed and any analogous grounds.³¹ These are informed by attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings or to affect them in a comparably serious manner.³² Article 3 of the African Children's Charter extends to such analogous grounds. Thus, children may be discriminated against based on their parents' or legal guardians' status but also on other grounds, thus 'analogous' grounds concerning 'other status'.³³

Therefore, the listed grounds are an important starting point as they capture some of the most prominent and already known grounds that inform discrimination against children. This part elucidates some of the listed grounds in article 3 as well as other non-listed or analogous grounds, and assesses how categories of children may find themselves discriminated against and what the obligations of state parties are towards these children. This is because the wording of article 3 reflects various grounds and

23 Art 4(1) African Children's Charter; Concluding Recommendations by the African Children's Committee on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child para 24. See Lesotho Child Protection and Welfare Act 7 of 2011 sec 4.

24 Art 5 African Children's Charter.

25 Arts 4(2), 7, 9 & 31 African Children's Charter.

26 Eg, regarding the principle of non-discrimination, see Abramson (n 1).

27 Secs 5 and 6 hint on the legal interpretation of the article and emerging jurisprudence. This is proof of the principle of non-discrimination as a critical pillar.

28 Eg, a look at all the state party reports and the Concluding Observations (<https://www.acerwc.africa/en/states-parties/reporting/overview>) shows that the reporting system reveals consistency in the structural content of the reports, reflecting that it is mandatory to report on the four principles.

29 T Ngcukaitobi 'Equality' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2018) 222.

30 As above. 'Differentiation' is described as legal classification and provision to treat them differently from other people for a variety of legitimate reasons and, therefore, not every differentiation can amount to unequal treatment or discrimination.

31 Ngcukaitobi (n 29) 223.

32 As above.

33 J Wexler 'Fun with reverse *ejusdem generis*' (2020) 5 *Minnesota Law Review* 1-38.

adds the term ‘other status’. This is an indication that the listed grounds are not exhaustive and can be enumerated further from both an objective and subjective stance.

2.1 Race, ethnic group and colour

According to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ‘racial discrimination’ is defined as unfair differentiation based on ‘race, colour, descent or national or ethnic origin’.³⁴ These grounds are biological, and in some instances social. They are categories upon which powerful and destructive ideologies of superiority and inferiority have been constructed.³⁵ This is a crucial observation on a continent where children suffer various vulnerabilities, such as apartheid in the pre-constitutional South Africa, and discrimination based on ethnic origin and descent.³⁶ As such, ensuring non-discrimination against children on these grounds requires systemic efforts by state parties to ensure that children are given an equal opportunity in law, policies and practice.

2.2 Sex

Discrimination on the grounds of sex takes place when discrimination is based on biological or physical differences.³⁷ In this case, it would be discrimination against a female child – girls. Discrimination based on sex against girls remains a challenge as practices such as child marriage, the exclusion of pregnant girls from schools³⁸ and female genital mutilation (FGM)³⁹ persist.

In so far as child marriage is concerned, Eastern and Southern Africa have a prevalence rate of 32 per cent, while West and Central Africa have the highest prevalence rate in the world, with nearly 60 million child brides.⁴⁰ Furthermore, the average prevalence of child marriage across West and Central Africa is approximately 41 per cent of total marriages, and the prevalence of child marriage below the age of 15 years is also very high, at 14 per cent, for the region.⁴¹ While the reasons for these statistics vary, what is clear is that this amounts to discrimination against girls since girls are more affected by child marriage in relation to boys.⁴² This does not, however, deter from the fact that in some places, child marriages present a picture of child grooms.⁴³ State parties are obligated to end this form of discrimination, based on the strength of the joint reading of articles 3 and 21(2) of the African Children’s Charter.

Efforts towards dealing with child marriages on the continental scene include the Joint General Comment of the African Commission on Human and Peoples’ Rights (African Commission) and the

34 Art 1, <https://humanrights.gov.au/our-work/commission-general/international-convention-elimination-all-forms-racial-discrimination> (accessed 25 September 2024).

35 Ngcukaitobi (n 29) 227.

36 See AU Human Rights Memorial Report, [https://au.int/en/auhrm-project-focus-area-apartheid#:~:text=The%20Apartheid%20\(1948%20to%201994,contact%20between%20the%20two%20groups](https://au.int/en/auhrm-project-focus-area-apartheid#:~:text=The%20Apartheid%20(1948%20to%201994,contact%20between%20the%20two%20groups) (accessed 25 September 2024).

37 Ngcukaitobi (n 29) 227.

38 African Children’s Committee ‘Teenage pregnancy in Africa’ (2022) 8, <https://www.acerwc.africa/sites/default/files/2023-01/Teenage%20Pregnancy%20Jan22-compressed.pdf> (accessed 28 September 2024).

39 As above.

40 See AU Campaign on Ending Child Marriage, <https://www.aucecm.org/> (accessed 28 September 2024).

41 As above.

42 An estimated 650 million girls and women alive today were married before their 18th birthday. Over 50 million of these reside in Eastern and Southern Africa. AU Campaign on Ending Child Marriage, <https://data.unicef.org/resources/child-marriage-in-eastern-and-southern-africa-a-statistical-overview-and-reflections-on-ending-the-practice/> (accessed 28 September 2024).

43 ‘Child grooms are often overlooked in the fight to stop child marriage’, <https://www.npr.org/sections/goatsandsoda/2022/01/02/1066099271/child-grooms-are-often-overlooked-in-the-fight-to-stop-child-marriage> (accessed 28 September 2024).

African Children's Committee on Ending Child Marriage,⁴⁴ where these bodies recognise child marriage as a manifestation of discrimination based on sex and gender and the fact that it has a disproportionate risk and impact on girls.⁴⁵ In addition, a further manifestation of discrimination based on sex includes the exclusion of pregnant girls from accessing education. A recent report of the African Children's Committee indicates that the regional averages for the prevalence of teenage pregnancy stand at 25 per cent for Eastern and Southern Africa and 27 per cent for West and Central Africa – figures are significantly higher than the global average of 1 per cent.⁴⁶ Teenage pregnant girls face various forms of discrimination,⁴⁷ including exclusion from education, even though the fact that article 11(6) of the African Children's Charter and article 12(2)(c) of the Maputo Protocol⁴⁸ require states to eliminate all forms of discrimination, to guarantee equal opportunities in education, and to promote the enrolment and retention of girls in school and organise programmes for girls who leave school prematurely. Much remains to be done in so far as discrimination based on sex is concerned. The continued discrimination against girls in the forms of child marriage and the exclusion of pregnant girls from school, respectively, have resulted in the filing of communications before the African Children's Committee. A look at the statistics on communications reveals that the African Children's Committee has finalised five communications on non-discrimination, which are *Children of Nubian Descent*,⁴⁹ *Mauritanian Enslaved Brothers*,⁵⁰ *Sudanese Nationality*,⁵¹ *Cameroonian Child Rape*,⁵² and *Tanzanian Girls*.⁵³

2.3 Nationality

Discrimination on account of nationality affects children's enjoyment of rights, and benefits from services that may be a preserve of children who are nationals or citizens of a given state. The challenge with the lack of nationality is in the fact that the denial of nationality to a child may extend to their children in perpetuity if no remedy is provided for by the state.

Children of Nubian Descent,⁵⁴ discussed in full later in this chapter, illustrates how this is a reality for children and the impact of such laws where children were deprived of their rights to have their birth registered and to nationality through discriminatory practice. It suffices to note that this communication reiterates the African Children Committee's use of innovative approaches by linking the enjoyment of socio-economic rights to the subsequent enjoyment of the right to nationality at birth and the affirmation of economic and social rights of the child as enshrined in the African Children's

44 https://www.acerwc.africa/sites/default/files/2022-09/Joint_General_Comment_ACERWC-ACHPR_Ending_Child_Marriage_March_2018_English.pdf (accessed 2 October 2024).

45 Joint General Comment on Child Marriage para 11.

46 African Children's Committee (n 38) 8.

47 African Children's Committee (n 38) 56.

48 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf> (accessed 2 October 2024) (Maputo Protocol).

49 *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*).

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

51 *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*).

52 *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, No 6/Com/002/2015, decided May 2018 (*Cameroonian Child Rape*).

53 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*).

54 *Children of Nubian Descent* (n 49).

Charter.⁵⁵ This matter informed the content of General Comment 2 on article 6 on the right to a name, nationality, registration of birth and combating statelessness.⁵⁶ As a consequence, it showed a strong link between interdependence and indivisibility of the rights.⁵⁷ In addition, it shows that the application of the principle of non-discrimination may be a tool used to advance the rights of children as stipulated in the African Children's Charter. Therefore, it is important that states eliminate laws, policies and practices that discriminate against children on grounds of their parents' marital status and to interpret their obligations in line with the General Comments of the African Children's Committee.

2.4 Disabilities

The African Children's Charter does not list disability as a ground upon which children may not be discriminated against under article 3. However, it has been established in several African Union (AU) soft laws and treaties (such as the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) that a child's disability is a ground for discrimination.⁵⁸ It is argued that the African Disability Protocol⁵⁹ expresses concern that persons with disabilities continue to experience human rights violations, including systemic discrimination.⁶⁰ Furthermore, it aims to enhance the protection for persons with disabilities and address discrimination faced by those with disabilities.⁶¹

Although 'disability' is not listed as a specific ground upon which children should not be discriminated against in article 3 of the African Children's Charter, it has emerged as an area that necessitates specific strengthening in so far as laws and policies are concerned, particularly the need for States to recognise non-discrimination on the ground of disability in laws and policies to be intentional about their responsibilities towards these children.⁶² The intersectional nature of some of the forms of discrimination needs nuanced understanding to ensure that legal reforms can translate to enhanced protection and promotion of the rights of these children. An example of a disability concerns children with albinism who face significant discrimination, which has led to the recognition of their unique exposure to discrimination and other violations of their rights. The severity of their challenges, therefore, cannot be overstated.⁶³ In 2024 the Day of General Discussion of the African Children's

55 E Durojaye & EA Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian children communication' (2012) 12 *African Human Rights Law Journal* 564-578.

56 See para 23 of General Comment 2, <https://www.refworld.org/legal/acerwc/2014/en/104996> (accessed 5 October 2024).

57 As above.

58 ST Tesemma & SA Coetzee 'Conflicting discourses on conceptualising children with disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 60.

59 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 2 October 2024).

60 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities Preamble.

61 As above.

62 This is evident from the various steps taken by the African Children's Committee to develop mechanisms that deal with children with disabilities. Eg, see the Working Group of the African Children's Committee on Children with Disabilities; see Working Groups, <https://www.acerwc.africa/en/page/working-groups> (accessed 2 October 2024).

63 African Disability Protocol (n 60) Preamble; African Children's Committee Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters – Tanzania (2016), https://www.acerwc.africa/sites/default/files/2023-02/Investigative_Mission_on_the_Situation_of_Children_with_Albinism_pages.pdf (accessed 5 October 2024); Report of the African Committee of Experts on the Rights and Welfare of the Child Working Group on Children With Disabilities in Africa – on the Fact-Finding Mission on the Situation of Children With Albinism in the Republic of Malawi, https://www.acerwc.africa/sites/default/files/2023-02/17.23_Final%20Report%20on%20the%20fact-finding%20mission%20in%20the%20Republic%20of%20Malawi%20%281%29.pdf (accessed 5 October 2024).

Committee was dedicated to children with albinism.⁶⁴ The discussion recognised the concerns about the entrenched stigma, prejudice and social isolation faced by children with albinism, which are compounded by multiple and intersecting forms of discrimination that impact their rights to life, health, security and education.⁶⁵ The outcome document contains numerous recommendations and, most notably, urges states to ratify the Disability Protocol and domesticate the African Union Plan of Action to End Attacks and Other Human Rights Violations Targeting Persons with Albinism in Africa (2021-2031) through the adoption of national action plans on albinism.⁶⁶ Furthermore, states, international organisations and civil society are urged to ensure the implementation of domestic legislation and to develop plans to address the different forms of discrimination faced by children with albinism.

2.5 Fortune

Article 3 of the African Children's Charter lists as one ground of non-discrimination based on 'fortune'. This ground is unique as CRC does not have a similar ground listed in article 2 thereof. The dictionary meaning of 'fortune' is an amount of wealth or material prosperity, especially when unqualified; a great amount; a power or force, often personalised, regarded as being responsible for human affairs; chance luck, especially when favourable, a person's lot or destiny.⁶⁷ With this dictionary meaning in mind, it may be that the African Children's Charter means that children should not be discriminated against based on their socio-economic circumstances. Africa is a continent besieged by inequality⁶⁸ and children are not spared from the effects of being discriminated against based on the fact that they are from poor families, communities and countries.⁶⁹ Furthermore, child poverty is caused by deprivation, which is a lack of material conditions and services.⁷⁰

This may require an assessment of what efforts states are making toward ensuring that children from disadvantaged or poor families are allowed to realise their rights in the African Children's Charter. Although there is no definition or enunciation of what this ground of discrimination on 'fortune' entails, a dictionary meaning is instructive. With the current lived realities of children in Africa, the African Children's Committee may soon be called upon to give this content and meaning in a manner that protects children who may be socio-economically vulnerable.

3 Links to other Charter articles

Article 3 is closely linked to all the articles because it has to be seen as a tool that is used to ensure that state parties see to it that the rights of children are promoted and protected. This is primarily because the application of the article informs the extent to which other articles are applied, each of which is informed by non-discrimination as a principle. By design, this chapter looks at specific provisions, such as the best interests of the child, the rights to life, survival and development, and participation. This is

64 See Day of General Discussion on the Solutions to the Challenges Faced by Children With Albinism Outcome Statement (2024), <https://www.acerwc.africa/en/article/activity/day-general-discussion-solutions-challenges-faced-children-albinism#:~:text=DATE%20AND%20TIME,00%20South%20African%20Standard%20Time> (accessed 5 October 2024).

65 As above.

66 As above.

67 See <https://www.collinsdictionary.com/dictionary/english/fortune#:~:text=an%20amount%20of%20wealth%20or,responsible%20for%20human%20affairs%3B%20chance> (accessed 5 October 2024).

68 T Tshabalala 'The intersectionality of educational inequalities and child poverty in Africa: A deconstruction' (2018) 17 *Education Research Policy and Practice* 70.

69 J Sloth-Nielsen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child law in South Africa* (2017) 429.

70 Tshabalala (n 68) 73.

because these three principles and non-discrimination form the child rights-based approach on which the promotion and protection of the rights of the child is based.⁷¹

3.1 Best interests principle

This principle requires that in all matters that concern a child, the best interests shall be the primary consideration. In terms of scope, this principle calls on states to apply it in both administrative and judicial proceedings. Concerning the principle of non-discrimination, it is expected that in the application of this principle and the engagement of the best interests of the child, the persons with the obligation to ensure the enjoyment of the right should not discriminate against children unless it can be established that the differentiation between children is for justifiable grounds.⁷² The principle of best interests of the child is important when a state party, for instance, prioritises some children to enhance the protection of their rights, thus constituting positive discrimination. There should be valid reasons that point to the fact that at the end of treating a child or a group of children differently, the steps taken would still be in the best interests of the child. That is, a specific cause of action both in judicial and administrative proceedings is engaged, for instance, adopting legislative measures to enhance the promotion and protection of the rights of children with albinism due to the heightened risks they face.⁷³ The state action of prohibition of all forms of discrimination calls for a reaction that inculcates appropriate proactive measures by the state to accord effective and equal opportunities for all children to enjoy the promotion and protection of their rights.⁷⁴

3.2 Right to life, survival and development

The right to life, survival and development has been interpreted as the protection of the right to life by law and the prohibition on the death penalty upon those under the age of 18 at the time of the commission of an offence and, second, the obligation on states to ensure to the maximum extent possible the survival, protection and development of the child.⁷⁵ This right, therefore, implicates a host of interventions to improve infant and child morbidity and mortality rates, as well as interventions in the early years to optimise the child's opportunities for development.⁷⁶

It is well noted that the implementation of the principle of non-discrimination requires that the state party actively (other than passively) identifies children who are discriminated against and consequently takes steps to correct this.⁷⁷ For instance, if birth registration is not done effectively, policies that speak to the holistic development of a child should emphasise the former. Consequently, the effective engagement of the principle of the right to life, survival and development inculcates the various steps taken by the state to ensure that the policies in place deal with such vulnerabilities as a systematic failure to register all births regardless of the status of the newborn child. Some critical pointers have to be followed: first, through the realisation that children are not homogenous and that they have differences that may require different approaches. Second, they need more support than just the provision of the right to life, survival and development. As a consequence, this reiterates the extension of the principle beyond the negative obligation of non-interference, and includes a proactive duty to take other measures beyond the usual judicial and administrative measures to ensure the

71 Sloth-Nielsen (n 69) 431.

72 Ngcukaitobi (n 29) 218-219.

73 See n 56 & 57.

74 S Besson & E Kleber 'Article 2: The right to non-discrimination' in J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 51.

75 Sloth-Nielsen (n 69) 430.

76 As above.

77 Bayefsky (n 1) 1-34.

enjoyment of the right to life and survival of the child.⁷⁸ Third, this obligation is mandatory for the state as a party to the African Children's Charter. A good example is the mandatory exclusion of the death sentence (article 5(3)) which accords children in conflict with the law an opportunity to live. An implementation of this provision is an active step by the state party in dealing with discriminatory tendencies in the judiciary, administrative and other spaces.

3.3 Participation

The African Children's Charter requires that a child capable of communicating their views should be accorded an opportunity to do so and such views should be considered.⁷⁹ Concerning non-discrimination, the child's communication of their views is not subject to their status, but rather their ability to communicate.⁸⁰ The African Children's Committee's Guidelines on Child Participation require state parties to provide a platform where children can be heard and their views are accorded due consideration without fear of reprisal and with the necessary support, particularly for children who are subject to discrimination.⁸¹ The Guidelines on Child Participation also call on state parties to take steps to ensure that all children, particularly those who are marginalised, such as girls, children who are orphaned, children in conflict with the law, children in humanitarian situations, displaced children and children with disabilities, have the opportunity to participate in all matters concerning them.⁸²

An effective application of the principle of participation further requires that the agency of the child takes centre stage in the implementation of a child rights-based approach.⁸³

4 Links to other human rights treaties

Article 2 of the African Charter on Human and Peoples' Rights (African Charter) enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁸⁴ Article 3 of the Children's Charter mirrors article 2 of the African Charter. Furthermore, article 18 of the African Charter calls on all state parties to eliminate all discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.⁸⁵ The relevance of this provision lies in the definition of a 'woman' in the Maputo Protocol. It defines a woman to include both girls and women.⁸⁶

The Universal Declaration of Human Rights (Universal Declaration) provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. Furthermore, all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.⁸⁷

78 M Nowak *A commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development* (2005), <https://brill.com/view/title/11606> (accessed 9 August 2024).

79 Art 4(2) African Children's Charter.

80 As above.

81 African Children's Committee 'Guidelines on child participation' (2022), https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Guidelines%20on%20Child%20Participation_English.pdf (accessed 8 October 2024).

82 African Children's Committee Guidelines (n 82) para 12.

83 Arts 3, 4(1), 4(2) & 7 African Children's Charter.

84 <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 25 July 2024).

85 As above.

86 Art 1(k) Maputo Protocol.

87 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948 art 7.

ICCPR provides in article 20(2) that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. Importantly, article 24(1) states that every child, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, shall have the right to such measures of protection as are required by their status as a minor, on the part of their family, society and the state. Furthermore, article 26 states that all persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁸

ICESCR obligates state parties to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁹ Article 10(3) requires state parties to take special measures of protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development should be punishable by law. States should also set age limits below which employment would amount to child labour, which should be prohibited and punishable by law. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol require state parties to eliminate discrimination against women, including girls, in all its forms and manifestations.⁹⁰

The Convention Against Torture (CAT) also uses the principle of non-discrimination as a yardstick for protection against torture. In addition to the definition that is attached to the term ‘torture’, any severe pain or suffering that is inflicted on account of discrimination may be found to be a violation of CAT. Conversely, CRC has a provision similar to art 3, which states that

[s]tates parties shall respect and ensure the right to set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardians’ race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.⁹¹

The foregoing provisions illustrate that there is a mandate on the state to refrain from acts that may lead to discrimination. In addition, the state has to take active steps to monitor the extent of discrimination and to ensure mitigation where possible.

In conclusion, there is a general narrative in various human rights monitoring instruments at both the continental and global levels that discrimination should not be condoned in society. The added value that this brings to the application of article 3 is the continuity in the application of the principle of non-discrimination even in instances where an individual is no longer a child, to spaces of adulthood with regard to other vulnerabilities.

88 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 28 July 2024).

89 Art 2(2).

90 See <https://www.ohchr.org/sites/default/files/cedaw.pdf> and <https://documents.un.org/doc/undoc/gen/n99/774/73/pdf/n9977473.pdf?token=VkawKWc2R6JU0tvSQL&fe=true> (accessed 27 July 2024).

91 Art 2(1) CRC.

5 Jurisprudence of the African Children's Committee

The reflections on the African Children's Committee's jurisprudence in this chapter arise from General Comments, recommendations to state parties and decisions in communications received under article 44 of the African Children's Charter.

5.1 General Comments

The African Children's Committee has reiterated in its jurisprudence the conceptual and contextual underpinnings of the implementation of the principle of non-discrimination.

In the Joint General Comment of the African Children's Committee and the African Commission on Female Genital Mutilation⁹² it is reiterated that the principle of non-discrimination requires state parties to ensure that children are not discriminated against on prohibited grounds. It makes a case that female genital mutilation (FGM) is a form of gender discrimination grounded in gender inequality.⁹³ From a contextual perspective, the Committee reiterates that certain groups of girls are at a higher risk of FGM due to societal challenges such as cultural and religious beliefs, literacy, and socio-economic status, among others.

In the General Comment on article 6 of the African Children's Charter on the right to birth registration, name and nationality,⁹⁴ the African Children's Committee contextualises the application of the principle of non-discrimination regarding the rights to a name, birth registration and to acquire a nationality. It states that no child should be deprived of their right to a name, not to mention the non-registration of their name on account of race, ethnicity, colour, sex, language, religion or other status or opinion of their parent(s) or legal guardian(s).⁹⁵

Furthermore, in its General Comment 1 on children of incarcerated and imprisoned parents and primary caregivers the African Children's Committee draws on the application of article 1 on state party obligations to reiterate the principle of non-discrimination.⁹⁶ It stresses the importance of the principle of non-discrimination as an enabling provision to the enjoyment of the rights and freedoms recognised and guaranteed in the African Children's Charter, including birth registration.⁹⁷ It is argued that in developing its jurisprudence on the principle of non-discrimination, the African Children's Committee draws inspiration from other sources of law to improve the understanding and subsequent implementation of the African Children's Charter.⁹⁸

92 Joint General Comment of the African Children's Committee and the African Commission on Human and Peoples' Rights, https://www.acerwc.africa/sites/default/files/2023-11/Joint%20General%20Comment_ACHPR-ACERWC_on%20FGM%20%282%29_0.pdf (accessed 9 August 2024).

93 Joint General Comment on FGM para 10.

94 General Comment on art 6 of the African Charter on the Rights and Welfare of the Child on 'Right to birth registration, name and nationality', https://www.acerwc.africa/sites/default/files/2022-09/General-Comment_Article_6_ACRWC_English.pdf (accessed 9 August 2024).

95 General Comment on art 6 (n 94) para 16.

96 General Comment 1 (art 30 of the African Charter on the Rights and Welfare of the Child) on 'Children of incarcerated and imprisoned parents and primary caregivers' 2013 para 18, https://www.acerwc.africa/sites/default/files/2022-09/General-Comment_Article_30_ACRWC_English.pdf (accessed 9 August 2024).

97 As above.

98 As above.

5.2 Selected jurisprudence

The African Children's Committee has received 24 communications of which ten have been finalised.⁹⁹ Out of the ten concluded communications, five communications provide evidence of a violation of the principle of non-discrimination. These include the communications against Kenya,¹⁰⁰ Sudan,¹⁰¹ Mauritania,¹⁰² Cameroon¹⁰³ and Tanzania.¹⁰⁴

The first communication is the *Children of Nubian Descent*.¹⁰⁵ One of the issues was whether the government of Kenya had violated the principle of non-discrimination. In this communication it was alleged that the denial of nationality to the people of Nubian descent was discriminatory against their children as far as they stood to suffer statelessness.¹⁰⁶ Despite the allocation of land by the colonial authorities to the Nubians, the post-colonial government of Kenya regarded them as aliens.¹⁰⁷ As such, the failure to recognise their claim to land and denial of Kenyan citizenship led to Nubian children being rendered stateless.¹⁰⁸ It was further argued that these children had no legitimate expectation of recognition by the State and would most probably be stateless.¹⁰⁹ Although the respondent was requested to submit a reply, no response was filed.

The African Children's Committee reminded the state that racial and ethnic discrimination was prohibited in international law.¹¹⁰ In addition, the Committee indicated that the state party had to play an active role in the identification of vulnerable children and in taking appropriate action to remedy the violation. As such, the failure of the state to address the discrimination against the Nubian children was a violation of the principle of non-discrimination.¹¹¹

The African Children's Committee indicated that the burden of proof was on the state to show that its treatment of the children was justified and that it did not amount to discrimination, but rather fair discrimination, which would be used for the benefit of the child.¹¹² The critical question was how this burden would be established where the respondent state had neither entered appearance nor submitted its response. It appeared that since Kenya by design opted not to respond to the allegations, the burden of proof was not discharged.¹¹³ While it is worth noting that the burden is a procedural issue and the matters of discrimination are substantive issues, it is important to note that article 3 is a tool that is used to reiterate the violation of a right. However, the African Children's Committee did look at this aspect in this regard. It should be noted that the failure of the state to respond did not deter the Children's Committee from considering the communication. The agency of the child remained at the forefront of the Children's Committee.

99 See results, https://www.acerwc.africa/en/communications/table?title=&field_member_state_target_id=All&field_decision_target_id=479 (accessed 19 July 2024); see ch 36 in this *Commentary*.

100 *Children of Nubian Descent* (n 49).

101 *Sudanese Nationality* (n 51).

102 *Mauritanian Enslaved Brothers* (n 50).

103 *Cameroonian Child Rape* (n 52) para 6.

104 *Tanzanian Girls* (n 53).

105 *Children of Nubian Descent* (n 49).

106 *Children of Nubian Descent* (n 49) para 2.

107 *Children of Nubian Descent* (n 49) para 3.

108 *Children of Nubian Descent* (n 49) paras 5 & 88.

109 *Children of Nubian Descent* (n 49) para 56.

110 *Children of Nubian Descent* (n 49) para 5.

111 Joint General Comment (n 45) para 11.

112 *Children of Nubian Descent* (n 49) para 57.

113 *Children of Nubian Descent* (n 49) para 5.

The second communication that dealt with the principle of non-discrimination is *Sudanese Nationality*. The main issue was whether the violation of the principle of non-discrimination led to the violation of the right to acquire nationality.¹¹⁴ The African Children's Committee held that the enjoyment of the right to non-discrimination was a principle whose application not was conditional on the need to balance various aspects to be applied.¹¹⁵ Consequently, the Committee correctly states that the right to nationality could not be denied in disregard of the principles that govern non-discrimination under the African Children's Charter.¹¹⁶

The African Children's Committee took on a conceptual approach requiring that the state party should not use discriminatory regulations on different groups of a population in granting nationality.¹¹⁷ It found that, as such, the law of the Sudan on the acquisition of nationality was discriminatory since it allowed fathers (excluding mothers) of Sudan children to automatically confer nationality on their children.¹¹⁸ In addition, the African Children's Committee expounded on the use of reciprocity and retaliation. This was based on the fact that a similar law was applied by South Sudan to deny nationality to children from Sudan.¹¹⁹ The African Children's Committee stated that the respondents' attempt to use reciprocity and retaliation was not applicable in areas of human rights but in other areas such as trade, intellectual property and technology transfer.¹²⁰ This was an important assertion in terms of qualifying retaliation and reciprocity regarding the application of the principle of non-discrimination.¹²¹ This meant that the status of the child was irrelevant and had no bearing on the enjoyment of the rights under the African Children's Charter.¹²²

In *Mauritanian Enslaved Brothers* the issue related to the principle of non-discrimination and whether the way in which the state treated child slaves compared to other children was a violation of the principle of non-discrimination. In this communication it was alleged that two children born to a mother from a Haratine sect were automatically slaves to the El Hassine family.¹²³ These children worked seven days a week without remuneration,¹²⁴ they were always subjected to corporal punishment and did not attend school.¹²⁵ The respondent state did not directly address the issues of discrimination but indicated that the government had a legislative framework that protected children against abuse,¹²⁶ a plan of action against child labour,¹²⁷ the enrolment of children in school,¹²⁸ and the prosecution of the perpetrators.¹²⁹ The African Children's Committee reiterated that there was no legitimate state interest, and proportional and necessary limitations, to justify the approach of the state.¹³⁰ This stance

114 *Sudanese Nationality* (n 51) para 31.

115 *Sudanese Nationality* (n 51) para 32 lines 1, 2 & 3.

116 *Sudanese Nationality* (n 51) para 32 lines 11-13.

117 *Sudanese Nationality* (n 51) paras 37-38.

118 *Sudanese Nationality* (n 51) paras 39-41.

119 *Sudanese Nationality* (n 51) para 48.

120 *Sudanese Nationality* (n 51) para 51.

121 *Sudanese Nationality* (n 51) para 51.

122 The Committee takes practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised, such as rural children, children of imprisoned mothers, children on the move and the gendered dimension.

123 *Mauritanian Enslaved Brothers* (n 50) para 5.

124 *Mauritanian Enslaved Brothers* (n 50) paras 6-7.

125 As above.

126 *Mauritanian Enslaved Brothers* (n 50) para 36.

127 *Mauritanian Enslaved Brothers* (n 50) para 37.

128 *Mauritanian Enslaved Brothers* (n 50) para 38.

129 *Mauritanian Enslaved Brothers* (n 50) para 39.

130 *Mauritanian Enslaved Brothers* (n 50) para 61.

by the Children's Committee was consistent with its earlier jurisprudence on differential treatment.¹³¹ In addition, the applicants argued that the failure of the state to integrate the children into society displayed a lack of commitment on its part to mitigate the effects of discrimination.¹³²

In the fourth communication, *Cameroonian Child Rape*, the complainants brought this communication requesting the African Children's Committee to make a finding on the violation of various provisions of the African Children's Charter, which included state party obligations (article 1); the definition of a child (article 2); the right to life, survival and development (article 5); freedom of expression (article 7); and protection against child abuse and torture (article 17).¹³³ It was alleged that the victim, a 10 year-old child (TFA) was raped on three occasions by an individual who had a high status in the community.¹³⁴ The African Children's Committee was informed that after the matter had been lodged in a local court for adjudication, the investigations by the police were delayed and, consequently, the court dismissed the case.¹³⁵ The mother of the victim decided to take the issue to a talk show on a local radio.¹³⁶ She was charged with judicial defamation.

The African Children's Committee applied article 46 of the African Children's Charter to use the principle of due diligence.¹³⁷ It was guided by the jurisprudence of the European Court of Human Rights,¹³⁸ the African Commission¹³⁹ and the Inter-American Commission of Human Rights.¹⁴⁰ It reiterated that even if the respondent state was not directly responsible for the violation of the principle of non-discrimination, it was important that the failure to exercise due diligence to investigate and prosecute the perpetrators of the crime made it accountable under international law. There was great reliance on jurisprudence from the CEDAW Committee, the European Court of Human Rights and the Inter-American Court as persuasive jurisprudence to find a violation of article 3.

In the fifth communication, *Tanzanian Girls*, the main issue was whether forced pregnancy testing in schools was a violation of the principle of non-discrimination. It was alleged that primary and secondary school-going girls were subjected to forced pregnancy testing and expulsion from schools.¹⁴¹ This practice, according to the complainants, was performed on very young children, without regard to the standard procedures on respect for dignity and the right to privacy.¹⁴² Furthermore, the results were not communicated to the students but shared with the school staff, indicating a violation of the right to privacy. The then applicable Education (Expulsion and Exclusion from School) Regulation of 2002¹⁴³ did not create an exception (to forced pregnancy testing) in instances of pregnancy due to sexual abuse or incest.¹⁴⁴

131 See General Comment 1 (n 96) para 18, *Children of Nubian Descent* (n 49); *Sudanese Nationality* (n 51).

132 General Comment 5 of the African Children's Charter on the right to birth and nationality para 9, https://www.acerwc.africa/sites/default/files/2022-09/General-Comment_Article_6_ACRWC_English.pdf (accessed 12 August 2024).

133 *Cameroonian Child Rape* (n 52) para 6.

134 *Cameroonian Child Rape* (n 52) para 18.

135 *Cameroonian Child Rape* (n 52) para 14.

136 As above.

137 The communication is silent on this matter.

138 *Cameroonian Child Rape* (n 52) paras 49 & 50.

139 *Cameroonian Child Rape* (n 52) para 53.

140 *Cameroonian Child Rape* (n 52) para 54.

141 *Tanzanian Girls* (n 53) para 2.

142 *Tanzanian Girls* (n 53) para 3.

143 *Tanzanian Girls* (n 53) para 4.

144 As above.

The African Children's Committee identified that discrimination had three complementary elements, namely, differential treatment, interference and rights and freedoms, in the African Children's Charter.¹⁴⁵ It also reiterated that reasonability, objectivity and achievement of a legitimate purpose had to inform the finding of the correct implementation of differential treatment.¹⁴⁶ In support of the earlier position in *Sudanese Nationality*, the African Children's Committee noted that the right to non-discrimination was absolute and not bound by a balancing test.¹⁴⁷ However, it stated that a restriction on a right was necessary if there is no other alternative to achieve the intended objective.¹⁴⁸ The expulsion of pregnant girls from school perpetuated negative and discriminatory attitudes which, in turn, led to child marriage and teenage pregnancy.¹⁴⁹ This may be interpreted to mean that where a state party perpetuates negative and discriminatory attitudes and tendencies, it would most likely be a violation of its obligations under the African Children's Charter.

The foregoing communications illustrate a development of the right against discrimination coupled with an agency for the child to enjoy the rights, freedoms and duties under the African Children's Charter.¹⁵⁰

6 Domestication of the provision in national legal systems

The obligation on states to ensure that children are not subjected to any form of discrimination is an important principle, as illustrated by the discussion above, highlighting the fact that this right interconnects with numerous other rights of children. Non-discrimination provisions tend to be contained in the constitutions of countries, particularly as the obligation in most instances is approached from a national interest perspective where they provide for the right to equality. From the table below, most African countries have provisions in this regard.

*African Constitutions that prohibit or forbid discrimination*¹⁵¹

1	Algeria (arts 35, 37)
2	Angola (art 23)
3	Benin (art 26)
4	Botswana (sec 15)
5	Burkina Faso (art 1)
6	Burundi (art 22)
7	Cameroon (Preamble, art 1)
8	Cape Verde (arts 1, 22)
9	Central African Republic (Preamble, art 6)
10	Chad (arts 13, 14)
11	Comoros (art 2)
12	Congo, Democratic Republic (arts 11-14)
13	Congo, Republic of (art 15, 17)
14	Côte d'Ivoire (Preamble, art 2)
15	Djibouti (arts 1, 10)
16	Egypt (Preamble, arts 11, 53)

¹⁴⁵ *Tanzanian Girls* (n 53) para 53.

¹⁴⁶ As above. See also *Children of Nubian Descent* (n 49) para 57.

¹⁴⁷ *Tanzanian Girls* (n 53) para 53.

¹⁴⁸ *Tanzanian Girls* (n 53) para 54.

¹⁴⁹ *Tanzanian Girls* (n 53) para 55.

¹⁵⁰ General Comment 5 (n 132).

¹⁵¹ <https://www.constituteproject.org/countries> (accessed 14 August 2024).

17	Equatorial Guinea (arts 13(c),15)
18	Eritrea (art 14)
19	Ethiopia (art 25)
20	Eswatini (sec 20)
21	Gabon (art 2)
22	The Gambia (sec 33)
23	Ghana (art 17 in the Bill of Rights and art 35(5) of the Directive Principles of State Policy)
24	Guinea (arts 1, 8)
25	Guinea-Bissau (arts 24, 25)
26	Kenya (secs 10, 27)
27	Lesotho (secs 18, 19 in the Bill of Rights and sec 26 of the Principles of State Policy)
28	Liberia (art 11(c))
29	Libya (art 5)
30	Madagascar (art 6)
31	Malawi (sec 20)
32	Mali (art 2)
33	Mauritania (art 1)
34	Mauritius (sec 16)
35	Morocco (art 6, 19, 35)
36	Mozambique (arts 35, 36)
37	Namibia (art 10)
38	Niger (art 8)
39	Nigeria (sec 17(2)(a) of the Fundamental Objectives and Directive Principles of State Policy and sec 42 in the Bill of Rights)
40	Rwanda (Preamble, arts 15, 16 in the Bill of Rights)
41	São Tomé & Príncipe (art 15)
42	Senegal (art 7)
43	Seychelles (art 27)
44	Sierra Leone (sec 8(2) of the Fundamental Principles of State Policy and sec 27 in the Bill of Rights)
45	Somalia (art 15)
46	South Africa (sec 9)
47	South Sudan (arts 9, 14)
48	Sudan (art 21)
49	Tanzania (sec 9(1)(g) of the Fundamental Objectives and Directive Principles of State Policy and secs 12(1), 13 in the Bill of Rights)
50	Togo (art 11)
51	Tunisia (art 6)
52	Uganda (art 21)
53	Zambia (art 23)
54	Zimbabwe (secs 17, 56)

The fact that almost all African countries have a non-discrimination clause in their constitutions is commendable. However, these provisions are not child-specific and may thus not be sufficiently protective. There are, however, countries that have gone a step further and incorporated non-discrimination clauses in their child-specific legislation.

The Kenyan Children Act¹⁵² is one such law and it provides that no person shall discriminate against a child on the grounds of age, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, health status, pregnancy, social, political, economic or other status, race, disability, tribe, residence or local connection or any other status.¹⁵³ In terms of section 10 of the Children Act, notwithstanding sections 8 and 9, differential treatment of a child which is intended to protect the best interests of the child shall not be deemed discrimination against the child and no differential treatment shall limit any rights of the child under this Act or the Constitution.

The South African Children's Act¹⁵⁴ provides in section 6(2) that children should be treated fairly and equally and that all proceedings, actions or decisions in a matter concerning a child must protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child.

The aforementioned non-discrimination provisions in the Kenyan and South African child-specific legislation are just an example of how state parties can and should go further to enhance the protection of children against all forms of discrimination.

7 Conclusion

Article 3 of the African Children's Charter, which guarantees the right to non-discrimination, serves as a cornerstone for the realisation of all other rights enshrined in the African Children's Charter. It emphasises both substantive and procedural dimensions of child rights, ensuring that all children enjoy equal protection and access to their rights without discrimination. Furthermore, article 3 is one of the four foundational principles of the child rights-based approach, alongside the best interests of the child (article 4), the right to survival and development (article 5), and the right to participate (article 7). This principle not only establishes a legal obligation for states to eliminate discrimination but also provides a framework for assessing laws, policies, and practices to ensure they align with the African Children's Charter's objectives. By addressing both structural and procedural barriers to equality, article 3 underpins the holistic promotion and protection of children's rights across Africa. The African Children's Committee has indeed taken proactive steps to give effect to the article through its various working methods such as research, the development of soft law as well as engagement of the principle in various General Comments. However, it appears that most national jurisdictions engage the right from a constitutional founding of the right to equality and freedom from non-discrimination. It is argued that more should be done to translate this right as a constitutional imperative to domestication in specific children's laws. This is clear from the jurisprudence of the African Children's Committee, as discussed in section 5 above, where it had made recommendations against state parties that discriminated on the grounds of sex, birth, nationality and the status of parents or legal guardians. These matters that have come before the African Children's Committee have also highlighted the interrelatedness of children's rights, particularly how discrimination puts the rights of life, survival and development of children at risk and, thus, is not in line with the obligation to advance their best interests.

152 <http://kenyalaw.org/8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/C/Children%20Act%20-%20No.%2029%20of%202022/docs/ChildrenAct29of2022.pdf> (accessed 11 August 2024)

153 As above.

154 https://www.gov.za/sites/default/files/gcis_document/201409/a38-053.pdf (accessed 11 August 2024).

We conclude that there is an urgency for state parties to ensure that children benefit from article 3 of the African Children's Charter as a matter of principle; that they refrain from acts that may lead to discrimination; and that, as a consequence of the engagement of the aforementioned points, state parties have to take proactive steps to identify instances of discrimination and take proactive steps to ensure the implementation of the article.

Lastly, we argue that by design, article 3 of the African Children's Charter places agency on the child to enjoy the rights, duties and freedoms under the Children's Charter. Article 3 states that 'every child shall' rather than 'the state shall'. This is an indication that while the duty bearer may be the state, it is incumbent upon all individuals to create an enabling environment for the child to enjoy all rights under the African Children's Charter. As a duty bearer, the state should be cognisant that creating an enabling environment is not sufficient, and they are expected to do more. To effect this, the state should engage in the active identification of children whose rights have been violated, and should adopt proactive steps to support a child, particularly those who face any form of discrimination.