Chapter 36
Article 44
Communications

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1. The Committee may receive communications from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

1 Introduction

Under article 44 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is mandated to receive and decide allegations of children's rights violations under the Children's Charter. While anchored in a distinctive treaty, it complements similar mandates of other human rights treaty bodies with both general and child-specific mandates.

The adoption in 1990 and entry into force in 1999 of the African Children's Charter by the predecessor to the African Union (AU), the Organisation of African Unity (OAU), brought into the African human rights landscape a body complementary to but distinct from the African Commission on Human and Peoples' Rights (African Commission). Mirroring the uniqueness of the African Charter on Human and Peoples' Rights (African Charter),[1] and building upon the open-endedness of article 18(3),[2] the African Children's Charter is Africa's normative safeguard of the rights of its children. More than that, the African Children's Charter establishes the African Children's Committee, mirroring the mandate of the African Commission, to promote and protect these rights. Under both the African Charter and African Children's Charter, states automatically accept the individual complaints (communications) procedure when they become a party to the treaty.[3] In this way the African Children's Committee differs from the Convention on the Rights of the Child (CRC) Committee, since the complaints mechanism under CRC is opt-in, by way of the Optional Protocol to CRC on a Communications Procedure (OPCP-CRC).[4] The African Children's Committee's protective mandate over 51 African state parties to the African Children's Charter not only co-exists, at the global level, with that of the CRC Committee in respect of four African states party to OPCR-CRC,[5] but also at the regional level with that of the African Commission in respect of the 54 state parties to the African Charter,[6] and with that of the African Court on Human and Peoples' Rights (African Court) with respect to the 34 states that have accepted its jurisdiction by becoming party to the Protocol to the African Court on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[7] Further, at the sub-regional level, in West Africa, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) has jurisdiction to find child-related violations of both the African Charter and the African Children's Charter.[8]

1 Such as the justiciability of socio-economic rights (arts 11 and 14 of the African Children's Charter) and the 'responsibilities of the child' (art 31 of the African Children's Charter). Compare these to arts 16-17 and 29 of the African Charter.

2 Art 18(3) of the Children's Charter places an obligation on state parties to protect the rights of children (and women) 'as stipulated in international declarations and conventions'.

3 Art 55 African Charter; art 44 African Children's Charter.

4 Adopted in 2011, entered into force in 2014; by July 2024 there were 52 state parties. The African and UN instruments also differ in the content of the rights they adjudicate. While there are many similarities between CRC and the African Children's Charter, there are also distinctive differences between the two.

5 By July 2024 Benin, Gabon, Seychelles and Tunisia were the only African states party to OPCP-CRC.

6 The African Charter has a generic jurisdictional scope that includes children; children's rights often conjoin with those of their families (see *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 5); children's rights were a central aspect of a case before the Commission dealing with the exclusion from Ivorian nationality of people of Dioula origin (*Open Society Justice Initiative v Côte d'Ivoire*, Communication 318/06); see in particular para 207, where the African Commission, without making a finding of violation of the African Children's Charter, recommends that Côte d'Ivoire ensure that its nationality law is consistent with the African Children's Charter.

7 Under art 4(1) of its Protocol, the Court has jurisdiction over the African Children's Charter. The Court found a violation of arts 1(3), 2, 3, 4 and 21 of the African Children's Charter in *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380; and in Application 31/2017, *Kabalabala Kadumbagula & Another v Tanzania*, the Court on 4 June 2024 held that the failure of domestic courts to take into account that a person sentenced to life imprisonment was only 16 years old when he committed the offence of rape, violated art 17(2) of the African Children's Charter, read with art 40(1) of CRC.

8 Under art 4(h) of the Revised ECOWAS Treaty, ECOWAS states commit themselves to recognise, promote and protect 'human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. This provision has been applied in numerous cases. In *The Registered Trustees of the Socio-Economic and Accountability Project (SERAP) v Nigeria & Universal Basic Education Commission* ECW/CCJ/JUD/07/10, 30 November 2010, the ECOWAS Court, eg, found a violation of the right to education in the African Charter. Although the African Children's Charter is not explicitly included, a purposive interpretation of art 4 would extend to the African Children's Charter as an analogous AU human rights treaty. However, the Court has not yet done so. Surprisingly, in *Women Against Violence and Exploitation in Society (WAVES) v Sierra Leone*, Suit ECW/CCJ/APP/22/18, 12 December 2019 (*WAVES*), the ECOWAS Court found that Sierra Leone's practice of establishing separate educational facilities for pregnant girls violated certain provisions of the Charter and CRC (but not the African Children's Charter, despite the applicant's contention to this effect; see 2 & 32).

This chapter first sets out the communications procedure, after which it develops a typology of submitted cases, reflects on the small number of communications, the cooperation by states and the nature of complainants and victims. Urgent protective interventions, in the form of provisional measures and urgent appeals, are then analysed. The main focus falls on the four phases through which communications advance, namely, admissibility, merits, reparations and implementation. A conclusion draws together some of the most salient themes.

2 Communications procedure

The African Children's Committee has an expansive mandate. Its promotional mandate is similar to that of the African Commission, including the examination of state reports (see chapters 33 and 34 of this volume). Its protective mandate, exercised through the communications procedure, is set out in two sentences in article 44 of the African Children's Charter.[9] Guidelines providing more particulars about this process were adopted in 2006.[10] In 2018 the Committee amended these guidelines, and adopted the Revised Guidelines for Consideration of Communications and Monitoring Implementation of Decisions of the African Committee of Experts on the Rights and Welfare of the Child (Communications Guidelines).[11] These guidelines are modelled closely on the communications procedure before the African Commission. The power to adopt rules to regulate its internal procedure is found in the Committee's foundational treaty.[12]

The way in which the procedure works is that complainants may allege violations of the African Children's Charter by submitting 'communications'. The formal requirements are that the communication must not be anonymous; must be in written format; in the 'official languages' of the Committee; against a state party; and signed by the complainant (or their representative).[13] After a preliminary screening by the Secretariat, the matter is transmitted to the Committee. The matter then proceeds through two distinct phases: admissibility and merits.[14]

The communication is sent to the respondent state, for a response within 60 days on the admissibility arguments.[15] This period may be extended by another 30 days. The complainant then has an opportunity to reply within 30 days. After a finding of admissibility has been made, the state is asked to reply within 60 days on the complainant's merits argument, after which the complainant may within 30 days submit 'additional information'. If the process runs smoothly, and all parties fully collaborate, the process should be concluded within six months. A particular feature of this procedure is that hearings may be scheduled, during which parties are invited to make oral submissions. These hearings are usually held in closed session. The Children's Committee's protective mandate is bolstered by the inclusion in the treaty text of its competence to conduct 'any appropriate method of investigation'.[16]

9 Art 44 African Children's Charter.

10 Eighth Meeting of the African Committee, Addis Ababa, Ethiopia, 27 November-1 December 2006 para 69; see also BD Mezmur 'Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session: Recent developments' (2007) 7 *African Human Rights Law Journal* 258, with the Guidelines annexed ((2007) 7 *African Human Rights Law Journal* 570).

11 Adopted at its 31st ordinary session, 24 April-4 May 2018 (Session Report para 137); the last revisions were made at its 35th session, 31 August-8 September 2020 (Session Report para 109), https://www.acerwc.africa/en/sessions/table (accessed 2 July 2024).

12 Art 38(1) African Children's Charter: 'The Commission *shall establish* its own Rules of Procedure' (my emphasis). The Committee also adopted Rules of Procedure (revised September 2020), but they only tangentially touch on communications.

13 Sec II(2) Communications Guidelines.

14 A separate judgment on admissibility is given, and shared with the parties. If the matter proceeds to the merits, a consolidated decision is later provided.

15 Sec XI Communications Guidelines sets out the procedure for hearings.

16 Art 45(1) African Children's Charter. An example of an investigative mission outside the ambit of a submitted communication is the Committee's August 2015 mission to Tanzania on the rights of children with albinism. The

These methods of investigation include country visits, undertaken for various purposes, among them fact-finding missions, to supplement the communications procedure by verifying facts on the ground.[17]

The African Children's Committee decides separately on admissibility. If a matter is admissible, a comprehensive decision is issued setting out the finding on both admissibility and the merits, and if a violation has been found, the recommendations on reparations. The matter may be amicably settled at any stage of the proceedings. The Committee may also at any stage issue provisional measures. State parties found in violation are required to report on the implementation of remedial recommendations.[18] These elements are discussed in more detail below.

The Committee can join 'similar' communications before it,[19] on its own motion or at the request of a party.[20] It can also separate communications if the 'victims' and alleged violations are too disconnected.[21]

The Committee is required to take measures to 'ensure the effective and meaningful participation' of children in the communications process. In particular, the Committee should hear children capable of expressing their views.[22] The evidence of two brothers at the hearing in *Mauritanian Enslaved Brothers* during the Committee's 28th session (November/December 2016) is a relatively rare example of children's views being heard on the violations as part of the process before the Committee.[23] In 2022, in *Tanzanian Girls*, one of the girls who had been expelled from school also testified at a hearing.[24]

The Committee may not refer communications to the African Court. It is not listed as an entity that can do so in article 5(1) of the African Court Protocol. By contrast, the African Commission – a quasi-judicial body with a mandate very similar to that of the African Children's Committee – has such competence. This anomaly provoked the Committee to submit a request to the African Court to clarify the position.[25] Although the Court considered indirect access by the Committee as 'highly desirable',[26]

Committee conducted a mission to Malawi on the same topic in August 2022. Although *Esnart Kenesi* was submitted in July 2022, there is no mention of this communication in the Malawi mission report.

17 BD Mezmur 'The African Children's Charter @ 30: A distinction without a difference?' (2020) 28 *International Journal of Children's Rights* 705.

18 Sec XIII(1)(iii) Communications Guidelines.

19 Sec VI(i) Communications Guidelines (similarity relates to the facts and the parties).

20 See eg *Taha Fadul, Nisreen Mustafa, Somia Shampaty and Nawras Elfatih on behalf of Abbas Mohamed AL-Nour Musa Al-Emam, Modathir Alrayah Mohamed Badawi and Fadoul Almoula Aljaili Nourallah: Taha Fadul & Others v Sudan*, No 15/Com/003/2020, admissibility decision November 2021; decided on merits Nov/Dec 2022 (*Sudanese Death Penalty*) paras 14-17, where it did so on its own motion.

21 Sec VI(iii) Communications Guidelines.

22 Sec XI(6) Communications Guidelines. This position is more advanced than that adopted by the CRC Committee. Initially, the question did not arise at the CRC Committee, since it did not hold oral hearings. The first such hearing, at which the legal representative of the authors – all children when they submitted the communication – were present, was held in Communication 104/2019, *Saachi & Others v Argentina and Four Similar Cases* (against Brazil, France, Germany, and Turkey). Rule 19 of the Committee's Rules of Procedure was subsequently aligned with this emergent practice. (See A Skelton & A Collins 'The Committee on the Rights of the Child' in Z Ra'ad Al Hussein & J Genser (eds) *The handbook on the UN human rights system* (forthcoming 2025).

23 *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*) para 3.

24 *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*) para 1 (reference to evidence by 'deponent 2' on 29 March 2022); para 82 (quotation from the deponent's affidavit reveals that she was 'in school' and was expelled in 'Form 2').

25 See *Request for an Advisory Opinion (Advisory Opinion 2/2013 on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Courts*).

26 Paras 95-96, 100; see also the 2008 Protocol on the Statute of the African Court on Justice and Human Rights art 30(c), where the Committee is listed as an entity that can seize the Court. This Protocol is not force.

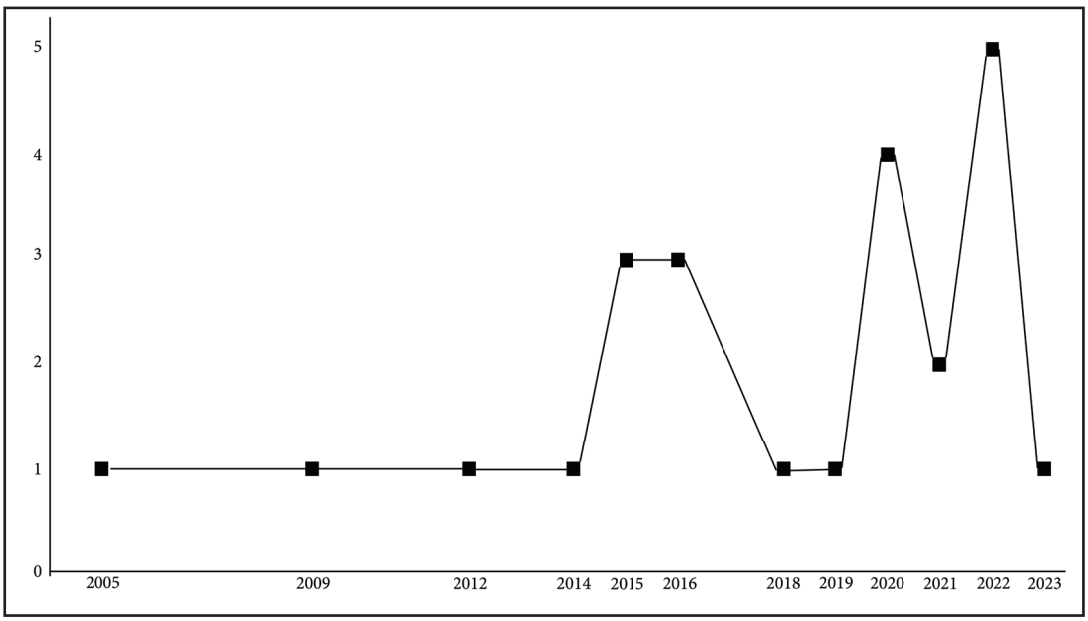
it ultimately concluded, based on the omission of the Committee from article 5(1) of the African Court Protocol, that the Committee does not have standing to bring cases directly to the Court. At the same time, it pointed out that the matter should be resolved politically through an amendment to the Court Protocol.[27] A drawn-out process to do so is ongoing.[28]

3 Overview of communications before the African Children's Committee

3.1 Typology of submitted communications (as at July 2024)

In the roughly 25 years since the entry into force of the African Children's Charter,[29] the Committee has received only 24 communications.[30]

Table A: Communications submitted to African Children's Committee (2005-2023)



27 Para 99.

28 A study completed by the AU Commission on International Law was submitted to the Sub-Committee on Human Rights and Governance PRC for consideration (EX.CL/Dec.1176(XLI) 41st ordinary session of the Executive Council, 14-15 July 2022, Lusaka, Zambia, Decision on the Activity Report on the AUCIL para 5.

29 The first Committee members were elected in 2001, and met for the first time in 2002, in Addis Ababa, Ethiopia; see A Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 320.

30 These figures are based on information publicly accessible on the Committee's website.

As at July 2024, the African Children's Rights Committee has finalised ten of these communications on the merits, against eight different state parties located in all regions of the continent, except Southern Africa. Two communications were against Sudan,[31] and one each against Kenya,[32] Uganda,[33] Senegal,[34] Mauritania,[35] Sudan,[36] Cameroon,[37] Tanzania[38] and Mali.[39] The first merits decision was handed down in March 2011, and the most recent in early 2023.

Working with the parties, the Children's Committee succeeded in reaching amicable settlements in two communications, concerning two state parties, based on an agreement signed by the state and the complainants. These settlements were reached in respect of the legal age of marriage in Malawi,[40] and with respect to the conflict in the South Kordofan and Blue Nile regions of Sudan.[41] Compared to the CRC Committee, the African Commission and African Court, the African Children's Committee has been comparatively successful in amicably settling matters before it.[42] Factors that may have had a role in making amicable settlement a striking feature of the communications mandate before the African Children's Committee are its multidisciplinary membership;[43] the small number of cases, which allowed for investment of time and resources in protracted and intensive processes of settlement through diplomatic means; and the nature of children's rights, which tends to allow states to take more flexible positions. A previous Chairperson of the Committee emphasised the potential of the amicable settlement process to reduce tensions that 'may arise during contentious proceedings', and to allow for constructive dialogue between parties.[44]

31 *Sudanese Death Penalty* (n 20); *African Centre for Justice and Peace Studies on behalf of Ms Umjumah Osman Mohamed v Sudan*, No 16/Com/004/2020, received 25 June 2020, admissibility decision March 2021, decided on merits April/May 2023 (*Sudanese Rape/Adultery*).

32 *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*). See E Durojaye & E 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* 576; J Sloth-Nielsen 'Children's rights litigation in the African region: Lessons from the communications procedure under the ACRWC' in T Liefaard & JE Doek (eds) *Litigating the rights of the child* (2015) 249.

33 *Hansungule & Others (on behalf of Children in Northern Uganda) v Uganda*, No 1/Com/001/2005, decided April 2013 (*Northern Ugandan Children*); see C Fawole 'Revisiting *Michelo Hansungule and Others (on behalf of the Children of Northern Uganda) v Uganda*: A case commentary' (2020) 4 *African Human Rights Yearbook* 415.

34 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*, No 3/Com/001/2012, decided 15 April 2014 (*Senegalese Talibés*); see MG Nyarko & HM Ekefre 'Recent advances in children's rights in the African human rights system: A review of the decision of the African Committee of Experts on the Rights and Welfare of the Child in the *Talibés* case' (2016) 15 *The Law and Practice of International Courts and Tribunals* 385.

35 *Mauritanian Enslaved Brothers* (n 23).

36 *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*).

37 *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*).

38 *Tanzanian Girls* (n 24).

39 *APDF and IHRDA on behalf of AS a minor v Mali*, No 13/Com/001/2020, received 13 January 2020, admissibility decision 14 July 2021; finalised on merits Nov/Dec 2022 (*Malian Girl Rape*) (available only in French).

40 *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*, No 4/Com/001/2014), finalised 27 October 2017 (*Malawian Amicable Settlement*)); see BD Mezmur 'No second chance for first impressions: The first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62.

41 *Project Expedite Justice & Others v Sudan*, No 11/Com/001/2018, admissibility ruling, March 2019 (*Sudanese Children in South Kordofan and Blue Nile (Admissibility)*), Amicable Settlement Report, 18 December 2020 (*Sudanese Amicable Settlement*).

42 On their implementation, see 5.4 below.

43 The competence required for membership of the Committee is expertise on 'matters of the rights *and welfare* of the child' (art 33(1) African Children's Charter).

44 Mezmur (n 40) 72.

Five matters before the Committee were declared inadmissible and, therefore, no merits decisions emanated from these cases. Two of these communications were against Egypt,[45] two against Cameroon,[46] and one against South Africa.[47] In all five instances, the basis for inadmissibility was the non-exhaustion of local remedies. The finding of these decisions turned on the value attached to and the extent of evidence required to prove contextual factors indicative of the non-existence and ineffectiveness of local remedies. The admissibility criteria and their application by the Committee are discussed further in a part 5.1 below.

In the first communication against it,[48] Egypt invoked, as a jurisdictional barrier to the African Children's Committee's competence, its reservation that it does not 'consider itself bound by article 44 which establishes that the Committee can receive communications'.[49] In response, using article 19(c) of the Vienna Convention on the Law of Treaties (VCLT) as legal standard, the Committee proceeded on the basis that this reservation is incompatible with the object and purpose of the African Children's Charter since the complaints procedure under article 44 is part of the 'core rationales' for the establishment of the Committee.[50] It therefore proceeded to deal with the matter.

Six matters before the Committee *await finalisation on the merits*. All six communications, two against Nigeria,[51] one each against Burundi,[52] Ghana,[53] Eritrea[54] and Botswana,[55] have been declared admissible.

45 *Dalia Lotfy on behalf Sohaib Emad v Egypt*, No 9/Com/002/2016, submitted 31 March 2016; inadmissibility decision, May 2017 (non-exhaustion of local remedies) (*Sohaib Emad (Inadmissibility)*); *Dalia Lotfy on behalf Ahmed Bassiouny v Egypt*, No 8/Com/001/2016, submitted 31 March 2016, inadmissibility decision, May 2017 (non-exhaustion of local remedies) (*Ahmed Bassiouny (Inadmissibility)*).

46 *Etoungou Nko'o on behalf of Mr and Mrs. Elogo Menye and Rev Daniel Ezo'o Ayo v Cameroon*, No 10/Com/003/2016, received 22 April 2016, inadmissibility decision, no date, (failure to establish *prima facie* violations; non-exhaustion of local remedies) (*Cameroon Hospital (Inadmissibility)*); *Institute for Human Rights and Development in Africa (IHRDA) and Association pour la promotion du développement local (APDL) (on behalf of Fadimatou Mohamadou & 9 Others) v Cameroon*, No 18/Com/002/2021, received 21 December 2021 (non-exhaustion of local remedies), inadmissibility decision March-April 2022 (*Cameroonian Child Marriage (Inadmissibility)*) (available only in French).

47 *Ramphele Attorneys on behalf of Tholodi Tloubatla and Thibedi Tloubatla v South Africa*, No 14/Com/002/2020, received 14 January 2020, inadmissibility decision,14 January 2020 (non-exhaustion of local remedies) (*South African Tax (Inadmissibility*)).

48 *Sohaid Emab (Inadmissibility)* (n 45) para 2.

49 Its reservation also purports to exclude arts 21(2), 24, 30 (a)-(e) and 45; also see H Sipalla '(In)validity of Egypt's reservations to the African Charter on the Rights and Welfare of the Child' (2019) 4 *Kabarak Journal of Law and Ethics* 193.

50 *Sohaid Emab (Inadmissibility)* (n 45) para 2. See also BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 132, arguing that the 'in-built' nature of individual complaints directly links this procedure to the object and purpose of the Charter.

51 *The Incorporated Trustees of ISH-61 Human Rights and Social Justice Initiative (ISH-61), the Institute for Human Rights and Development in Africa (IHRDA), and the Centre for Human Rights (CHR) (on behalf of children in Nigeria) v Nigeria*, No 23/Com/005/2022, admissibility decision, November 2023 (*Nigerian Child Act*); a hearing in this matter has been scheduled for the beginning of October 2024; *Child Rights and Rehabilitation Network, Institute for Human Rights and Development in Africa and Centre for Human Rights (on behalf of Children Affected by Witchcraft Accusations in Nigeria) v Nigeria*, No 17/Com/001/2021, admissibility finding 2023 (*Nigerian Witchcraft*) (Review requested by Nigeria; request rejected by Committee, Decision on the Application for Review of the Admissibility Decision 1/2023 on Communication No 17/Com/001/2021, April 2024).

52 *Institute for Human Rights and Development in Africa (IHRDA) v Burundi*, No 22/Com/004/2022, received 5 September 2022; admissibility decision April/May 2023 (*Burundian Parental Separation*) (available only in French).

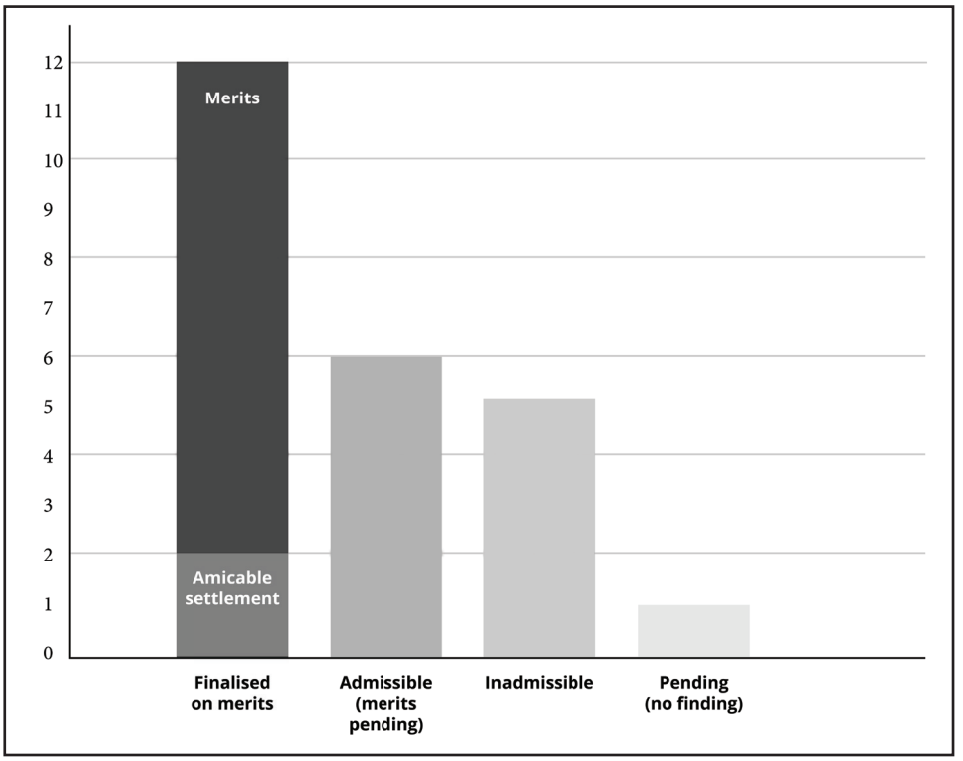
53 *Institute for Human Rights and Development in Africa and Mr Solomon Joojo Cobbinah (on behalf of school girls living in villages along the River Offin in the Ashanti Region of Ghana) v Ghana*, No 19/Com/001/2022, received 29 March 2022; admissibility decision May 2023 (*Ghanaian Girls Crossing River Offin*).

54 *Lawyers Associated for Human Rights in Africa (on behalf of Children of Jehovah's Witnesses) v Eritrea*, No 20/Com/002/2022, received 1 April 2022; admissibility decision Nov 2023 (*Eritrean Children of Jehovah's Witnesses*).

55 *IHRDA on behalf of ACM v Botswana*, No 24/Com/001/2023, received 28 August 2023; admissibility decision April 2024 (*ACM*).

A single case is *pending the consideration* by the Committee. In other words, no proceedings have thus far been completed in this communication against Malawi.[56]

Table B: Status of communications submitted to African Children's Committee (as at August 2024)



3.2 Dearth of communications

The figures above signify a trickle of communications. A total of 24 communications submitted over 25 years represents an average of only about one communication per year.[57] The Committee is mandated to consider communications as soon as states become party to the African Children's Charter. By August 2024, the near-universal ratification of 51 state parties has been achieved.[58] The vast majority of the state parties have been party to the treaty for at least the last 15 years.[59] Only four states have become party to the African Children's Charter since 2010,[60] with the Sahrawi Arab Democratic Republic (SADR) the most recent, on 29 July 2024, to deposit its instrument of ratification.[61]

56 *People Serving Girls at Risk and Equality Now (on behalf of Esnart Kenesi) v Malawi,* No 21/Com/003/2022, received 12 July 2022 (*Esnart Kenesi*).

57 If the date when the Committee became operational (2002) is taken as starting point, the calculation would be only slightly different (1,3 communications per year).

58 See www.au.int (last updated 14 February 2023; accessed 12 August 2024); however, the Committee's Facebook page (posted 31 July 2024) provides photographic evidence of the deposit of the instrument of ratification by the Sahrawi Arab Democratic Republic, on 29 July 2024, making it the 51st state party.

59 It took a decade (1990 to 1999) to ensure the acceptance by 15 AU member states, to bring the African Children's Charter into force. In the next decade (2000 to 2010), 32 states became party. Between 2011 and 2024 only four states joined the treaty.

60 Djibouti, São Tomé and Principe, Eswatini and the DRC, which did so on 8 December 2020, an inexplicable almost four years after ratification on 31 January 2017.

61 SADR deposited its instrument of ratification on 29 July 2024, but at the time of writing this is not yet reflected on the AU

A number of factors explain the slow flow of communications. First, litigation on children's rights issues at the national level remains rare. While Africans are not particularly litigious, litigation on children's rights is even more infrequent before the continent's domestic courts. Patriarchy, legal impediments and a culture of negating the role of children in public space leave little room for initiating child-specific litigation. Also, most of the international organisations supporting child rights matters on the continent do not have specific programmes and dedicated budgets for children's rights litigation. This means, as shown by the status of the communications above, that even if there are alleged child rights violations, these cases would often not pass the admissibility criterion of exhaustion of domestic remedies. However, as will be discussed below in part 5.1 below, in some specific cases the Committee, like the African Commission, has been willing to dispense with the requirement of exhaustion of domestic remedies.

Second, even in instances where domestic remedies have been exhausted, a limited number of communications are submitted to African supra-national bodies such as the African Children's Committee (as well as the African Commission and African Court).[62] The limited use of supranational quasi/judicial bodies may be ascribed to a preference for 'community-based resolution systems';[63] a lack of awareness and knowledge of the African human rights system, even among lawyers and child rights activists; linked to the relative invisibility of AU human rights treaties and treaty bodies, generally, and the African Children's Charter and Committee, specifically; and potentially a lack of confidence that the decisions of supra-national national bodies (such as the Committee) would be implemented in practice.

Third, in the early years, it took the African Children's Committee a while to get its house in order. The first Committee members 'took office' only in 2002,[64] some three years after the entry into force of the African Children's Charter. It functioned under serious constraints, due to a lack of funding by the AU, with staff members of the AU Department of Social Affairs – rather than a self-standing secretariat – supporting the Committee. When it received its first communication in 2005, the Committee was unprepared. Unsure about the content of its mandate under article 44, it sought the advice of the AU legal counsel. In response, the legal counsel clarified that the Committee had the mandate to 'receive and consider' 'complaints and grievances', and not merely be a conduit for communicating 'information'.[65] Guidelines detailing the operationalisation of the very succinct Charter provisions related to communications were also not in place. It was only after the first set of Communications Guidelines had been finalised in 2006, that the first – and subsequent – communications could be dealt with. The complainants in the first communication in response updated the communication to align it with these Guidelines, translated it into French, and resubmitted it in 2010.[66] The second communication was received on 20 April 2009.[67] The Committee's first finding is dated 22 March 2011 – more than 11 years after its foundational treaty entered into force.

A comparison between the regional system (under the African Children's Committee) and United Nations (UN) system (CRC Committee) underlines the very limited extent of African usage of complaints. Communications to the CRC Committee have been quite numerous, despite the constraining factor that complaints can only be brought against states that have become party to

website.

62 F Hampson, C Martin & F Viljoen 'Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa' (2018) 16 *International Journal of Constitutional Law* 184-185.

63 A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children' rights in Africa: A legal perspective* (2008) 48.

64 Sloth-Nielsen (n 32) 252.

65 Seventh Meeting, African Committee, Addis Ababa, Ethiopia 19-21 December 2005 para 39.

66 *Northern Ugandan Children* (n 33) paras 12 & 13.

67 *Children of Nubian Descent* (n 32) para 1.

OPCP-CRC. While OPCP-CRC has entered into force relatively recently, in 2014, some ten years later, more than 238 complaints have been submitted to the CRC Committee, against 19 of the total number of 52 state parties.[68] The bulk of cases have been submitted against a few West European states (such as Spain, Switzerland, Denmark and Finland). No case has been submitted against any of the four African states party to the Protocol. At the UN level, some 137 communications have been finalised: 49 communications were finalised on the merits (with 45 violations found (around 33 per cent of the total number), and no violations in four communications); 35 communications were declared inadmissible (26 per cent); and a further 53 communications were discarded for other reasons (for example, by being struck out).

CRC still enjoys more visibility and prominence across Africa than its African counterpart.[69] Without doubt, much awareness raising, sensitisation, education and training is required before the African Children's Charter and Children's Committee will become household names in Africa, or even just a constant source of reference for children's rights by children and those working for their best interests.

3.3 State involvement in consideration of communications

States are provided an opportunity to participate in the proceedings before the Committee. This is in line with the principle of 'hearing both sides'. In addition to written submissions, the Committee generally allows for oral hearings, to which both parties are invited. When a state has declined or ignored all opportunities to participate in the proceedings, the Committee goes ahead in its absence.[70] To ensure the state's collaboration, the Committee has on occasion bent backwards to extend the timelines for state participation. States have generally cooperated in the procedure, but collaboration remains precarious, with state non-cooperation appearing in some pending cases.[71]

In four instances, respondent states in the cases finalised on the merits have been fully responsive to and engaged with the process before the African Children's Committee. The level of non-cooperation differs in the remaining six cases. Kenya and Sudan (in *Sudanese Rape/Adultery*) did not participate at all during any stage of the proceedings. Mauritania initially did not submit any responses,[72] leaving the Committee no option but to deal with admissibility without any contributions by the state. However, at the merits hearing following the admissibility finding, the state and the complainant were present, together with the two victims. With the support of the state, the Committee subsequently undertook an on-site investigation through a fact-finding mission to learn more about the practice of slavery in Mauritania, before taking a final decision.[73] Despite numerous invitations through *notes verbales*, Cameroon also did not participate in the admissibility phase of the *Cameroonian Child Rape* case. Only after the Committee had declared the matter admissible did it make a request for a review of the decision, and supplied its arguments on admissibility.[74] The Committee indicated that because the state did not participate in the admissibility process, it was precluded from later contesting admissibility

68 These figures reflect the position as at early 2024; see https://www.ohchr.org/en/treaty-bodies/crc/individual-communications; https://juris.ohchr.org; https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx; https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf (accessed 12 August 2024).

69 See eg AT Mbise 'The diffusion of the UNCRC more than the ACRWC in Africa: The influence of coercion and emulation' (2016) *International Social Work* 8 (concluding that CRC has, through coercive and emulation mechanisms, become the main 'organising framework for protecting children in Africa').

70 Sec XII Communications Guidelines.

71 The failure of Mali (*Malian Girl Rape*) to respond to the communication despite several reminders by the Committee (2021 Activity Report para 21) must be contextualised against the *coup d'état* in that country in May 2021.

72 *Mauritanian Enslaved Brothers* (n 23) para 2.

73 The mission took place 27-30 March 2027 (*Mauritanian Enslaved Brothers* para 4).

74 *Cameroonian Child Rape* (n 37) paras 1-4.

before the Committee; it could only ask for a revision of the decision based on the emergence of 'new facts'.[75] In the absence of 'new facts' the Committee denied this request, and Cameroon presented its written arguments at an oral hearing.[76] In *Sudanese Death Penalty* the state only participated at the hearing stage, and in *Malian Child Rape* the state belatedly became involved at the merits stage.[77]

All other states (Uganda, Senegal, Sudan, Tanzania and Malawi) fully participated in the process. The Senegalese government's response in *Senegalese Talibés* was particularly encouraging, in that it admitted that the alleged violations existed and continued to take place.[78] The state further indicated that the government convened – between the submission of the complaint and its finalisation – a workshop, followed by an inter-ministerial council on child begging, under the auspices of the Prime Minister.[79] In 2018, when political circumstances allowed for a window of opportunity, *Sudanese Nationality* was also nearly settled amicably. At the request of the government of Sudan, the Committee availed its good offices towards settling the case. Although the complainant could eventually not agree to the terms, Sudan fully participated in the case, including in making an oral submission during a hearing on the merits.[80]

The extent of state collaboration is one of many factors that account for the relative speed with which complaints were finalised. The first communication received (*Northern Ugandan Children*), which took a record eight years and three months (99 months) to be concluded, is an exception. The shortest period of finalisation is 21 months.[81] The average delay between the receipt and final decision of these communications is 36 months (if all communications are included), or 29 months (if *Northern Ugandan Children* is excluded as an outlier).

3.4 Nature of complainants and victims

In the proceedings before the African Children's Committee, standing is not treated as a separate issue or phase. Under article 44 of the Children's Charter, read with the Communications Guidelines, the following may submit a communication to the Committee:[82] (i) an individual or group of individuals, including children, their parents and legal persons; (ii) a non-governmental organisation (NGO) (recognised by a member state, the AU or the UN); (iii) an AU or UN-specialised organ or agency (such as the United Nations Children's Fund (UNICEF)); (iv) national human rights institutions; or (v) a state party to the Charter.

By granting state parties 'access' to the African Children's Committee, the Guidelines introduce the possibility of inter-state communications. Given that the African Children's Charter itself makes no mention of this procedure, and that the Guidelines do not provide any further guidance on the matter, it is not surprising that, by July 2024, no inter-state communication has been submitted under the African Children's Charter. Drawing on the practice before the other AU human rights bodies, other regional human rights systems and UN human rights treaty bodies, it seems unlikely that this will become a frequently-used avenue to vindicate the rights of African children.[83]

75 *Cameroonian Child Rape* paras 1-4.

76 *Cameroonian Child Rape* paras 39-40.

77 Para 5.

78 Para 26.

79 Para 27.

80 *Sudanese Nationality* (n 36) para 2; see also the Committee referring to specific contentions, eg, paras 29, 83, 89.

81 *Senegalese Talibés* (n 34).

82 Art 44(1) African Children's Charter; sec I(i) Communications Guidelines.

83 See F Viljoen 'Inter-state complaints under the African human rights system: A breeze of change?' (2024) 13 *International Human Rights Law Review* 96-129.

With one exception,[84] the 12 cases finalised on the merits were submitted by NGOs.[85] Of the other 12 communications, eight were submitted by NGOs,[86] three by individuals or groups or individuals,[87] and one in the name of a firm of attorneys.[88] The communications submitted by individuals and the law firm were all declared inadmissible.

Complainants submit communications either on their own behalf or on behalf of an affected 'child victim' or victims.[89] So far, communications have mostly been presented as collective complaints, in the name or interests of groups of children. These groups are the children of Northern Uganda exposed to conscription as child soldiers during the terror of the Lord's Resistance Army; the children in Kenya of Nubian descent who risk statelessness and deprivation of benefits due to the state's failure to issue them birth registration and grant them nationality; the Talibés children in Senegal who are forced to beg on the streets while undergoing religious instruction; the children of Malawi who are affected by the definition of childhood under the Malawian Constitution; the children suffering untold violence in a region of Sudan beset by internal armed conflict; and girls in Tanzania excluded from school due to pregnancy.

By admitting complaints submitted by these NGOs on behalf of unidentified groups of persons, the African Children's Committee allows standing in the public interest (*actio popularis*).[90] In this regard, the Committee follows the practice of the African Commission, before which very broad standing is allowed, without any requirement that the complainant be either the 'victim' or be authorised to represent the affected person or community.[91] This broad standing also reflects and follows logically from the recognition of collective or peoples' rights provided for in the African Charter. While the African Children's Charter does not contain collective (peoples') rights, its Preamble links back to the African Charter, which also invokes the values of 'African civilisation', of which a communitarian ethic is part. The African Children's Charter also provides for 'responsibilities' of the child, for example, to 'preserve social and national solidarity' and 'African cultural values', thereby underscoring children's embeddedness within communities.[92] Acquiring consent from the children constituting such expansive and nebulous groups would be very hard, if not impossible, to achieve. The Communications Guidelines facilitate *actio popularis* submissions by allowing the presentation of communications without the explicit consent of the affected children as long as the complainants are able to show that they act 'in the supreme interest of the child'.[93]

Although also submitted by NGOs, six of the communications decided on merits zoom in on the specific individuals affected by the violation. These cases deal with the failure to bring to justice the perpetrator of the rape of a child (anonymised as TFA) in Cameroon; the violation of the rights of two brothers (Said and Jarg Ould Salem) held in slavery or slave-like conditions in Mauritania; a child (Imam Hassan Banjamin) being denied her nationality by Sudan; a child (Umjumah Osman

84 *Sudanese Death Penalty* (n 20) (submitted by four individuals).

85 'Hansungule and others' are a law professor and Master's students at the Centre for Human Rights, University of Pretoria (an NGO enjoying observer status with the Committee). Although one person's name is used, the authorship is institutional rather than personal.

86 Mostly submitted by multiple NGOs.

87 *Sohaib Emad (Inadmissibility), Ahmed Bassiouny (Inadmissibility)* (n 45)*; Cameroon Hospital (Inadmissibility)* (n 46).

88 *South African Tax (Inadmissibility)* (n 47) (Ramphele Attorneys).

89 Sec I(iii) Communications Guidelines.

90 See F Viljoen *International human rights law in Africa* (2012) 402.

91 See eg *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

92 Art 31 African Children's Charter.

93 Sec I(iii) Communications Guidelines. Although mention is made in *Children of Nubian Descent* (para 18) of the instruction by the Kenyan Nubian Council of Elders for the domestic litigation, no such information is provided or required for submitting the case to the Committee.

Mohamed) raped yet accused of adultery in Sudan; three persons (Abbas Mohamed AL-Nour Musa Al-Emam, Modathir Alrayah Mohamed Badawi and Fadoul Almoula Aljaili Nourallah) sentenced to death in Sudan; and a girl (AS) exposed to rape in *Malian Girl Rape*. Subsequent communications reveal an ongoing trend towards more communications being submitted in respect of the rights of identified individuals or groups of individuals, as such.[94]

The communication must invoke the violation of the rights of a 'child', which under the African Children's Charter is defined as anyone under the age of 18 years.[95] Because the African Children's Committee's jurisdiction is determined by the alleged victim's age at the time of the alleged violation, it does not matter if the case is concluded after the child turns 18 – as long as it was submitted before the child's eighteenth birthday.[96] On this basis, the complaint in *Sudanese Rape/Adultery* was declared admissible: Although the complainant was 20 years old at the time of the admissibility hearing, she was 16 at the time of the alleged violation.[97] The Committee retains jurisdiction over these cases on the basis that the alleged violations had been committed when the victims were younger than 18 years old; in combination of the continuous and ongoing nature of these violations. However, it should be possible for the Committee to retain jurisdiction merely on the basis of the violation having been perpetrated against a 'child', even if the violation is no longer 'ongoing'.

4 Urgent interventions

4.1 Provisional measures

Provisional measures are not mentioned in the African Children's Charter, but are quite comprehensively outlined in section VII of the Communications Guidelines. The Guidelines allow the Committee, in respect of one or more case pending before it, at its own initiative or at the request of a party, to request that a respondent state takes provisional measures to prevent the 'likelihood of grave or irreparable harm' to a child in situations of urgency, serious or massive violations of the African Children's Charter.[98] The Committee's request to the state party is made by way of a letter of request, and does not culminate in a self-standing decision.[99] To provide greater exposure, and add political weight to the arguably weak legal weight of these measures, the Committee transmits a copy of the request not only to the victim, but also to AU policy organs.[100]

To date there have not been many requests from complainants, nor has the Committee thus far made much use of provisional measures. In one example, *Sudanese Death Penalty*, the Committee in 2018 issued a request to Sudan to refrain from executing three persons on death row who had been sentenced to death for crimes committed when they were children. Because their sentences had been confirmed by the highest court, the death sentence could be executed at any time. Executing anyone in respect of an offence when they were under the age of 18 is in flagrant violation of the Charter, and

94 *Cameroon Hospital* (Elisabeth Gloria aged 4 and Jacques Le Juste aged 6); *Esnart Kenesi*; *Cameroonian Child Marriage (Inadmissibility)* (Fadimatou Mohamadou and 9 Others); *Sudanese Death Penalty* (10 named persons); *Sudanese Rape/Adultery* (Umjumah Osman Mohamed); *Malian Girl Rape* (AS); see also J Sloth-Nielsen and BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 164.

95 Art 3 African Children's Charter.

96 Sec I(iv) Communications Guidelines.

97 *Sudanese Rape/Adultery* (n 31) para 25.

98 Sec VII(1) Communications Guidelines.

99 *Sudanese Death Penalty* (n 20) para 12 (the provisional measures decision was an integral part of the admissibility decision).

100 AU Assembly, AU Peace and Security Council and AU Commission.

evidently constitutes a serious and grave violation likely to cause irreparable harm.[101] In two instances, the Committee rejected provisional measures requests.[102]

4.2 Urgent letters of appeal

Similar to the communications procedure, urgent appeals form part of the Committee's protective mandate.[103] The Committee's competence to send urgent letters of appeal to state parties has no Charter basis, but is provided for in the Rules of Procedure.[104] However, letters of appeal are not submitted by complainants, but are initiated by the Committee. Letters of appeal closely resemble requests for provisional measures issued at the Committee's initiative.[105] Both are sent by 'letter', and the aim of provisional measures – to prevent irreparable harm –also is at the heart of urgent appeals. In practice, letters of appeal may be directed at the plight of individual children, or at ongoing legal reform affecting children. In their form and substance, urgent appeals are akin to statements issued by the Committee on matters of contemporary relevance – but they are personalised to highly-placed members of the targeted country's executive, rather than to the public at large or the government in general. The Committee may draw the attention of the AU Chairperson, the Executive Council, the Peace and Security Council or any other relevant AU organ to the urgent letter of appeal.[106]

Information about urgent appeals is sparse. Five instances of the use of this procedure appear on the Committee's website:[107] In 2017 the Committee sent a joint letter of urgent appeal, with the African Commission, to Tanzania related to the subject matter of *Tanzanian Girls*; in 2018, the Committee sent an urgent appeal to Cameroon concerning the alleged extra-judicial execution of children suspected of being members of Boko Haram; it directed an appeal in 2019 to Mauritius concerning the minimum age of 18 in a draft Bill on child marriage; to Somalia, in 2020, addressing aspects of the Sexual Intercourse Related Crime Bill; and to South Sudan, expressing concern about the death penalty against children (not dated).

5 Phases of a communication

5.1 Admissibility

Admissibility is a contested issue in just about all communications before the Children's Committee. Even when the state does not participate in the admissibility proceedings, the Committee carefully considers each of the admissibility criteria.[108] Non-compliance with even a single admissibility requirement renders the communication inadmissible. Of the 23 communications finalised on admissibility, the African Children's Committee declared only five (22 per cent) inadmissible.

There is no reference in the African Children's Charter to admissibility. It does, however, set out standing requirements,[109] and outlines the basic elements of form.[110] More detailed admissibility

101 Art 5(3) African Children's Charter ('Death sentence shall not be pronounced for crimes committed by children').

102 In *Sohaid Emab (Inadmissibility)* for lack of evidence of urgency and gravity (para 10); and in *Eritrean Children of Jehovah's Witnesses* for lack of proof of 'irreparable harm', and due to the overlapping nature of relief sought (paras 14-15).

103 Ch XIII, separate chapter titled 'Protection mandate of the Committee'.

104 Rule 67 Revised Rules of Procedure (20 September 2020).

105 Sec VII(1)(i) Communications Guidelines.

106 Rule 67(4) 2020 Revised Rules of Procedure.

107 https://www.acerwc.africa/en/key-documents/statements-open-letters (accessed 2 August 2024).

108 See eg *Sudanese Death Penalty* (n 20) paras 20-26, where the state did not participate in the admissibility proceedings.

109 Art 44(1) African Children's Charter.

110 Art 44(2) African Children's Charter.

requirements, largely mirroring those of the African Charter,[111] are contained in the Committee's Communications Guidelines.[112] Based on the injunction in article 46 of the Children's Charter to 'draw inspiration from international law on human and peoples' rights', the Committee's jurisprudence on admissibility is heavily influenced by the African Commission,[113] to a lesser extent, the African Court[114] and, on rarer occasions, UN human rights treaty bodies.[115]

Of the six admissibility requirements discussed below, the requirement for exhaustion of local remedies is most frequently contested.

5.1.1 Compatibility with AU law and the African Children's Charter[116]

The condition of compatibility with the AU Constitutive Act and the Charter is met if a communication makes out a case for *prima facie* violations of the African Children's Charter.[117] Although not requiring detailed arguments at the admissibility stage, the Committee requires more than just the mention of particular provisions. The relevant facts and the alleged violations of the African Children's Charter provision must be connected, and jointly make a case for a *prima facie* violation of Charter rights.[118]

Arguing for inadmissibility on this ground, Sudan invoked the principle of non-intervention in the internal affairs of states, enshrined in the AU Constitutive Act,[119] to challenge the admissibility of the complaint in *Sudanese Rape/Adultery*. The Committee rejected this argument, based on the voluntary acceptance by Sudan of binding treaty obligations under the African Children's Charter, which requires the Committee's 'intervention' in order to protect and promote children's rights.[120]

This requirement, as well as article 44 of the African Children's Charter, implies that a communication has to be submitted *against a state party* as duty bearer under the Charter. Under international law – and the African Children's Charter – the state is responsible whether it acts through its executive, legislature or judiciary, or through the central or territorial units within the state.[121] Any organ of the state party, including the judiciary, can therefore be responsible for the violation of Charter rights.[122]

111 Art 56 African Children's Charter.

112 Sec IX(1) Communications Guidelines.

113 See eg reliance by the Committee on the Commission's landmark admissibility decision in *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (in eg *Children of Nubian Descent* para 29; *Senegalese Talibés*, para 20); in respect of the onus on the complainant to lay a basis for an exemption to exhaust local remedies, the Committee has placed repeated reliance on the Commission's decision in *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) (see eg *Sohaib Emad (Inadmissibility)* para 23; *Ahmed Bassiouny (Inadmissibility)* para 31; and *Mauritanian Enslaved Brothers* para 23); see also *Ghanaian Girls Crossing River Offin* paras 18-19.

114 See eg reference to the Court's judgment in *Hamad Mohamed Lymbaka v Tanzania* (in *Sudanese Rape/Adultery* para 39); and to *Zongo v Burkina Faso* in *Sudanese Children in South Kordofan and Blue Nile (Admissibility)* para 49.

115 See eg *Sudanese Children in South Kordofan and Blue Nile (Admissibility)* (n 41) para 34.

116 Sec IX(1)(a) Communications Guidelines.

117 *Senegalese Talibés* (n 34) para 18; *Ahmed Bassiouny (Inadmissibility)* (n 45) para 18; even if it merely invokes the violation of the 'best interests of the child' (*South African Tax (Inadmissibility)*) (n 47) para 9.

118 *Cameroon Hospital* (n 46) para 21.

119 Art 4(g) AU Constitutive Act.

120 *Sudanese Rape/Adultery* (n 31) para 30.

121 *South African Tax* (n 47) para 6.

122 As above.

5.1.2 Communication not based exclusively on media reports[123]

The purpose of this requirement is not to minimise the important role of the media in exposing and reporting on children's rights. It is rather aimed at ensuring that the complaint is rooted in local realities, as reflected in witness statements, reports by local NGOs and national human rights institutions (NHRIs). Especially for (I)NGOs not based in the country against which the violations are alleged, it is important to show an acute awareness of local circumstances and the relevant facts, for example, by highlighting contact with local lawyers, visits to the country, and meetings with victims.[124] A combination of NGOs from the affected country itself and other countries is an obvious way in which to overcome some of this deficit.[125]

5.1.3 Matters before the Committee should not have been settled or being settled by a human rights settlement body[126]

This requirement aims to ensure that the Committee would not hear complaints that have been 'settled' (*res judicata*) by human rights law settlement procedures; *and* complaints that are 'being settled' or 'pending settlement' (*lis pendens*) before such bodies. The objective of this rule is to exclude the possibility of conflicting decisions by the Committee and other international bodies on similar matters, and to prevent duplication and inefficiency by not allowing more than one human rights settlement body to consider the same case at the same time.[127]

The matter is considered 'settled' if it was brought before a procedure or body with a mandate comparable to that of the Committee. The procedure or body must be able to address in substance the rights guaranteed under the African Children's Charter;[128] and it must be able to grant declaratory or compensatory relief to victims, not merely make political resolutions of declarations.[129] To be considered a relevant international body, the body before which the case has been settled or is pending must act independently, impartially and free from political influence.[130] In terms of these criteria, the Committee found the African Commission to be a comparable body, but not the UN Security Council,[131] or special procedures reporting to the UN Human Rights Council.[132] The 'matter' before the Committee and the other body must also be 'similar'. The Committee considers the matters to be similar if the *alleged violations and victims* are the same before the Committee and the 'other procedure'.[133]

The bodies most likely to deal with cases similar to the Committee are the African Commission, the African Court, the Economic Community of West African States (ECOWAS) Court and the CRC Committee. As a treaty of general application, the African Charter – which the African Commission supervises – also extends to children. The fact that the African Commission does not have jurisdiction

123 Sec IX(1)(b) Communications Guidelines.

124 *Mauritanian Enslaved Brothers* (n 23) para 21.

125 See eg *Senegalese Talibés* (n 34), submitted jointly by a Senegalese and a South African-based NGO.

126 Sec IX(1)(c) Communication Guidelines; see also OPCP-CRC art 7(d) (matters that have been or are being examined under another procedure of international investigation or settlement are inadmissible before the Committee). The equivalent provision in the African Charter, art 56(7), is narrower in that it refers only to matters that have been 'settled' and does not extend to matters 'being settled'.

127 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 33.

128 *Sudanese Children in South Kordofan and Blue Nile* para 37.

129 *Tanzanian Girls* (n 24) para 13.

130 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 37.

131 *Sudanese Children in South Kordofan and Blue Nile* para 40.

132 *Tanzanian Girls* (n 24) para 14-16.

133 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 34 ('the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body').

to find violations of the African Children's Charter does not detract from the extensive overlap in principles between the two treaties. In many ways, the African Children's Charter extends the African Charter by spelling out the protections for children of African Charter rights. Although the African Court Protocol does not stipulate the complementary nature of the relationship between itself and the Committee, their overlapping substantive mandate is evident. With a broad human rights mandate and standing, the ECOWAS Court also allows, at least by implication, for concurrent adjudication by the ECOWAS Court and the Committee.[134] The same is true for the CRC Committee, but only in respect of the four states that have become party to OPCP-CRC. A matter pending before or decided by the African Commission, African Court, ECOWAS Court or CRC Committee should therefore be declared inadmissible before the Committee – provided the alleged violations and victims are 'similar'.

The African Court, applying the *res judicata* principle under article 56(7) of the African Charter, held that a matter 'settled' by the Committee was inadmissible before the Court.[135] In determining whether the 'same' matter was before the Committee and the Court, the Court held that, although the Committee in its decision only found violations of the African Children's Charter and not of the African Charter, the overlap in the 'principles' in the two treaties was sufficient to render the issues before the two bodies the 'same'.[136] Although the parties were not identical, the Court held that the parties in public interest litigation on the same issue before different bodies can be considered similar because they 'both aim to protect the interest of the public at large, rather than only specific private interests'.[137]

5.1.4 Exhaustion of local remedies[138]

While, as noted above, the Committee's Communications Guidelines are largely modelled on the African Commission's communications procedure and the African Charter, which provides for admissibility criteria in article 56, there are some differences. In relation to the requirement to exhaust local remedies, the wording of the Guidelines differs from the wording of article 56 of the Charter. While article 56(5) requires the exhaustion of domestic remedies 'if any' 'unless it is obvious that this procedure is unduly prolonged', the Guidelines articulate explicit exemptions that have crystalised through the African Commission's jurisprudence,[139] noting that exceptions to exhaustion of domestic remedies also include 'unavailability' and 'inaccessibility' of remedies.

The African Children's Committee in its jurisprudence often highlights the purpose of this requirement, namely, providing ample notice to respondent states about alleged violations for which they may be responsible, and allowing them an opportunity to remedy the alleged violation within their legal system.[140] This complementarity is based on the principle of subsidiarity, in terms of which the national institutions have the primary responsibility for ensuring that treaty standards are observed, and remedies provided to vindicate these rights. It is only when the domestic approaches to exhaust local remedies fail, by being unavailable, inaccessible or unduly prolonged, that the regional system should become an avenue of 'last resort'.[141]

134 See n 8 above.

135 Application 42 /2020, *Mwambipile & Another v Tanzania,* 1 December 2022 (*Mwambipile*). A dissenting judge held that the matter was not 'settled' because the Committee, as a 'quasi-judicial' body, did not deal definitively with the matter as it cannot give binding decisions (*Mwambipile, Dissent* (Achour) para 19).

136 *Mwambipile* (n 135) para 56.

137 *Mwambipile* (n 135) para 50.

138 Sec IX(1)(d) Communications Guidelines.

139 In particular, *Jawara v The Gambia* (n 113).

140 See eg *Tanzanian Girls* (n 24) para 26; *South African Tax* (n 47) para 11.

141 *Sohaib Emad* (n 45) para 15.

It follows from this rationale that the allegations that the state would face at the supra-national level should be the same that it had an opportunity to remedy at the local level. For example, in *South African Tax (Inadmissibility),* because the complainant before the domestic courts raised issues only pertaining to a punitive cost order related to tax payments, and before the Committee for the first time raised the issue of the best interests of the child, the Committee declared the case inadmissible for failing to exhaust domestic remedies.[142]

Only local remedies of a judicial nature need to be exhausted.[143] Non-judicial remedies, in respect of which there is no requirement of exhaustion, include resorting to a national human rights commission that acts as an advisory mechanism, and a supervisory body monitoring judiciary and justice institutions.[144] The Committee accepted that if there is no judicial remedy ('practical avenue available to these victims to challenge a change of law'), complainants are exempted from exhaustion.[145] This only leaves remedies of a non-judicial (and more overtly political) nature, which are not 'encompassed within the concept of exhaustion of local remedies'.[146] Only 'ordinary' (as opposed to 'extraordinary') judicial remedies need to be exhausted.[147] To qualify as 'effective', domestic remedies have to yield results in practice and not only have a formal or theoretical existence.[148]

Patterns of exemption have emerged from the African Children's Committee's case law: (i) In instances of grave and massive violations of human rights, the vast and varied scope of the violations alleged, the scale and nature of the alleged abuses, and the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient.[149] (ii) In respect of situations of conflict, it would be 'unreasonable to expect local remedies to offer a likelihood of success as it relates to alleged violation resulting from the conflict itself, thus rendering the remedies ineffective'.[150]

Complainants have to lay a basis for exemptions based on deficient local remedies. However, the complainant cannot rely on abstract arguments vilifying the state structures and casting doubt about their effectiveness and availability, without providing 'sufficient proof' of these allegations to make their case that local remedies are not 'effective' and 'available'.[151] In *Cameroonian Child Marriage*, where the ten complainants and their lawyers launched no domestic action whatsoever, the African Children's Committee found the case inadmissible because the complainants simply cast doubt on the availability and effectiveness of domestic remedies, without providing supporting evidence based on their attempts to exhaust at least some domestic remedies.[152] The Committee also indicated that complainants should not assume knowledge of widespread violations within the respondent state on the part of the Committee.[153] The proven existence of one specific case is not proof of general judicial dysfunctionality.[154]

142 Para 12 ('the local courts were not given the opportunity to rule on this substantive issue which is the main allegation').

143 *Sudanese Rape/Adultery* (n 31) para 40.

144 *Sudanese Rape/Adultery* paras 42-45.

145 *Nigerian Child Act* (n 51) para 20.

146 *Nigerian Child Act* (n 51) paras 19-20; *ACM* (n 55) para 29 (Ombudsman not a local remedy in need of exhaustion).

147 *Children of Nubian Descent* (n 32) para 30.

148 *Mauritanian Enslaved Brothers* (n 23) paras 24-26.

149 *Senegalese Talibés* (n 34) para 23.

150 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 46; see also *Northern Ugandan Children* (n 33) para 26.

151 *Sohaib Emad* (n 45) paras 20-24.

152 *Cameroonian Child Marriage* (n 46) para 62.

153 *Sohaib Emad* (n 45) para 21.

154 *Sohaib Emad* paras 21, 23.

The requirement to exhaust local remedies is waived when it is 'obvious' that these remedies are 'unduly prolonged'. By definition, arguments about unduly-delayed local judicial proceedings relate to some attempt(s) at exhausting local remedies, as exemplified by the following two communications. In *Children of Nubian Descent* the complainants instituted proceedings at the Kenyan High Court before approaching the Committee. In the admissibility decision in this matter, the Committee concluded that not having constituted a bench and not having set a date for a substantive hearing on the case more than six years after domestic proceedings were instituted on behalf of the Nubian community, was an obvious instance of 'undue prolongation' by Kenyan judicial authorities.[155] In *Malian Girl Rape* the failure of the relevant authorities for more than two and a half years to provide any information about a relatively straightforward case of a minor having been allegedly raped by an identified alleged perpetrator was found to constitute unduly-delayed local judicial proceedings.[156] The Committee emphasised that reasonableness of domestic delay needs to be considered on a case-by-case basis; there is therefore no fixed time period that would constitute 'undue delay'.[157]

Remarkably, the African Children's Committee in *Children of Nubian Descent* invoked the best interests of the child principle (in article 4 of the Charter) to strengthen and ground its reasoning on admissibility, since the best interests of the child is 'the primary consideration' in all matters concerning the child.[158] This principle therefore exerts its influence not only over the substance of children's rights, but also over procedural matters such as admissibility proceedings. The concept 'unduly prolonged' has a particular meaning when applied to cases involving children since children are entitled to the rights under the African Children Charter only up to the age of 18 years.[159] For them, the effect of delay therefore is amplified. A year in the life of a child is almost six per cent of their childhood, and the determination of undue delay by the Committee should and does take this into account.[160]

5.1.5 Submission to the African Children's Committee within a reasonable time[161]

The rationale of this requirement is to ensure that authors and complainants alleging violations act with 'due diligence' in pursuing their cases, so as to prevent delays in submitting a complaint to an international adjudicatory body after having exhausted local remedies.[162] Although the Guidelines are silent on the length of time within which cases should be submitted to the Committee after exhaustion of local remedies, the yardstick used by the Committee should be the reasonableness of the delay. Given the similarity in the wording of this requirement in the applicable legal frameworks, the Committee should draw on the interpretation of the African Commission and African Court. It should distinguish its interpretation from that adopted by the European and Inter-American systems, where very different and much stricter requirements apply.[163] Factors that may play a role in assessing the reasonableness of the delay include an ongoing situation of armed conflict;[164] the delay in obtaining a copy of the judgment of the local court; and the time it takes to prepare a submission to a supranational body such as the African Children's Committee.[165]

155 *Children of Nubian Descent* (n 32) para 34.

156 *Malian Girl Rape* (n 39) para 32.

157 As above.

158 *Children of Nubian Descent* (n 32) para 42.

159 *Senegalese Talibés* (n 34) para 13.

160 *Children of Nubian Descent* (n 32) para 33.

161 Sec IX(1)(e) Communications Guidelines.

162 *Tanzanian Girls* (n 24) para 22.

163 Under the European system, after the entry into force of Protocol 15 to the European Convention in 2021, the time period is 4 months; and under the American Convention, it is 6 months.

164 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 51.

165 *Sudanese Death Penalty* (n 20) para 25.

There are some inconsistencies in the Committee's approach to the question of whether communications that have been exempted from the exhaustion of local remedies should be submitted within a reasonable time. On the one hand, the Committee took the position that even under these circumstances, communications still need to be submitted within a reasonable time because excessive delays in resolving issues undermines certainty and finality and may make it impossible to find the 'truth'.[166] On the other hand, the Committee concluded that the reasonable time framework does not apply since, under conditions of exemption, violations are likely to be continuous or ongoing.[167] The ongoing nature of the violation makes it very difficult to delineate a reasonable submission period. From this point of view, the application of the reasonable period criterion is, in principle, conditional upon the exhaustion of local remedies. Under these circumstances, the Committee instead uses the test whether the victims and complainants have pursued their cases with due diligence.

5.1.6 Communication must be in professional, polite and respectful language[168]

This requirement has not frequently been raised. On occasion, the Committee drew a distinction between 'factual' allegations or claims, and 'derogatory characterisation' of a government body or official, including the head of state.[169] The former is in order; the latter is to be avoided.

5.2 Finalised cases: Merits decisions and amicable settlements

In each of the communications finalised on their merits, including amicable settlements, the respondent state was found in violation of at least one provision of the African Children's Charter.[170] In total, the Committee found a Charter breach in 55 out of the 67 violations alleged in these communications (82 per cent of alleged violations). The highest number of violations found in a single communication is nine,[171] with one the lowest.[172] Violations have been found in a cross-section of Charter rights, but with a slight leaning towards socio-economic rights.[173]

166 *Sudanese Children in South Kordofan and Blue Nile* (n 41) para 51.

167 *Cameroonian Child Marriage* (n 46) para 56.

168 Sec IX(1)(f) Communications Guidelines.

169 *Sudanese Children in South Kordofan and Blue Nile* (n 41) paras 52, 53.

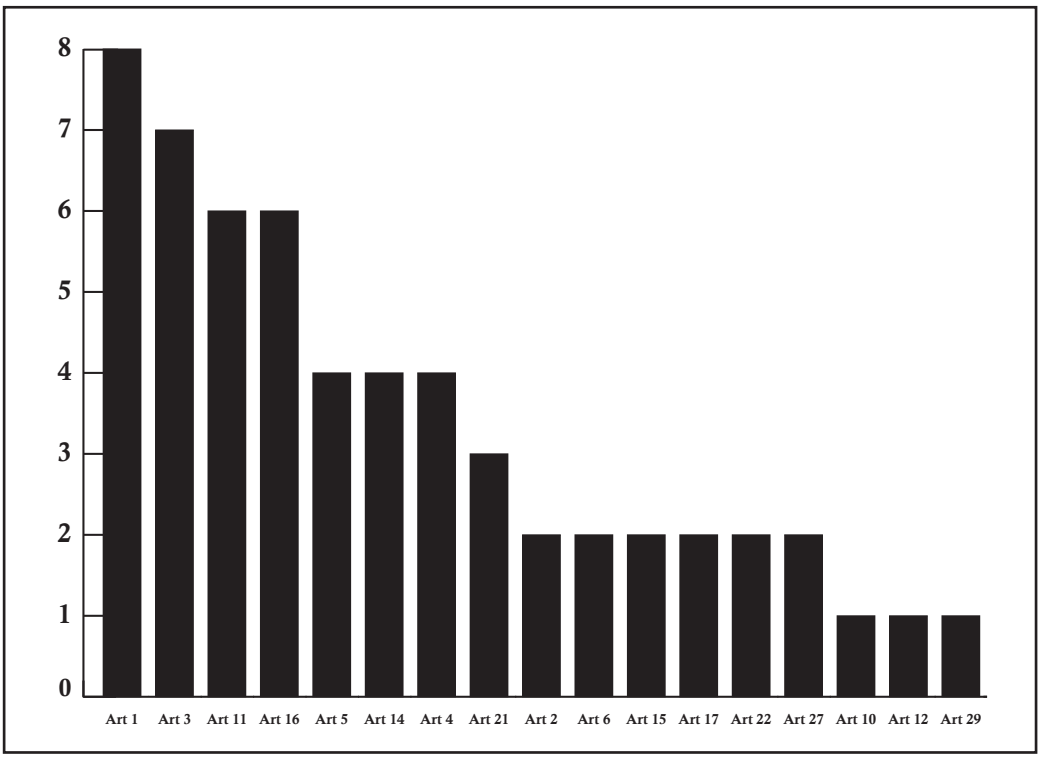
170 These figures include the amicably-settled communications, in which the respondent states Malawi and Sudan acknowledged all alleged violations.

171 *Mauritanian Enslaved Brothers* (n 23).

172 *Malawian Amicable Settlement* (n 40).

173 In this regard, the Committee differs from the African Commission and African Court, which have been inclined, with a few notable exceptions, towards the consideration of 'civil and political rights'.

Table C: Number of communications per right in Children's Charter (12 finalised cases)



Article 1 on the general obligations of state parties accounts for the highest number of violations (eight). The Committee adopted the second highest number of findings of violation on the right not to be discriminated against (article 3, with seven violations).[174] Non-discrimination is both a 'general' interpretive principle of 'cardinal' importance under the African Children's Charter and a substantive right in and of itself.[175] The Committee found violations of article 3 based on the following: differential treatment of children of Nubian descent based on their race and ethnicity;[176] the failure of the government to *protect* by allowing children to be treated as slaves based on their membership of a particular ethnic group (Haratine);[177] failure to investigate the rape of a girl amounting to discrimination based on gender;[178] expulsion from school of pregnant and married girls based on sex, marital status and health status (pregnancy);[179] and the deprivation of South Sudanese children of their Sudanese nationality based on their parents' nationality.[180]

174 *Children of Nubian Descent; Mauritanian Enslaved Brothers; Sudanese Nationality; Cameroonian Child Rape; Tanzanian Girls; Sudanese Amicable Settlement; and Malian Rape.*

175 *Cameroonian Child Rape* (n 37) para 59; *Tanzanian Girls* (n 24) para 52.

176 *Children of Nubian Descent* (n 32) para 56.

177 *Mauritanian Enslaved Brothers* (n 23) paras 59, 61. However, the government was not held in violation of its duty to *respect*, since there was insufficient evidence that the state interfered *directly* with enjoyment of right to non-discrimination (para 65).

178 *Cameroonian Child Rape* (n 37) para 66; see also *Sudanese Death Penalty* (n 20) para 79 (discrimination based on 'sex').

179 *Tanzanian Girls* (n 24) para 55.

180 *Sudanese Nationality* (n 36) para 53.

The right to education (article 11) and to protection against child abuse and torture (article 16) have attracted six violations each.[181] Violations of the 'best interests principle' (article 4), the right to survival and development (article 5), and the right to health and healthcare services (article 14), were recorded in four cases. Next, the right to be protected against harmful social and cultural practices (article 21) was found to have been violated in three cases. Two violations were found in respect of six further rights,[182] and a single violation was found in respect of three rights.[183]

Fourteen of the Charter rights have not at all been litigated in the finalised communications before the Committee.[184] It is surprising that quite a number of rights that relate to issues of burning contemporary concern to African children are included in this group, such as the rights of children with disabilities, refugee children's rights, and the right of children not to be used in drug production and abuse.

The number of violations found by the Committee closely corresponds to the number of violations alleged. In seven of the communications the Committee found exactly the same violations as had been alleged. This equivalence suggests that the Committee places considerable reliance on complainants' pleadings. In only three communications (*Northern Ugandan Children, Sudanese Nationality* and *Mauritanian Enslaved Brothers*) did the Committee *not* find violations in respect of all alleged violations. Of the seven rights violations argued by the complainant in *Northern Ugandan Children*, only two culminated in findings of violations, namely, articles 1 and 22(2). The finding of no violation in respect of five allegations can be explained by the long delay between the submission of the communication and the Committee's eventual decision. The changed circumstances due to the time lapse were brought out by the Committee's on-site investigation, which provided it with an evidentiary and empirical basis for its finding, and the confidence to 'second-guess' the complainant. In *Sudanese Nationality* the Committee did not find a violation of the right to family,[185] and did not address the alleged violation of article 4 (the best interests of the child). There indeed is some divergence in view whether article 4 is a self-standing substantive right on which a finding of violation can be directly based, or whether it is an animating principle of interpretation that should only be read together with other Charter rights, rather than lead to a violation in its own right.[186] In *Mauritanian Enslaved Brothers* the Committee did not find sufficient legal and factual grounds to conclude that the state had violated its obligation under article 29 to take measures to combat the abduction, sale and trafficking of children.[187] This finding seems to be based for the major part on the fact that the situation of the brothers had already been captured as one of the 'worst forms of child labour', and that a finding based on article 29 would amount to a duplication.

In one instance, *Sudanese Rape/Adultery*, the Committee found a violation in the absence of a specific allegation to this effect. While the complainant only contended that the state violated article 16 (the prohibition against child abuse and torture), the Committee extended its finding to article 27

181 *Senegalese Talibés*; *Children of Nubian Descent; Sudanese Nationality; Mauritanian Enslaved Brothers; Cameroon Child Rape; Tanzanian Girls.*

182 Arts 2, 6, 15, 17, 22 & 27.

183 Arts 10, 12 & 29.

184 Arts 7, 8, 9, 13, 18, 19, 20, 23, 24, 25, 26, 28, 30 & 31.

185 Para 103.

186 See, eg, *Tanzanian Girls* (n 24), in which the Committee finds (para 74) that mandatory pregnancy testing, expulsion and denial of re-entry of pregnant and married girls violate art 4; it does, however, indicate as a point of departure that art 4 functions at three levels: not only as substantive right and principle of interpretation, but also as rule of procedure (para 70). This is in line with the CRC Committee's 2013 General Comment 14 on the right of the child to have their best interests taken as a primary consideration (para 6). For domestic judicial practice supporting the view that the best interests principle can be a basis for a substantive rights finding, see the South African Constitutional Court's judgment in *J v National Director of Public Prosecutions and Another* [2014] ZACC 13 (para 44).

187 Para 96.

(sexual exploitation) based on the interrelated and mutually-reinforcing nature of the two rights in the context of sexual abuse.[188] The Committee made this finding without being promoted to do so (acting *ex mero motu*), in line with its primary mandate to protect children's rights, and on the basis that Committee members 'know the law' (following the Latin maxim *iura novit curia*).

In a number of communications complainants invited the Committee to find violations of provisions in AU treaties other than the African Children's Charter, in UN human rights treaties, and even in the Universal Declaration of Human Rights (Universal Declaration).[189] In response, the Committee has been unequivocal: It does not have the mandate to find violations of any instrument aside from the African Children's Charter.[190] In the same breath, the Committee affirmed its reliance on all these 'instruments' as sources from which it draws interpretive guidance. In this respect, the Committee mirrors the practice of the African Commission, based on largely-corresponding textual provisions in the African Charter and African Children's Charter that limit the scope of their subject matter jurisdiction.[191]

5.3 Reparations

Neither the African Children's Charter nor the Communications Guidelines provides a legal basis for or elaborates on the kinds of reparations the Committee can recommend to respondent states found in violation of the Charter. However, where they list information to be contained in decisions, the Guidelines include 'recommendations of the Committee on actions to be taken by the parties to remedy the violations found by the Committee' and mentions that the operative part of the decisions can deal with 'compensation'.[192]

It stands to the considerable credit of the African Children's Committee that it has developed a robust and extensive range of remedial measures on this meagre basis ('to remedy the violations').[193] Its approach appears to have drawn on the practice of the African Commission and African Court. As with findings on the merits, complainants' pleadings and arguments have also left their mark on these recommendations.

Remedial recommendations usually reflect the nature of the violations found. Individualised reparations, aimed at redressing the harm to the individual complainants resulting from the violations found in the case, are only adopted in a few communications – those with identifiable victims. In *Sudanese Nationality* the Committee, for example, draws attention to the need to ensure that a specific victim be granted Sudanese nationality.[194]

Monetary compensation for non-pecuniary damage has been recommended in a small number of cases. The limited number of recommendations for compensation correlate with the small number of communications by clearly-identifiable victims. None of the communications involving larger groups entails the payment of compensation. In the case of the two enslaved Mauritanian brothers (Said Ould Salem and Jarg Ould Salem) the Committee recommended 'adequate compensation' to be paid to each

188 Para 87.

189 See eg *Cameroonian Child Rape* (n 37).

190 *Sudanese Nationality* (n 36) para 90; *APDF and IHRDA on behalf of AS a minor v Mali*, No 13/Com/001/2020, received 13 January 2020, admissibility decision 14 July 2021; finalised on merits Nov/Dec 2022 (*Malian Girl Rape*) (available only in French) para 82.

191 Art 60 African Charter; art 46 African Children's Charter.

192 Sec XIX(1)(ii) Communications Guidelines.

193 See the Committee's 2024 Guidelines on Reparations; and J Sloth-Nielsen 'Remedies for child rights violations in African human rights systems' (2023) 56 *De Jure Law Journal* 625-645.

194 *Sudanese Nationality* (n 36) para 105(A).

of them, commensurate with the 11-year ordeal in slavery or slave-like practices, and the violations they have suffered.[195] While deference was allowed to local authorities to set the exact amount in this matter, in *Cameroonian Child Rape* a fixed amount (CAF 50 million) was granted as non-pecuniary damage for pain, suffering, physical, mental and emotional trauma experienced by a girl raped at the age of 10.[196] The African Children's Committee locates this award, also citing the African Court, as part of a 'positive trend' to award 'determined amounts',[197] and justifies the relatively large amount based on the multiplicity of rapes; the trauma the complainant would experience for the rest of her life; and the additional suffering due to the 'painstaking quest' to obtain a local remedy.[198] In *Sudanese Rape/Adultery*, dealing with the rape of a child (Umjumah Osman Mohamed), the Committee set the amount of compensation at US $100 000.[199] In *Sudanese Nationality*, also dealing with a named 'victim', the Committee rejected the complainant's request for compensation due to a lack of evidence of actual damage.[200]

Based on the collective nature and group-focused perspective of the majority of communications, the remedies recommended to governments are mostly of a more general nature, contain guarantees of non-repetition, and are forward-looking rather than backward-facing. These guarantees relate to a vast array of legislative, administrative and other measures.

It is significant that one of the measures entails constitutional amendment.[201] Traditional views of state sovereignty and an adherence to a constitutional system in which international treaties would have a status below or equal to (but not above) the Constitution, may problematise the acceptance of such remedies.[202] It should be noted, however, that the constitutional change in *Malawian Amicable Settlement* is part of an amicable settlement, considered and agreed to by government. It is likely that the intervention of the regional system made it easier to win over domestic constituencies to support such a far-reaching legal change.

In most cases the primary guarantee of non-repetition is legislative enactment or reform. In *Northern Ugandan Children* the state is called upon to criminalise the recruitment of child soldiers;[203] and in *Sudanese Nationality* the Sudanese government is recommended to revise the 2017 Sudanese Nationality Act.[204] A striking feature of a number of recommendations is that they do not require states to enact new laws, but to ensure the actual and effective implementation of existing legislation. Both *Senegalese Talibés* and *Mauritanian Enslaved Brothers* address the gap between enactment of legislation and its lack of implementation in practice.

Guarantees of non-repetition recommended by the Committee take many other forms,[205] such as the development of national action plans on a particular topic; institutional reform such as the establishment of socialised units to deal with investigation and prosecution of rape or the victims on

195 *Mauritanian Enslaved Brothers* (n 23) para 89(G); see also *Malian Girl Rape* (n 190) para 85(b).

196 *Cameroonian Child Rape* (n 37) para 81 (the complainant requested CFA 50 million).

197 Para 81 (Court's judgment in *Mtikila v Tanzania* para 27).

198 Para 82.

199 Para 100 (around CFA 60 million).

200 *Sudanese Nationality* (n 36) para 104.

201 *Institute for Human Rights and Development in Africa (IHRDA) v Malawi*, No 4/Com/001/2014, finalised 27 October 2017 (*Malawian Amicable Settlement*).

202 Venice Commission Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, CDL-AD (2016)005 para 65.

203 *Northern Ugandan Children* (n 33) para 81(1).

204 *Sudanese Nationality* (n 36) para 105(B) (Committee recommending 'legislation to eliminate all violence, particularly sexual violence against children').

205 *Cameroonian Child Rape* (n 37) para 84; *Mauritanian Enslaved Brothers* (n 23) para 98*; Tanzanian Girls* (n 24) para 90.

universal and accessible birth registration; training programmes on sensitivity towards rape victims for officials such as police officers, prosecutors, judges and other justice officials; extensive sensitisation of teachers, healthcare providers, police and other actors with regard to their treatment of pregnant and married girls; and budgetary allocation for eradicating slavery.

A transitional justice approach to remedies affecting children was taken in *Northern Ugandan Children*. The Committee acknowledged, in general, the suitability of holding some children accountable for crimes committed during the armed conflict. However, it also recommended that a more transitional justice approach aimed at restorative justice should – in the best interests of children – be followed when appropriate.[206] This approach could entail measures such as reintegration and truth-telling.

Measures of satisfaction (such as public apologies and the construction of memorial sites) have not featured much in the Committee's reparations jurisprudence.[207] There is very little indication of complainants requesting this form of reparation.

In *Senegalese Talibés,*[208] *Mauritanian Enslaved Brothers*[209] and *Cameroonian Child Rape,*[210] the African Children's Committee issued accountability measures, recommending that states ensure that perpetrators are brought to justice, including through investigation, prosecution, and imposing and enforcing appropriate punishment.

While the African Children's Committee mostly issued an impressively long list of remedial recommendations, some of them granular in their attention to detail and specific in what they require,[211] others are framed in an overbroad way that does not indicate to the state with sufficient clarity what it should do.[212] For example, in *Senegalese Talibés* the Committee recommended that the state 'fully recognise and implement the rights included in the African Children's Charter and in other international instruments'.[213] In general, however, the Committee has granted extensive and far-reaching remedies, including some that 'hinge on resource mobilisation and the progressive implementation of socio-economic rights' and that require 'considerable human, technical and financial capacity'.[214]

5.4 Implementation

When it comes to implementation, a threshold question is whether the 'decisions' of the African Children's Committee on communications are binding on states to the dispute. The answers to this question, offered in relation to the African Commission, also apply to the Committee.[215] The most likely answer is that these findings are not binding but persuasive, and should be complied with in

206 *Northern Ugandan Children* (n 33) para 81(5).

207 While these types of remedies are common in the Inter-American human rights system, the African Commission, similar to the Committee, has stayed away from this type of remedy, indicating that a finding of a violation of the right serves a similar purpose.

208 Para 82(g) (all perpetrators must be brought to justice, held accountable and punished for their actions).

209 Para 98(a) (the state must ensure that the members of the family responsible for the enslavement be prosecuted and punished).

210 Para 84(a) (the state must 'immediately ensure that the perpetrator of rape' is prosecuted and an effective remedy is provided to the victim of the rape).

211 See eg *Tanzanian Girls* (n 24) para 109, 'review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 GN 295 of 2002 and in doing so remove wedlock as a ground of expulsion …').

212 See eg *Senegalese Talibés* (n 34) para 82(k) ('fully recognise and implement the rights included in the African Children's Charter and in other international instruments').

213 *Senegalese Talibés* (n 34) para 82(k).

214 Sloth-Nielsen (n 32) 264.

215 See eg RH Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015).

good faith. Since 2022, the Executive Council in its decision on the Committee's annual report has consistently called on state parties to 'comply with their obligations under the Charter by responding to the Committee's requests and implementing the Committee's decisions'.[216] Even if full state compliance is rare, no state has ever expressly disputed that it is obliged to implement Committee decisions.

The implementation process starts with the state's implementation report. Within six months of receiving a merits decision against it, a state must report to the African Children's Committee on the measures it has taken to implement the Committee's remedial recommendations.[217] The Committee does not provide a time period within which implementation, as such, should be effected. In line with the principle of subsidiarity, it leaves the implementation time frame in the state's discretion. The state's implementation report is shared with the complainant for their comments on its content. Failure to submit a report, even after a further grace period of three months, triggers the obligation on the African Children's Committee to 'refer' the matter to the AU Assembly for its 'appropriate intervention'.[218] However, this appears not to have happened in practice.

The Committee engages in follow-up to monitor state implementation through a Committee member appointed as 'rapporteur' for a specific communication. The rapporteur, who has a wide mandate to take 'appropriate' action to encourage implementation,[219] is supposed to report at each of the African Children's Committee's sessions.

When it considers that the state's implementation report 'lacks clarity or is unsatisfactory',[220] the Committee may hold an implementation hearing. The hearing takes the form of a constructive dialogue, involving the state, the complainant and the Committee. Hearings aim to ascertain the extent of implementation, identify factors that hinder implementation, and guide the state towards full implementation.[221] They generally take place during the Committee's open sessions.[222]

If non-compliance is established, the Committee 'shall draw the attention' of the Permanent Representatives Committee and the Executive Council to this fact.[223] From a perusal of publicly-accessible documents, it is not clear to what extent the Committee has reported instances of non-compliance to AU policy organs.[224] Mostly, the Committee raises concerns about non-implementation of decisions in a generic manner, without identifying any specific communication or state.[225] On the few occasions when the Executive Council expressed itself on the issue of implementation of specific Committee decisions, it did so in line with the recommendations in the Committee's annual report.[226]

216 See eg EX.CL/Dec.1248(XLIV) para 7.

217 Sec XXII(1) Communications Guidelines.

218 Sec XXII(1)(5) Communications Guidelines.

219 Sec XXII(5)(iii) Communications Guidelines.

220 Sec XXII(2)(i) Communications Guidelines.

221 Sec XXII(2)(iii) Communications Guidelines.

222 Sec XXII(3)(viii) Communications Guidelines.

223 Sec XXII(5)(v) Communications Guidelines.

224 According to BD Mezmur & MB Kahbila 'Follow-up as a "choice-less choice": Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *African Human Rights Yearbook* 219, when it presented its report at the 27th ordinary session of the AU Executive Council, it made reference to the *Senegalese Talibés* decision.

225 See eg African Children's Committee Report to the Executive Council 2021, para 28: 'To reiterate the importance of the Communications procedure of the ACERWC established pursuant to Article 44 of the African Children's Charter, and call on the concerned Member States to comply with their obligations under the Charter by responding to the Committee's requests and implementing the Committee's decisions'; repeated verbatim, Committee Report to the Executive Council 2022, para 46.

226 See eg Committee Report to Executive Council 2015 para 5; and Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child, Executive Council, 7-12 June 2015, Johannesburg, EX.CL/

Under its Rules of Procedure, the Committee is competent to transmit recommendations arising from its decisions on communications to the Pan-African Parliament for follow-up.[227]

In recent times, the Committee has dramatically upgraded its attention to implementation. In 2020 it established a Working Group on Implementation of Decisions,[228] initially composed of four Committee members, but in 2024 expanded to include 'external experts'.[229] In 2022 it adopted its first resolution on this topic;[230] and in 2023 it held its first continental workshop on implementation of its decisions and recommendations.[231]

It is difficult to give a definitive pronouncement on the status of state compliance with the Committee's recommendations, as there is no centralised publicly-accessible source containing this information. There is very little publicly-accessible information on the extent of implementation and follow-up measures. Contrary to the expectations created by the Guidelines, the issue of implementation has not consistently featured on the agenda of the Committee's public sessions. The Committee's website and session reports also do not contain a data base of information indicating whether the required reports have been received and, if so, what information has been provided. Keen observers are left to construct a picture from pieces of information scattered throughout the Committee's session and annual reports, states' periodic reports and other relevant sources.[232]

Based on available sources, an overview is provided below of the extent of implementation with provisional measures, letters of appeal, amicable settlement and merits decisions issued by the Committee.

Provisional measures: The provisional measure in *Sudanese Death Penalty*, issued on 18 September 2018, required the state to refrain from executing three persons who were sentenced to death for crimes committed when they were younger than 18 years old. States are given a shorter period than in other cases (15 days) within which to report.[233] By the time the admissibility finding was taken (November 2021), the Committee indicated that the Sudanese government had not submitted any report on implementation of the provisional measures request.[234] However, Sudan in 2022 declared that it would stay execution until the Committee reached its decision on the merits.[235]

Letters of urgent appeal: Available information indicate that the Committee has not received any response from the states to which urgent appeals were sent.[236]

Dec.889(XXVII) para 7(ii).

227 Rules of Procedure Rule 81(6).

228 Resolution on the Establishment of a Working Group on Implementation of Decisions and Recommendations, adopted at the Committee's 35th ordinary session, 31 August-8 September 2020.

229 Communiqué on the 43rd ordinary session, 15-25 April 2024 para 16(d).

230 Resolution 16/2022 by the Working Group on Implementation of Decisions and Recommendations, adopted at the Committee's 39th ordinary session, 21 March-1 April 2022.

231 Final Report: Workshop on Implementation of ACERWC Decisions and Recommendations, 23-24 February 2023, Nairobi, Kenya.

232 See also 'Agenda 2040: Assessment of the first phase of implementation 2016-2020', which consolidated available information (pages 5-8); and Sloth-Nielson (n 191) 630-640.

233 Sec VII(4) Communications Guidelines.

234 *Sudanese Death Penalty* (n 20) para 17; See Committee Resolution 16/2022, Preamble ('the Committee received no response from states to which it issued urgent letter of appeals or provisional measures').

235 *Sudanese Death Penalty* (n 20) para 3 (referring to statement during Committee's 40th ordinary session).

236 Committee Resolution 16/2022, Preamble.

Amicable settlements: Amicable settlement agreements need to be monitored just like all other finalised communications. Although the implementation of amicable settlements is not specifically mentioned in the Guidelines, it follows that the Guidelines apply equally, with the necessary adjustments, to amicable settlements.[237] As indicated below, implementation hearings, as contemplated in the Guidelines, have also been held in respect of amicably settled communications.

- Under the *Malawi Amicable Settlement*, not only the Constitution but all other relevant laws had to be aligned with the Children's Charter. Section 23(5) of the Malawian Constitution, which at the time had defined 'children' as 'persons under 16 years of age', was in 2017 amended to raise the age in the definition of a 'child' to 18 years, and to abolish the exceptions for those under 18 to marry.[238] Even if prodded by the Executive Council,[239] it took Malawi considerably longer to harmonise these 'other laws' with this new constitutional standard. The Ministry of Justice identified a further eight pieces of legislation that needed to be aligned with the constitutional amendment.[240] The Committee devoted part of its 2022 mission to Malawi on children with albinism to take follow-up action on this settlement.[241] A collaborative and dialogic process of periodic reporting on progress, stipulated under the settlement and largely adhered to by the state,[242] sustained and pushed forward the lengthy implementation process. The terms of the settlement were eventually fully adhered to in 2023, with the adoption of the Statute Law (Miscellaneous Amendments) Act and the Penal Code (Amendment) Act 2023. In the view of a previous Committee Chairperson, the amicable settlement has lent 'significant positive pressure, and urgency, to convince parliamentarians, and complete the amendment process within a reasonable period of time'.[243]

- The prospects of implementing the other amicable settlement, reached by the Committee in 2018 in respect of the children of the South Khordofan and Blue Nile regions of Sudan, initially looked promising, but were diminished due to the military takeover in 2021, and the flare-up of conflict between the Sudanese Armed Forces and the Rapid Support Forces on 13 April 2023. The communication, submitted in 2018, relates to events that took place as far back as June 2011, when armed conflict – affecting children in particular – erupted in the South Kordofan and Blue Nile regions of Sudan. Under the amicable settlement agreement, the parties agreed to an on-site investigation, as a way of allowing the Committee to assess the situation of children in the two areas 'on the ground', and identify any other affected communities that might exist beyond those explicitly mentioned in the communication.[244] The Committee conducted this on-site investigation

237 RD Nanima 'Amicable settlements: A comment on Guideline 13(2)(v) of the Revised Guidelines for Consideration of Communications and Monitoring Implementation of Decisions by the African Committee of Experts on the Rights and Welfare of the Child' (2023) 48 *South African Yearbook of International Law* 1.

238 M Yadessa 'Malawi amends its Constitution to comply with article 2 of the Charter' (April 2017) 1 *ACERWC Tribune* 11.

239 Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child, Executive Council, 29 June 2018, Nouakchott, EX.CL/Dec.1017(XXXIII) para 4.

240 See also Report of the African Committee on the Fact-Finding Mission on the Situation of Children with Albinism in the Republic of Malawi and Status of Implementation of ACERWC's Decision on Communication 4/Com/001/2014, 29-31 August 2022, para 43 (Report of Fact-Finding Mission to Malawi).

241 Report of Fact-Finding Mission to Malawi (n 240) paras 43-44.

242 By 2021, the Committee reminded Malawi to submit its final of three-monthly progress reports (Committee's 2021 Activity Report para 21).

243 Mezmur (n 50) 146.

244 Committee's 2021 Activity Report para 9.

from 23 to 31 May 2021.[245] In the context of the resurgent instability and violence, the obligation to report every six months has understandably not been adhered to.

Merits decisions: Decisions on the merits have seen some, but in most cases not yet full implementation.

- *Beyond implementation?* The first communication to the Committee was submitted as far back as in 2005, and decided in 2011.[246] The case relates to the use of child soldiers in a situation of insurrection and instability that prevailed in Northern Uganda for some 20 years between 1986 and 2006. It may be argued that circumstances have changed and that implementation so long after the decision should be abandoned.[247] However, the guarantees for non-repetition made at that time are as pertinent now as ever.

- *Children of Nubian Descent: On the winding road to full implementation:* In 2017 the Committee held implementation hearings on *Children of Nubian Descent* with government representatives and the complainants present.[248] During these hearings Kenya provided information about measures taken and noted the challenges they experienced. Although the government reported on the measures taken in implementing the decision, most of these measures dealt with birth registration and ancillary issues in a general way, without mentioning children of Nubian descent specifically. In a closed session, the Committee discussed with the delegation the 'way forward on further implementation' of the decision.[249] The AU Executive Council expressed appreciation for the progress in implementation, and encouraged Kenya to work towards its 'full implementation'.[250] In its first periodic report submitted in 2018, Kenya restated the *legal position* that the 2010 Constitution and Kenya Citizenship and Immigration Act 12 of 2011 accords birth registration and citizenship to children of Nubian descent born in Kenya 'if they meet the required measures set out'.[251] However, the report does not indicate the actual application of these legal provisions in respect of children of Nubian descent born in Kenya. In its Concluding Observations on Kenya's first periodic report, in 2020, the Committee urged the state to 'urgently … comply with the decision of the Committee'.[252] In its subsequent report, Kenya again provided information largely of a generic nature.[253] In its subsequent Concluding Observations, the Committee makes no reference to issues directly related to *Children of Nubian Descent*.[254]

- *Comprehensive but partial implementation: Senegalese Talibés* is a rare example in which the government not only fully participated in the proceedings, but also did not contest the core factual allegations levelled against it. At its meeting in June 2015, the Executive Council called on Senegal to 'implement the recommendations of the Committee regarding the issue of children known as "Talibés" and continue in their efforts to address that issue'.[255] Immediately prior thereto, when the

245 Committee's 2021 Activity Report item 4.1.

246 See Sloth-Nielsen (n 32) 264 (noting that the issue became 'dangerously close to being moot').

247 BD Mezmur 'Taking measures without taking measurements? An insider's reflections on monitoring the implementation of the African Children's Charter in a changing context of armed conflict' (2019) 101 *International Review of the Red Cross* 623.

248 Committee's 29th ordinary session, April/May 2017, Maseru, Lesotho.

249 Committee's 2017 Activity Report para 43.

250 Committee's 2017 Activity Report para 70.

251 Kenya's 2nd and 3rd state party periodic report 2012-2017 on the African Charter on the Rights and Welfare of the Child presented to the African Union November 2018 23.

252 Concluding Recommendations by the African Children's Committee on the Kenya 1st periodic report on the status of implementation of the African Children's Charter para 12.

253 Kenya's 2nd and 3rd periodic report (2012-2017) para 3.1 23.

254 Concluding Observations on the second periodic report of Kenya, 2020 para 31.

255 Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child, Executive Council, 7-12 June 2015, Johannesburg, EX.CL/Dec.889(XXVII) para 7(ii).

Permanent Representatives Committee (PRC) considered the Committee's report, Senegal insisted that the report should reflect that 'a vast programme with sufficient funding has been put in place in Senegal in order to eradicate this phenomenon through the modernisation of Qur'anic schools'.[256] To address the complexities of implementing *Senegalese Talibés* with the government, the Committee undertook an on-site visit to Senegal in 2015.[257] In 2017 the Committee held implementation hearings, with government representatives and the complainants present.[258] Senegal's detailed report spoke to the Committee's specific recommendations. For example, it reported that a budget of one hundred million CFA was allocated for the implementation of the recommendations; 74 Daraas were constructed; a curriculum was drafted for Daraas that includes learning of Quran, Arabic and French subjects; norms, standards and time schedules for Daraas were set up; and access to medical coverage for Talibé children had been strengthened.[259] These measures resulted in 1 147 children being removed from the streets and 2 344 Talibé children being enrolled in health units.[260] The Executive Council in 2017 expressed its appreciation to Senegal for the 'progress achieved in implementing' and encouraged it to 'work towards the full implementation' of the recommendations.[261] When it considered Senegal's first periodic report in 2019, the Committee concluded that the recommendations in *Senegalese Talibés* had not been fully implemented.[262] Although it acknowledges that progress has been made, the Committee urged Senegal to finally adopt a long-pending law establishing legal status and regulations for Daaras or Koranic schools.[263] It also called on the government to engage in much more extensive sensitisation, and to ensure the effective prosecution of religious leaders, the provision of social services to the Talibés and the permanent removal of begging children from the streets.[264]

- *Partial and ongoing implementation:* In *Mauritanian Enslaved Brothers* extensive exchanges concerning implementation have taken place between the African Children's Committee and the government. After examining the state's initial report in 2019, in which the state provided replies, the Committee largely restated its recommendations.[265] During an implementation hearing, also in 2019, Mauritania indicated that the perpetrators had been punished, that identity cards had been provided to the victims, and that the guardians of the victims had been compensated.[266] Prodded by the Committee, the government delegation provided further information, including that an assessment showed that the brothers did not need any psychosocial support.

256 PRC/Rpt (XXX) para 131(iii).

257 Mezmur & Kahbila (n 224) 216.

258 Committee's 29th ordinary session in April/May 2017 in Maseru, Lesotho; Centre for Human Rights, 'Centre for Human Rights takes part in African Children's Rights Committee hearing on implementation', www.chr.up.ac.za/childrens-right-news/505-centre-for-human-rights-takes-part-in-african-children-s-rights-committee-hearing-on-implementation (accessed 1 October 2024).

259 Committee's 2017 Activity Report para 45.

260 Committee's 2017 Activity Report para 46.

261 Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child, Executive Council, 27 June-1 July 2017, Addis Ababa, Ethiopia, EX.CL/Dec.977(XXXI) para 6(i).

262 Concluding Observations by the African Children's Committee on Senegal's periodic report, 2019 para 4(d).

263 Para 42.

264 Paras 41-43.

265 Concluding Observations on the initial report of Mauritania, paras 49, 59.

266 Committee's 34th ordinary session report paras 110-114.

- *Incomplete and ongoing implementation:* After holding a hearing on the implementation of *Cameroonian Child Rape,*[267] the Committee concluded that despite some implementation measures being undertaken, its recommendations remain largely unimplemented. The state indicated that one-tenth of the amount of compensation had been paid, and that the alleged perpetrator had been convicted and sentenced to 12 years, but that the matter had been set aside on appeal and sent back for a retrial.[268] However, it conceded that no law on sexual violence had been adopted. The complainant, who was represented at the hearing, contested most of the state's averments.[269] The Committee directed the state to provide a timeline and roadmap for the payment of the compensation and the enactment of legislation to eradicate sexual violence, in particular. It also requested the state to provide evidence of the case before the Court of Appeal; and to report every two years.[270] There is no indication of any subsequent report having been submitted.

- Limited information is available on the ongoing implementation of *Sudanese Nationality* and *Tanzanian Girls*.[271]

6 Conclusion

After a slow start, the African Children's Committee's mandate under article 44 has since 2011, when the first communication was decided, become a modest but meaningful regional safety net to complement the protection of children's rights on the national level in Africa. The 12 finalised communications stand as milestones on the regional human rights landscape, establishing an undeniable historical record of notable human rights violations; providing relief to individual children, drawing attention to the need for and spearheading the transformation of legal and social practices in concrete contexts, and enhancing accountability. The Committee has viewed and interpreted its mandate expansively. It has embraced a broad approach to standing, and made comprehensive remedial recommendations aimed more at legal and societal transformation through general measures guaranteeing non-repetition than at providing redress to individual victims.

The Committee pays close attention to the implementation of communications. Its ability to use its good offices to broker two amicable settlements reveals an inclination towards a dialogic and flexible approach to its protective mandate. Its innovative use of implementation hearings and follow-up visits to state parties has been effective in keeping states engaged in implementation, and resulted in an encouraging rate of compliance. Establishing the Working Group on Implementation of Decisions is an important step towards according implementation a more continuous and prominent place on the Committee's agenda. However, the future impact of this nascent institution is contingent upon it being made fully functional, and meticulously observing its mandate.

The Committee has made a pointed contribution to the evolving construction of a consistent and integrated regional African human rights jurisprudence. It shares with the African Commission and African Court a mandatory textual basis to draw inspiration from international human rights law, including, in its case, the African Charter.[272] In their interpretive practices, the three bodies have made copious reference to one another's case law.[273] As the Committee and Court embarked on interpretation, they were well served by the longest-standing of the three, the African Commission. Jurisprudential

267 Report of Committee's 37th session, March 2021.

268 Para 95.

269 Para 96.

270 Para 97.

271 In 2023 the Executive Council called on Tanzania to 'fully implement' the Committee's recommendations in *Tanzanian Girls* (EX.CL/Dec.1248(XLIV) para 6.

272 Arts 60 & 61 African Charter; art 46 African Children's Charter.

273 See part 5.1 of this chapter.

cross-fertilisation has been particularly pronounced in findings on admissibility, which is an issue that all three of them address routinely on a substantively similar legal basis. The interpretive guidance extends to the scope and meaning of substantive rights, which are also largely similar.[274] Although it is a sub-regional court, the rich case law of the ECOWAS Court also has to be viewed as firmly part of this evolving jurisprudence.[275]

Nevertheless, 24 cases submitted against only one-third (16) of the state parties, and 12 finalised cases over the 25-year lifespan of the Charter is a manifest under-use of this procedure. Crucial Charter rights issues, including the rights of children with disabilities and refugee children's rights, have not yet been litigated. Much of the explanation – and solution – of this regrettable state of affairs lies in reversing the Committee's general lack of visibility. The Committee should do better in response to grave and urgent situations. The two tools to address these situations, namely, provisional measures and urgent appeals, are the least visible parts of its mandate and are very infrequently invoked. The protective mandate should be integrated more fully into other aspects of the Committee's mandate. While irregular state reporting to some extent explains why the state reporting procedure has not become a more productive means to coax states into compliance, the Committee should more consistently and rigorously assess implementation as part of state reporting.

The Committee's protective mandate is poised to attain greater significance, and to become a truly 'impactful tool' to realise its full potential.[276] The Committee should however be vigilant to ensure that pending cases are dealt with expeditiously. While it (still) has the luxury of a small case load, it should strengthen and fine-tune its procedures and clear the small backlog of cases.

The position of children on the continent remains precarious. The Committee's protective mandate holds as yet unexplored potential for addressing these aspects on the basis of the African Children's Charter, especially in areas of burning contemporary concern, such as climate change.[277] Litigation on this issue, based on the best interests of the child,[278] may become the pivot around which the largely unhidden potential of this procedure may be unleashed.

The regional protection under article 44 is not an end in itself. Ideally, if effective recourse is available at the national level, the need for supranational recourse to the African Children's Committee would not be needed.[279] Under the principle of subsidiarity, the state has the primary responsibility to ensure that rights under the Children's Charter are realised at the national level. Treaty provisions should be domesticated and given effect through the domestic legal system, allowing for optimal child participation in the process. At the same time, in order to domesticate any possible adverse decisions in

274 See also the development of joint soft law standards by the Commission and Committee (Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage).

275 See eg the strong interpretive reliance placed by the Committee in *Tanzanian Girls* (n 24) para 42 on the ECOWAS Court decision in *WAVES* (n 8).

276 A slight adjustment of the claim Mezmur made in 2000 that the art 44 mandate 'remains one of the most impactful tools the African Committee has in discharging its mandate' (Mezmur (n 17)).

277 E Boshoff & SG Damtew 'The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child' (2022) 22 *African Human Rights Law Journal* 328; BD Mezmur 'The calm before the storm? Child rights climate change litigation in Africa' (2023) 56 *De Jure Law Journal* 543; however, see Y Suedi & M Fall 'Climate change litigation before the African human rights system: Prospects and pitfalls' (2024) 16 *Journal of Human Rights Practice* 146 (omitting any discussion of the African Children's Charter).

278 AO Jegede 'Framing climate litigation in individual communications of the African human rights system: Claw-backs and substantive divergences' (2024) 16 *Journal of Human Rights Practice* 120.

279 See EX.CL/Dec.1111(XXXVIII) para 4 (states are encouraged to 'assess the implementation of the Charter at country level; undertake legislative audits to harmonise national laws and policies with the provisions of the African Children's Charter and ensure the existence of functional institutions for protection of children's rights').

communications, state parties to the African Children's Charter should establish an effective domestic legal and institutional framework for the implementation the Committee's recommendations.