

## Chapter 38

### Article 46

### Sources of inspiration

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The Committee shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration of Human

Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

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## 1 Introduction

Article 46 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) is neither a right nor an obligation. It is largely optional and should be considered as a last resort, especially in instances where there is no locally-appropriate interpretation approach to a legal provision. Indeed, the origin of the requirement for courts, quasi-judicial bodies and other modes of interpretation of the provisions of international, regional and domestic law, to draw inspiration from other jurisdictions or decisions, is obscure. For instance, as discussed below, the Universal Declaration of Human Rights (Universal Declaration), celebrated as one of the major inspirations of international human rights law, contains no provision that requires borrowing or drawing inspiration from other jurisdictions and/or decisions to interpret human rights provisions.<sup>1</sup>

Nevertheless, as discussed further below, article 46 has made an appearance in several decisions of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). It seems to enjoy a strong relationship with all the provisions in the African Children's

1 Universal Declaration of Human Rights, 1948.

Charter and, over the years, has enabled the African Children's Committee on several occasions, on varied children's rights issues, to make favourable recommendations.<sup>2</sup>

This chapter sets out to investigate the rationale of article 46, its links with other African Children's Charter rights, to establish whether, and to the extent to which, it also appears in the text of other regional instruments, and its contextual meaning and significance in legal decisions. The chapter also spotlights and provides an in-depth analysis on the varied jurisdictions that the African Children's Committee has mostly relied upon, to draw inspiration to attain its decisions, its General Comments, Concluding Observations and other working documents.

## 2 Links to other Charter rights

Article 46, akin to most provisions in the African Children's Charter, is not a stand-alone provision. Its inclusion in the Children's Charter is intended to provide the African Children's Committee with alternative approaches to interpretation, and for the Committee to seek inspiration from other treaties, decisions, accepted guidance and jurisdictions, in order to clarify the contextual and up-to-date meaning of complex children's rights issues. Essentially, it offers a platform for the application of other interpretation approaches to rights, to ensure that a child's right is satisfactorily promoted and protected under the African Children's Charter. In a sense, article 46 does not have a direct relationship with any provision in the Charter. Rather, it enjoys an indirect relationship with all provisions of the Charter. This is the case because it is a tool of interpretation applicable only when the Committee fails to find an internal solution or interpretation to a children's rights issue.

Perhaps the indisputable link that article 46 enjoys with other Charter rights is in its relationship with the Guiding Principles on children's rights interpretation. As elucidated in previous chapters in this *Commentary*, these include non-discrimination (article 3); the best interests of the child (article 4(1)); respect for the views of the child (article 4(2)); and survival and development (article 5). For instance, given the complex nature of the best interests principle, discussed in chapter 5 of this *Commentary*, article 46 permits the borrowing of best practices from other jurisdictions to ensure a favourable interpretation of the best interests principle, as protected in the African Children's Charter. Indeed, the African Children's Committee, in its decision in *Children of Nubian Descent*, drew inspiration from decisions by the African Commission on Human and Peoples' Rights (African Commission) and the UN Human Rights Commission, to establish that it was not in the best interests of the Nubian children to be stateless in Kenya.<sup>3</sup>

Besides the general principles, article 46 also enjoys a symbiotic relationship with article 7 (freedom of expression) and article 8 (freedom of association and peaceful assembly). There is a paucity of African-based knowledge and literature on the extent to which these rights are necessary for children. One of the contributors to this lack of clarity is that classic African traditions and cultures do not, explicitly and impliedly, allow a child to freely express an opinion or to associate with others without, for example, parental knowledge.<sup>4</sup> Therefore, should it arise, either through a communication or the

<sup>2</sup> See, eg, *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 12, where the African Children's Committee drew inspiration from the African Commission to decide on the admissibility of the communication.

<sup>3</sup> See *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*) para 42.

<sup>4</sup> GK Nukunya *Tradition and change in Ghana: An introduction to sociology* (2003); A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415-443. See also RK Ame 'Traditional religion, social structure, and children's rights in Ghana: The making of a *trokosi* child' in DJ Johnson and others (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* (2013) 240-252.

development of a General Comment, the African Children's Committee could rely on the spirit and intent of article 46 to adduce progressive exemplars from other jurisdictions to provide a children's rights-based interpretation to articles 7 and 8 as it did, for example, in most parts of its Guidelines on Child Participation.<sup>5</sup>

Further, article 46 links to article 11 which protects the right to education. The phrase 'inclusive education' is not used in article 11. However inclusive education, according to the United Nations Children's Fund (UNICEF), is 'the most effective way to give all children a fair chance to go to school, learn and develop the skills they need to thrive'.<sup>6</sup> The African Children's Committee, thanks to the latitude established through article 46, agrees with this definition and has considered it in its forthcoming General Comment on the right to education. Akin to the right to education, article 46 also enjoys a similar relation with other social, economic and cultural rights in the African Children's Charter.

### 3 Links to other human rights treaties

As indicated earlier, a similar provision to article 46 does not feature in either the Universal Declaration or in the Vienna Convention on the Law of Treaties (VCLT). The VCLT is recognised in international law as the treaty that first pronounced on, among others, varied approaches to interpret international law provisions, under articles 31, 32 and 33. None of these provisions explicitly embodies that spirit and intent of article 46. However, article 32, impliedly, does link to article 46, to the extent that it requires a supplementary means of interpretation, when a provision 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.<sup>7</sup> The inclusion of the phrase 'supplementary means of interpretation' is an open invitation to seek alternative means of interpretation in instances where existing knowledge and understanding of the scope of a provision is not sufficient to, for example, interpret a provision in the best interests of a child. Therefore, it is not surprising that the Convention on the Rights of the Child (CRC) Committee, albeit not having a similar provision as article 46 in CRC, over the years, as discussed below, has drawn inspiration from other sources to reach its decisions. Besides this implicit link to article 32 of the VCLT, there are hardly any other links between article 46 to other United Nations (UN) human rights treaties, nor to other regional instruments (with the exception of the African Charter). This is the case even with CRC, which enjoys a considerable similarity with the African Children's Charter.

Globally, the only human rights treaty with a similar provision that has a direct link to article 46 is the African Charter on Human and Peoples' Rights (African Charter). The relevant provision (article 60) states:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

5 African Children's Committee's Guidelines on Child Participation, [https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Guidelines%20on%20Child%20Participation\\_English.pdf](https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Guidelines%20on%20Child%20Participation_English.pdf) (accessed 13 November 2024).

6 For more on this, see <https://www.unicef.org/education/inclusive-education> (accessed 14 November 2024).

7 Art 32 of the VCLT provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

Just like the African Children's Committee, the African Commission draws inspiration generally from international human rights law, and specifically from identified instruments such as the Charter of the United Nations, the Charter of the Organisation of African Unity (now the Constitutive Act of the African Union) and the Universal Declaration.

The African Charter extends this requirement to two Protocols (the Maputo Protocol and the African Court Protocol)<sup>8</sup> which are addendums to the Charter to the extent that, under article 7 of the African Court Protocol, for example, the African Court is required to draw inspiration from the provisions of the African Charter and any other relevant human rights instruments ratified by states involved in a matter before the Court. Further, this indirect link is also applicable to matters relating to the Maputo Protocol, since the Court, as per article 27 of the Maputo Protocol, is seized with matters of interpretation arising from the application or implementation of the Maputo Protocol.<sup>9</sup>

## 4 Legal interpretation

It is highly possible that although the African Children's Charter drew much of its design, structural and contextual inspiration from CRC, article 46 was inspired by the African Charter. The only difference between the scope of article 60 of the African Charter and article 46 is the inclusion of 'African values and traditions', under article 46, as a source from which to draw inspiration. Even though article 61 of the African Charter also mandates the African Commission to draw inspiration from African practices and customs, the context is different, compared to article 40, in that article 61 only requires the Commission to draw inspiration only from African practices and customs that are acceptable by law and international norms. Whereas, Article 46 has no restrictions and the African Children's Committee is allowed to draw in inspiration from any African values and traditions that would enhance the best interest of the child.<sup>10</sup> Basically, article 46, therefore, calls on the African Children's Committee to draw inspiration from two sources, namely, human rights treaties and African values and traditions.

### 4.1 Inspiration from human rights treaties

Article 46 is crafted to be applied as a last resort, especially in situations where the African Children's Committee lacks sufficient understanding and knowledge of a specific right or approach to a procedure under the African Children's Charter. Article 46 is an open-ended provision with a life of its own. Even though it spotlights key human rights instruments from which the African Children's Committee should draw inspiration, it is worth noting that the inclusion of phrases such as 'particularly from' and 'other instruments adopted by the UN and the AU' is an open invitation for the Committee to cast its net as wide as possible in search for the best approach to interpret a right.

### 4.2 Inspiration from African values and traditions

It is common knowledge that the need to infuse African values and traditions in the African Children's Charter is one of the reasons why the Charter was generated and adopted alongside CRC.<sup>11</sup> Several

8 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004 (African Court Protocol).

9 For more on how this link was established, see A Rudman 'Preamble' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 24-25.

10 Our emphasis.

11 T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009); D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal for Children's Rights* 127-136. See also ch 1 in this *Commentary*.

elements of African values and traditions appear in almost all the substantive rights protected in the Children's Charter. For example, under article 11(2)(c) (education), the Charter anticipates an education system that would ensure 'the preservation and strengthening of positive African morals, traditional values and cultures'. Also, under article 1 (state obligations), also discussed in chapter 2 of this *Commentary*, the Charter provides that '[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged'.

## 5 Jurisprudence of the African Children's Committee

This section looks at how the African Children's Committee has applied article 46 in selected communications. This is guided by, but not limited to, (i) the direct or indirect application of article 46 in the use of persuasive jurisprudence; (ii) whether there was a reference to either of the two sources of inspiration under article 46, discussed above. These communications are discussed according to the year in which they were finalised.

### 5.1 *Children of Nubian Descent*

The applicants alleged that, historically, the Nubians were forcibly conscripted into the colonial British army and upon demobilisation, they were never returned from the countries in which they settled back to Sudan.<sup>12</sup> Consequently, the Nubian population lacked any ancestral land in Kenya, and the failure to recognise their claim to land caused a denial of citizenship.<sup>13</sup> Since the parents of the children of Nubian descent did not have valid documentation, the children as a consequence did not have citizenship, which affected their ability to obtain benefits that accrue therefrom.<sup>14</sup> The applicants further averred that since these children had no legitimate expectation from the state to be awarded citizenship, they would most probably be stateless.<sup>15</sup>

The African Children's Committee relied on the content of the Human Rights Committee's General Comment 17, 'Article 24: Rights of the child',<sup>16</sup> the 1954 UN Convention relating to the Status of Stateless Persons,<sup>17</sup> to establish the definition of a stateless [child],<sup>18</sup> and went further to add:<sup>19</sup>

At the global level, a range of instruments recognise the right to acquire a nationality, albeit with varying formulations. Here, it is worth mentioning that, as Doek rightly explains, international human rights law has shifted from the position that 'the child shall be entitled from his birth ... to a nationality', to one mandating that the child 'shall acquire a nationality' (article 7(1) of CRC, article 24(3) of ICCPR). The same wording and position is transparent under article 6 of the African Children's Charter. The reason for such a shift is because it is felt that 'a state could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless the circumstances'.

The situation of *Children of Nubian Descent* was different and required a different approach at which the African Children's Committee satisfactory arrived, in the best interests of the children of Nubian

12 *Children of Nubian Descent* (n 3) para 2.

13 *Children of Nubian Descent* (n 3) para 3.

14 *Children of Nubian Descent* (n 3) para 5.

15 *Children of Nubian Descent* (n 3) para 56.

16 General Comment 17: Rights of the child (art 24) 07/04/89. CCPR General Comment 17, <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2017.pdf> (accessed 18 November 2024).

17 Para 8.

18 See 1954-Convention-relating-to-the-Status-of-Stateless-Persons\_ENG.pdf (accessed 18 November 2024).

19 *Children of Nubian Descent* (n 3) para 47.



descent, thanks to the inspiration it drew from other sources. Among others, in its recommendation to the government of Kenya, the African Children's Committee called on the government of Kenya, to

take all necessary legislative, administrative and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth;

take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.<sup>20</sup>

## 5.2 *Northern Ugandan Children*

In this communication the African Children's Committee grappled with Uganda's delay to enact laws to domesticate article 22 of the African Children's Charter to protect children from involvement in armed conflict, the violation of the right to education under article 11, and the right to life, survival and development in article 5. Other alleged violations included the right to enjoy the best attainable state of physical, mental and spiritual health in article 14, and the right to be protected from sexual abuse and violence in articles 16 and 27.

To arrive at its decision, the African Children's Committee makes a direct reference to article 46 and specifically relies on the first source of inspiration (human rights treaties), as it made reference to other jurisprudence such as the African Charter; CRC and the Optional Protocol to CRC on the Involvement of Children in Armed Conflict (OPAC 2000); the four Geneva Conventions (1949); and the 1977 Additional Protocols to the Geneva Conventions.<sup>21</sup> Other international instruments from which the Committee drew its inspiration in this communication include International Labour Organisation (ILO) Convention 182 on the Worst Forms of Child Labour (1999) and the Statute of the International Criminal Court (ICC) (1998).<sup>22</sup>

The use of all these instruments is informed by the fact that most African states have ratified them. However, in *Northern Ugandan Children* the African Children's Committee went further than the prescribed sources from which it could draw inspiration, to refer to the then draft Statute of the ICC and the Report of the Preparatory Committee on the Establishment of an International Criminal Court.<sup>23</sup> Credit must be given to the Committee for being this creative and innovative in its application of article 46. There is no indication or latitude under article 46 for the Committee to draw inspiration from draft treaties. However, in this case the Committee deemed it fit and necessary to protect the best interests of the child in Uganda first, and the best solution it could find was in the draft Statute of the ICC and the Report of the Preparatory Committee on the Establishment of an International Criminal Court.<sup>24</sup> It is thanks to this inspiration that the Committee was able to call on Uganda to establish

administrative procedures and practices in relation to all armed forces and units of defence, including private security operations, which ensure that, in instances where there is no credible proof of age, or in the case of conflicting or inconclusive evidence of age, the person alleged to be or alleging to be a child shall not be

20 *Children of Nubian Descent* (n 3) paras 69(1) & (2).

21 *Hansungule & Others (on behalf of Children in Northern Uganda) v Uganda*, No 1/Com/001/2005, decided April 2013 (*Northern Ugandan Children*) para 39.

22 *Northern Ugandan Children* (n 20) paras 39 & 41.

23 *Northern Ugandan Children* (n 20) para 42.

24 The Court is now fully operational; for more on the Court, <https://www.icc-cpi.int/> (accessed 22 November 2024).

recruited or used in any situations of hostilities, tension or strife until conclusive proof of age is provided to confirm that the person is aged over 18 years.<sup>25</sup>

### 5.3 *Senegalese Talibés*

In this communication the applicants alleged that over 100 000 children (the Talibé children) were sent by their parents to go to Qu'ranic schools, also known as *daraas*, in urban centres in order to receive religious education.<sup>26</sup> When in the *daraas*, these children were forced by their teachers to beg on the streets.<sup>27</sup> The children were required to bring a daily quota to the *daraas* or suffer punishments in default.<sup>28</sup> The complainants alleged violations of article 4(1) (the best interests principle); article 5 (the right to life, survival and development); article 11 (the right to education); and article 12 (leisure, recreation and cultural activities).<sup>29</sup> Other provisions allegedly violated include article 15 (child labour); article 16 (prohibition of child abuse and torture); and article 21 (prohibition of sale, trafficking and abduction, and protection against harmful practices).<sup>30</sup>

In its reasoning of what could be the best solution and set of recommendations to Senegal to remedy the plight of the Talibé children, the African Children's Committee relied on article 46. In this communication the Committee found some solution internally, particularly in the experience it had obtained in its interaction with *Children of Nubian Descent* and other sources as required under article 46. In particular, the Committee relied on General Comment 14 (best interests of the child) of the CRC Committee, as it stated in paragraph 35 of *Senegalese Talibés*:<sup>31</sup>

In guaranteeing the best interest of the child, a state party has the obligation to ensure the consideration of the best interest of the child in all actions taken by 'any person' or authority affecting the life of the child. In this context, 'any person' is broadly interpreted and entails that the principle of the best interest of the child must be applied in all actions concerning children, regardless whether those actions are undertaken by private or public entities. The Committee also notes that 'action' includes omissions and commissions that are manifested in decisions, proposals, services, procedures and other measures.

Given the central focus of the communication (child labour, article 15 of the African Children's Charter), the African Children's Committee also relied on the jurisprudence of the ILO, to the extent that it conceptualises child labour, and particularly labour that is hazardous to children's well-being.<sup>32</sup> It is important to note that before this communication, the African Children's Committee had not sufficiently interacted with the context of article 15 of the African Children's Charter. Thus, to find a meaningful solution and to make a satisfactory recommendation to Senegal, it was necessary to search for best approaches elsewhere as required under article 46.

Besides considering the jurisprudence of the CRC Committee and the ILO, the African Children's Committee also considered the jurisprudence of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee. The African Children's Committee called on Senegal to

25 *Northern Ugandan Children* (n 20) para 81(4).

26 *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*).

27 *Senegalese Talibés* (n 25) paras 3-4.

28 *Senegalese Talibés* (n 25) para 9.

29 *Senegalese Talibés* (n 25) para 11.

30 As above.

31 See also CRC Committee General Comment 14 (2013) on the right of the child to have their best interests taken as a primary consideration para 4.

32 *Senegalese Talibés* (n 25) para 61.

ensure that all Talibé children are immediately taken back from the streets to their families;  
 intergrade the *daaras* into formal education systems;  
 establish functioning and effective institutions and mechanisms to provide Talibé children with short and long-term appropriate psychological, medical and social assistance in order to promote their full recovery.

#### 5.4 *Mauritanian Enslaved Brothers*

In this communication it was alleged by the applicants that two minors, Said Ould Salem and his brother, born in a Haratine sect of Mauritania's slave class, automatically became slaves to the El Hassine family.<sup>33</sup> They had to look after the family's animals and worked all week without pay, time off, or time to play.<sup>34</sup> The minors were subjected to corporal punishment, received no proper meals and never attended school.<sup>35</sup> The adjudication at the domestic courts was unsatisfactory because, after the conviction and sentence, the slave 'owner' was released on bail pending appeal. At the time of lodging the communication in 2017, it was noted that since the filing of the appeal in 2015, no steps had been taken by the courts.<sup>36</sup> Among the various alleged violations, the applicants alleged a violation of article 1 (state obligations); article 3 (non-discrimination); article 4(1) (best interests of the child); article 5 (survival and development); article 11 (education); article 12 (the right to play); article 15 (child labour); and article 16 (protection against child abuse and torture).<sup>37</sup>

The respondent state claimed the existence of a legislative framework that protected children against abuse and all forms of exploitation and provided for special protection measures against holding persons as slaves and trafficking of persons.<sup>38</sup> It added that it was in the process of developing a plan of action against child labour in partnership with the ILO to combat the exploitation of children.<sup>39</sup> Furthermore, the respondent state averred that steps had been taken to prosecute the perpetrators and take measures to place the child victims in schools and grant them civil status.<sup>40</sup>

Despite these claims by the state, the African Children's Committee was not convinced that adequate attention and seriousness had been given to the plight to these children. As a result, the Committee had to issue stronger recommendations to the state to ensure that the rights of these children were protected. There perhaps was no need for the Committee to apply article 46 in this communication, given the fact that at the time it received the communication, the Committee already had a growing jurisprudence on the scope and implication of child labour, the right to education and protection of children against abuse and exploitation which it established in *Northern Ugandan Children*, *Senegalese Talibés* and *Children of Nubian Descent*. However, because the context was slightly different, the African Children's Committee relied on the jurisprudence of the African Commission, the Inter-American Commission of Human Rights and the CRC Committee's General Comment 14 on the best interests of the child, to call on Mauritania, among others, to<sup>41</sup>

ensure that all members of the EL Hassin family are prosecuted for the enslavement of Said and Yarg and that they receive sentences commensurate to the crimes committed pursuant to the laws in Mauritania;

33 *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 5.

34 *Mauritanian Enslaved Brothers* (n 32) para 6.

35 *Mauritanian Enslaved Brothers* (n 32) para 7.

36 *Mauritanian Enslaved Brothers* (n 32) paras 8-11.

37 *Mauritanian Enslaved Brothers* (n 32) para 12.

38 *Mauritanian Enslaved Brothers* (n 32) para 36.

39 *Mauritanian Enslaved Brothers* (n 32) para 37.

40 *Mauritanian Enslaved Brothers* (n 32) para 38.

41 *Mauritanian Enslaved Brothers* (n 32) para 98.



provide psychological support to Said and Yarg in order to properly rehabilitate them from the physical and mental abuse they suffered and reintegrate them in the society and minimise to the maximum extent possible the negative psychological impact of their enslavement for 11 years;  
 take special measures to take out children from slavery and slavery-like practices and ensure that all children in such situations receive psychological, educational, as well as all forms of support needed to ascertain that they enjoy their rights and as enshrined in the Charter.

### 5.5 *Cameroonian Child Rape*

In this communication a 10 year-old child (TFA) was raped four times, on 9, 12, 15 and 16 April 2012, in Bamenda, north-west region of Cameroon, by an affluent person in her community.<sup>42</sup> While the matter was reported to the police, the latter delayed the investigations and, subsequently, the court dismissed it. The child's mother appeared on a local radio talk show and expressed dissatisfaction at the way in which the matter was handled.<sup>43</sup> In a surprising turn of events, the state authorities preferred charges of judicial defamation against her. This matter was lodged with the African Children's Committee on account of the failure by the state to investigate the crime of rape committed against TFA. The complainants alleged that Cameroon had violated its state party obligations (article 1); the definition of a child (article 2); the right to life, survival and development (article 5); freedom of expression (article 7); and protection against child abuse and torture (article 16). The alleged violations also included provisions in other treaties. These include articles 4 and 37 of CRC; articles 1, 2, 5, 7 and 18(3) of the African Charter; articles 2(1), 3, 4(1), 4(2), 5, 8 and 25 of the Maputo Protocol; articles 2, 3 and 5(a) of CEDAW; articles 2, 12 and 13 of CAT and others.<sup>44</sup>

As was the case in, for example, *Northern Ugandan Children*, the African Children's Committee was creative in its application of article 46, to the extent that it referred to a regional instrument with no jurisdiction in Africa. In particular, the Committee relied on the decision of the European Court of Human Rights in *PM v Bulgaria*, where the European Court held that 'investigations into alleged cases of sexual abuse should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible', and further that 'states have a positive obligation ... to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.<sup>45</sup> The Committee relied on the jurisprudence of the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe*<sup>46</sup> to establish the principle of due diligence, as it stated that 'an act by a private individual and therefore not directly imputable to a state can generate responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violence or for not taking the necessary steps to provide the victims with reparation'.<sup>47</sup> The African Children's Committee also relied on another decision of the African Commission, where the Commission in *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*<sup>48</sup> held that

the negligence of a state to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to this state,

42 *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*) para 6.

43 *Cameroonian Child Rape* (n 41) para 14.

44 *Cameroonian Child Rape* (n 41) para 18.

45 *Cameroonian Child Rape* (n 41) para 50.

46 (2006) AHRLR 128 (ACHPR 2006).

47 *Cameroonian Child Rape* (n 41) para 43.

48 (2008) AHRLR 75 (ACHPR 2008).

even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals.<sup>49</sup>

Further, the African Children's Committee also relied extensively on jurisprudence of the CEDAW Committee to establish the link between rape and gender-based violence. In so doing, the Children's Committee agreed with the CEDAW Committee, that 'states are responsible for private actors if they fail to protect women from violence caused by private actors or if they fail to investigate and prosecute perpetrators', and further that 'the state party's authorities have failed in their duty to adopt appropriate legislative and other measures, including sanctions, prohibiting violence against women as a form of discrimination against women'.<sup>50</sup>

These exemplars of sources and others, such as the Inter-American Commission of Human Rights,<sup>51</sup> from which the African Children's Committee drew inspiration in the communication, enabled to Committee to, among others, call on Cameroon to

immediately ensure that the perpetrator of rape against TFA is prosecuted and punished for violating TFA's right to be free from inhuman and degrading treatment and ensure effective remedy for TFA;  
pay a sum of 50 million CFA to TFA as a compensation for the non-pecuniary damage she suffered as a result of the above-mentioned violations;  
enact and implement a legislation eliminating all forms of violence, including sexual violence against children.

## 6 Conclusion

In a nutshell, it appears that the inclusion of article 46 in the African Children's Charter is a positive move. No study has yet been conducted to ascertain the extent to which its inclusion makes the jurisprudence of the African Children's Committee richer than that of other treaty bodies. However, even though there is no actual requirement in CRC to draw inspiration from anywhere, the CRC Committee does draw inspiration from other UN and regional treaty-monitoring bodies and organs. For example, the CRC Committee drew inspiration from other sources, including the African human rights system in *MEV, SEV and BIV v Finland*.<sup>52</sup> Was there a need for this provision in the African Children's Charter? Arguably, yes, as it situates the African Children's Committee within the broad church of bodies developing international law and, in addition, allows the Committee to ensure the continued relevance of the African Children's Charter, 34 years after its adoption and 25 years since it came into force.

49 *Cameroonian Child Rape* (n 41) para 43.

50 *Cameroonian Child Rape* (n 41) para 63.

51 *Cameroonian Child Rape* (n 41) para 54.

52 See, eg, views adopted by the CRC Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication 172/2022 (*MEV, SEV and BIV v Finland*) paras 9.13 & 9.24.