

## Chapter 6

### Article 5

### Survival and development

*Yehualashet Mekonen and Retta Getachew*

1. Every child has an inherent right to life. This right shall be protected by law.
2. State parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

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## 1 Introduction

The Preamble to the African Charter on the Rights and Welfare of the Child (African Children's Charter) stipulates that the child occupies a unique and privileged position in African society. Children are highly desired and their life and survival are much valued and celebrated, not only within the close family and community, but also the wider lineage and society.<sup>1</sup> They are collectively regarded as the 'young trees' that perpetuate the 'forest' that signifies the family and society.<sup>2</sup> It is in light of this that children, beyond their individual agency, are seen in the African context as tantamount to the 'survival' of the family and their existence and full development paramount for society as a whole.<sup>3</sup>

Article 5 of African Children's Charter on survival and development, as reflected in the text of the article above, encompasses three specific sub-articles, dealing with the inherent right to life of the child that must be protected by law; the obligation of state parties to ensure, to the maximum extent possible, the survival, protection and development of the child; and prohibition of death sentence for crimes committed by children. Given the breadth of the implications of article 5, the right to survival and development is considered one of the four cardinal principles of children's rights under the African Children's Charter (the other three are the right to non-discrimination; the best interests of the child;

- 1 M Makiwane & C Kaunda 'Families and inclusive societies in Africa' (2018) paper presented at the Observance of the International Day of Families at the UN in New York, 15-16 May 2018. B Siegel 'African family and kinship' in AA Gordon & DL Gordon (eds) *Understanding contemporary Africa* (1996) 1.
- 2 African Child Policy Forum (ACPF) 'The African report on child well-being: How child-friendly are African governments?' (2008) 1.
- 3 UN Human Rights Committee (HRC) General Comment 36 on article 6 (Right to life), 3 September 2019, CCPR/C/GC/36 para 2.

and the right to be heard).<sup>4</sup> Article 5 thus has a bearing on the interpretation and implementation of almost all the rights provided for in the African Children's Charter.

The African Union (AU) Agenda for Children 2040 elucidates that Africa's children shall be empowered through the full implementation of the African Children's Charter. One of the ten aspirations (Aspiration 4) relates to article 5 and states that every child survives and has a healthy childhood.<sup>5</sup> It underscores the need for children to enjoy their inherent right to life and survive under conditions that enable them to develop to their full potential.<sup>6</sup> Enabling children to achieve their full developmental potential, beyond an obligation to fulfil basic rights, is a critical requisite for sustainable development of the continent under the AU Agenda 2063.<sup>7</sup>

This chapter discusses article 5 of the African Children's Charter on survival and development in greater detail. It begins with an overview of the state of child survival and development in Africa and the various legal, policy and programmatic measures that state parties have taken to fulfil these fundamental rights. Subsequent parts elaborate legal interpretations, linkages with the other provisions of the African Children's Charter as well as other regional and international human rights instruments. It also discusses the death sentence for crimes committed by children. The chapter concludes with highlights of key issues and measures that need to be taken to ensure the effective implementation of article 5.

## 2 The state of child survival and development in Africa

Considerable progress has been made in ensuring child survival in Africa since the African Children's Charter came into force in November 1999. The median child mortality rate<sup>8</sup> in the southern, eastern, western and central regions of Africa, for example, has dropped from 156 to 73 child deaths per one thousand live births.<sup>9</sup> The significant reduction in infant and child mortality in Africa is a success story to build upon and further improve the situation.<sup>10</sup> However, compared to countries in other regions of the world, child mortality remains unacceptably high in most countries of Africa. Currently, one in 14 children in Africa die before reaching their fifth birthday. This rate is almost 15 times higher than the risk for children born in high-income countries.<sup>11</sup> Furthermore, the recent United Nations Children's Fund (UNICEF)'s league table of countries based on burden of death among children under age 5, largely due to preventable causes, reveals that most African countries are at the bottom of the ranking.<sup>12</sup> Figure 1 illustrates the trend in child mortality rates in Africa since the entry into force of African Children's Charter. There is a visible decline in child mortality over the last two decades caused mainly due to an improvement in preventive services such as vaccination, treatment of key causes of

4 African Children's Committee 'Mapping children on the move within Africa' (2018) 16. P Eriamiatoe 'An overview of the country studies' in R Miamingi (ed) *State party reporting and the realisation of children's rights in Africa* (2020) 36.

5 African Children's Committee 'Africa's Agenda for Children 2040: Fostering an Africa fit for children' (2016) 7, <https://www.who.int/publications/i/item/97892400020986> (accessed 16 February 2024).

6 African Children's Committee General Comment 5 on State party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) 40.

7 African Union Commission 'Agenda 2063: The Africa we want' (2015).

8 Child mortality rate (often referred to as the under-five mortality rate) refers to the probability that a new-born would die before reaching exactly 5 years of age, expressed per 1 000 live births.

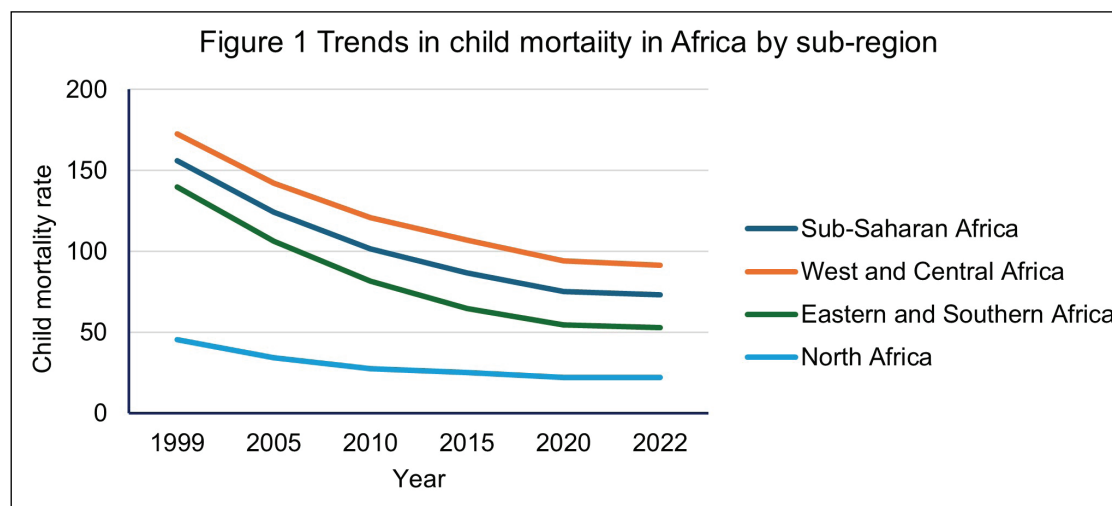
9 UNICEF West and Central Africa Regional Office 'Levels and trends of child mortality in West and Central Africa' (2023) 4, [https://www.unicef.org/wca/media/9501/file/hild%20Mortality%20in%20WCAR\\_Technical%20brief\\_finale\\_20230929.pdf](https://www.unicef.org/wca/media/9501/file/hild%20Mortality%20in%20WCAR_Technical%20brief_finale_20230929.pdf) (accessed 27 February 2024).

10 G Demombynes & R Reinikka 'Africa's success story: Infant mortality down' World Bank Blogs, 7 May 2012, <https://blogs.worldbank.org/en/africacan/africas-success-story-infant-mortality> (accessed 10 April 2024).

11 UNICEF (n 9) 4.

12 UNICEF 'The state of the world's children 2023. For every child, vaccination' (2023) 6, <https://www.unicef.org/media/108161/file/SOWC-2023-full-report-English.pdf> (accessed 7 March 2024).

childhood illness and death, and efforts to reduce risk factors, including malnutrition.<sup>13</sup> However, the current levels show the long way ahead in ensuring children's inherent right to life.



Source: United Nations Inter-Agency Group for Child Mortality Estimation (UNIGME) (2023)<sup>14</sup>

While certain deaths of children are unavoidable, most child deaths in the African context are a result of preventable causes, and state parties to African Children's Charter bear responsibility for these avoidable deaths.<sup>15</sup> Avoidable causes of child death include acute respiratory infections, diarrhoea and malaria. Among older children and adolescents under 18 years of age, injuries (unintentional and intentional) are the most common causes of death.<sup>16</sup>

Child death is also recorded from the death penalty effected across Africa despite provisions and efforts to abolish this. The incidence of death penalty among children has shown an increment in recent years from 298 in 2022 to 494 in 2023.<sup>17</sup> Given the possibilities for wrong convictions and the irreversibility of executions, the death penalty constitutes a gross human rights violation. State parties to African Children's Charter are obliged to ensure the survival and development of children to the maximum extent possible, including through the prohibition of the use of the death penalty against children. The high rates of avoidable child deaths show the gaps in meeting their obligations under the Charter.

Children in many African countries also suffer severe hunger and malnutrition, which significantly increase their risk for death and result in irreversible damage to their physical, emotional and cognitive

13 United Nations Inter-Agency Group for Child Mortality Estimation (UNIGME) 'Levels and trends in child mortality: Report 2023' (2024), <https://childmortality.org/wp-content/uploads/2024/03/UNIGME-2023-Child-Mortality-Report.pdf> (accessed 20 August 2024).

14 United Nations Inter-Agency Group for Child Mortality Estimation (UNIGME) 'Levels and trends in child mortality: Report 2022' (2023), <https://childmortality.org/wp-content/uploads/2023/01/UN-IGME-Child-Mortality-Report-2022.pdf> (accessed 27 February 2024).

15 M Nowak *A commentary on the United Nations Convention on the Rights of the Child, article 6: The right to life, survival and development* (2005) 1.

16 UNIGME (n 14) 9.

17 Amnesty International 'Death sentences and executions' (2023), <https://www.amnesty.org/en/documents/act50/7952/2024/en/> (accessed 19 August 2024).

development.<sup>18</sup> Hunger and malnutrition among children are violations of children's basic rights to adequate nutrition as provided for in article 14(2)(c) of African Children's Charter, which jeopardises their ability to survive, thrive and reach their full potential.<sup>19</sup> Yet, 30 per cent of children currently suffer from stunting, an indicator for long-term nutritional deprivation and impaired growth and development.<sup>20</sup> Between 2000 and 2022, the actual number of stunted children in Africa increased from 54,5 million to 63,1 million, showing the huge magnitude of deprivation in this regard.<sup>21</sup>

Children in Africa also live in extreme and multidimensional poverty, which limits their access to quality education and affects their physical, cognitive, social and emotional development. More than 53 per cent of African children live in multidimensional poverty and experience deprivation in essential aspects of life.<sup>22</sup> Most of these children do not receive the health care, nutritious food, education or a standard of living that would optimise their opportunities for development and enable them to achieve their full potential.<sup>23</sup> Besides, children's developmental status<sup>24</sup> tracked in 23 African countries, using data from recent UNICEF's Multiple Indicator Cluster Surveys (MICS), show that the percentage of children of 24 to 59 months who are developmentally on track ranged from as low as 36 percent to 73 percent.<sup>25</sup> The significant disparities among African states is a clear indication of the severity of challenges in certain countries but also of the possibilities to make strides in addressing deprivations and improving early childhood development outcomes.

Harmful practices related to accusations of witchcraft and ritual attacks also occur to a varying degree across the continent, infringing children's inherent rights to life, survival and development. These practices take place in secrecy and, hence, exact numbers of children affected are hardly known. Available estimates, however, indicate that hundreds of thousands of children face accusations each year in Africa.<sup>26</sup> These practices are extremely harmful and violate the rights of children to life, dignity, development, equality, and non-discrimination, and others. There have been reports of infanticide because of such harmful practices in Benin,<sup>27</sup> Ghana<sup>28</sup> and Ethiopia.<sup>29</sup> In 2019, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in its Concluding Observations and recommendations for the Republic of Benin recognised the physical attacks and killings of children for ritual purposes, including their accusations of being witches, and underlined

18 UNICEF 'UNICEF data: Child malnutrition' May 2023, <https://data.unicef.org/topic/nutrition/malnutrition/> (accessed 1 April 2024).

19 ACPF 'No end in sight: Child hunger in Africa' (2023).

20 UNICEF, WHO & World Bank Group 'Levels and trends in child malnutrition: Key findings of the 2023 edition' (2023) 73.

21 UNICEF, WHO & World Bank Group (n 20).

22 ACPF 'The African report on child well-being 2023: Justice not charity: African governments must end child poverty' (2023) 9.

23 E Sutherland 'The child's right to life, survival and development: Evolution and progress' (2015) 26 *Stellenbosch Law Review* 279.

24 This was measured using the Early Childhood Development Index (ECDI) composed of 10 indicators across physical, learning/cognition, social-emotional, and literacy-numeracy developmental domains. Children are classified as developmentally on track if they pass all but one item in each domain.

25 UNESCO 'Education starts early: Progress, challenges and opportunities – Regional report for sub-Saharan Africa' (2023) 25.

26 ACPF 'Uncovering our hidden shame: Addressing witchcraft accusations and ritual attacks in Africa' (2022).

27 Government of Benin combined (initial and periodic) report of Benin on the implementation of the African Charter on the Rights and Welfare of the Child' (2016).

28 M Bayat 'The stories of "snake children": Killing and abuse of children with development disabilities in West Africa' (2015) 59 *Journal of Intellectual Disability Research* 1-10.

29 S Eppe 'Combatting infanticide in Bashada and Hamar: The complexities behind a "harmful traditional practice" in Southern Ethiopia' in S Eppe *Legal pluralism in Ethiopia* (2020) 339.

the need to strive towards the prevention, investigation into and redress of such attacks against children through continuous sensitisation, investigation with due diligence, and prosecution of perpetrators.<sup>30</sup>

Children in Africa are also caught up in violent armed conflicts which, among other things, significantly increases the risk of death among children. According to the United Nations (UN) Secretary-General's 2023 report on children in armed conflict, the number of children killed increased over the last year. The incidences were particularly higher in countries such as Burkina Faso, the Democratic Republic of the Congo (DRC), Central African Republic, Ethiopia, Mali, Nigeria, Sudan and South Sudan.<sup>31</sup> Armed conflicts and insurgencies are increasingly becoming causes for the violation of children's rights to life. The African Children's Committee, for example, expressed its concern over children's loss of life caused by armed conflict in the northern part of Nigeria. It noted that children are coerced to play support and combat roles, including the carrying out of suicide bombings.<sup>32</sup>

Despite the devastating impact of armed conflict on children, families and the wider society, the political commitment to resolve the problem is lacking. As a result, children are killed and maimed in conflict situations with limited accountability for serious violations. Studies show that trauma exposure in such circumstances or experiencing violent crime, rape, or physical assault leading to grievous bodily harm, increases the risk of depressive symptoms and suicide.<sup>33</sup> Girls, in particular, experience the worst forms of sexual abuse in conflict areas, which potentially could lead to the termination of life through suicide and other physical, psychological and emotional complications resulting from severe abuse.<sup>34</sup> Access to confidential sexual and reproductive healthcare services, including the termination of any pregnancy caused by rape or incest, may be regarded as an essential right in ensuring girl victims' survival and development.<sup>35</sup>

A number of regional policies and initiatives have been impactful in promoting child survival and development in Africa. Further discussion on these initiatives can be seen in the chapter dealing with article 14 on health and healthcare services.

There are also key policy instruments that seek to ensure the survival and healthy development of children. For example, Africa's Health Strategy 2016-2030, which envisions an Africa free from its heavy burden of disease, disability and premature death, is an important policy instrument.<sup>36</sup> It is targeted at ending preventable maternal, newborn and child deaths by 2030 through strengthening the health system, increasing investments in health and addressing inequality of access.<sup>37</sup> As far back as 2001, African Union (AU) member states adopted the Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, in which they committed themselves to increase their health budget to at least 15 per cent of the state's annual budget.<sup>38</sup> Very few states have reached that target, and the majority spend less than half of the Abuja target.<sup>39</sup> Such low levels of

30 Concluding Observations and recommendations on the initial report of Benin (2019).

31 United Nations 'Children and armed conflict: Report of the secretary-general' (2023) UN Doc A/77/895-S/2023/363.

32 African Children's Committee 'Concluding Observations on the periodic report of Nigeria' (2019) para 16.

33 MT Machisa and others 'Suicidal thoughts, depression, post-traumatic stress, and harmful alcohol use associated with intimate partner violence and rape exposures among female students in South Africa' (2022) 19 *International Journal of Environmental Research and Public Health* 7913.

34 AZ Fan and others 'Applying structural equation modeling to measure violence exposure and its impact on mental health: Malawi violence against children and young women survey' (2021) *Journal of Interpersonal Violence* 1699-1717.

35 African Children's Committee General Comment on art 22 on children in situations of conflict (2020) para 41.

36 African Union 'Africa health strategy 2016-2030' (2015) 16.

37 African Union Commission (n 7) 16-17.

38 OAU 'Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases' (2001) Document OAU/SPS/ABUJA/3 para 26.

39 ACPF (n 22) 49.



investment has made it difficult to achieve the objectives of the health strategy and, hence, has limited children's enjoyment of their rights to survival and development.

### 3 Links to other Charter articles

The right to survival and development, as one of the four core principles enshrined in the Charter, has implications for most other provisions under the African Children's Charter. Among those directly related are the rights to health (article 14); education (article 11); protection from child labour, abuse, torture, harmful practices and other forms of exploitation including sexual abuse (articles 15, 16, 21 and 27, discussed in this *Commentary*). In view of the ongoing armed conflicts in many parts of Africa, which continue to disproportionately affect children, article 22 on armed conflicts has implications for the rights to survival and development of children. Article 4 on best interests of the child is also related to the rights to survival and development in view of the obligation on state parties to ensure that it is the primary consideration in all actions concerning the child, whether undertaken by an individual or authority. Many of the actions could have implications for the enjoyment of the rights stipulated in article 5.

Article 14 of African Children's Charter on health and healthcare services entitles every child to the right to enjoy the best attainable state of physical, mental and spiritual health. Article 14 not only guarantees enjoyment of the right to the best attainable standard of health, but also spells out specific obligations, for example, that the state must ensure the reduction of infant mortality rates. It outlines a range of measures needed to be taken to ensure the full implementation of this particular right. Some of these include the provision of necessary medical assistance, adequate nutrition and safe drinking water. It also includes support to parents, care givers and communities in the use of basic knowledge of child health and nutrition, including on breastfeeding, hygiene and environmental sanitation.<sup>40</sup> The non-realisation of a child's right to enjoyment of the best attainable state of physical, mental and spiritual health, therefore, is either death or survival in a poor condition and an overall stunted development that limits their active involvement in society.

The rights to life, survival and development are also related to provisions under article 22 of African Children's Charter dealing with armed conflict, where state parties are obliged to respect and ensure that other actors also respect the rules of international humanitarian law applicable during armed conflict, including in situations of internal armed conflicts, tension and strife. Under article 22(2), state parties are also obliged to take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain from recruiting any child and ensure the protection and care of children who are affected by armed conflicts. In its General Comment on article 22, the African Children's Committee indicated that the killing and maiming of children, rape and sexual violence, abduction, recruitment and the use of children by armed groups are among the main violations of children's rights.<sup>41</sup> Yet, children are directly or indirectly involved in armed conflicts and encounter an arbitrary deprivation of their rights to life and experience violations of their rights to survival, protection and development.<sup>42</sup> It is estimated that children are 24 times more likely to die during armed conflict than in peace time.<sup>43</sup>

The right to education, as stipulated at length in article 11, entitles children to an education directed, among other things, to the promotion and development of their personality, talents and mental and physical abilities to their fullest potential. The education envisioned in this article is one that encompasses several aspects of learning and development that prepares children from early life to

40 African Children's Charter arts 14(2)(a)-(h)).

41 African Children's Committee (n 35) para 2.

42 African Children's Committee 'The impact of conflict and crises on children in Africa' (2016) 87, African Children's Committee (n 5) 1.

43 African Children's Committee (n 35) 1.

be responsible citizens, and embody mutual respect, solidarity and co-existence in a diverse continent. Early childhood is the most critical period for cognitive and social development. Early childhood education, for example, lays the foundation for life-long learning and stimulates children's social, physical and cognitive development, among other things.<sup>44</sup> It should, therefore, be recognised as a first step of basic education that must be universally provided for all children. This is linked with, and further strengthened by, article 11(3)(a) which provides for the right to free and compulsory basic education for children.

Article 5 provides an important obligation for state parties to ensure the rights of children to grow up in conditions that positively impact their physical and mental well-being and development. A failure to effectively implement article 5 from early childhood can potentially have a negative impact on children's personal, social and educational difficulties and affect their current well-being and future prospect.<sup>45</sup>

Interestingly, article 11(2)(h) of the African Children's Charter refers to the promotion of children's understanding of primary health care, which would have positive impact on their health, survival, development and overall well-being. To this effect, state parties are obliged to take all appropriate measures to provide free and compulsory basic education and ensure equal access to all, including the disadvantaged. Article 13, in particular, obliges state parties to take special measures to ensure that the disabled child is protected and supported to fully develop and actively participate in the community.

Article 21 on protection against harmful practices obliges state parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, growth and development of the child. It makes particular reference to those customs and practices prejudicial to the health or life of the child, illustrating its direct linkage with article 5. Harmful practices often increase girls' vulnerability to health risks and loss of life. These practices encompass behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their rights to life, health, dignity, education and physical integrity.<sup>46</sup> Interventions targeting girls, therefore, should factor these multifaceted risks and vulnerabilities into medical treatment to avoid risks that could threaten their lives.<sup>47</sup>

Furthermore, article 16 on protection against child abuse and torture obliges state parties to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment, and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of parents and others. Such abuse could be detrimental and result in the deprivation of children's rights to life or leave life-long scars with implications for their rights to survival and development. Equally important is children's protection from hazardous labour, as provided in article 15, so as to ensure their physical, mental, spiritual, moral and social development without interference of such abuse and exploitation.

Article 7 on freedom of expression guarantees every child who is capable of communicating their own views to the right to express them freely in all matters. The right to freedom of expression has also immense significance in enhancing the capacity of the child and contributing to their development. Such opportunities enable children to enhance their skills, competencies, aspirations and confidence, as well as building tolerance and respect for others.<sup>48</sup>

44 Education International 'Early childhood education: A global scenario' (2010) 13, <https://www.ei-ie.org/en/item/28134:early-childhood-education-a-global-scenario> (accessed 6 June 2024).

45 CRC Committee General Comment 7 on Implementing child rights in early childhood (2005) para 8.

46 African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art 1(g).

47 African Children's Committee 'Teenage pregnancy in Africa: Status, progress and challenges' (2022) 52.

48 ACPF 'The African report on child well-being 2018: Progress in the child-friendliness of African governments' (2018) 65.

The African Children's Charter outlines the responsibilities of the child in article 31 that encompasses the immediate family and society, the state and other legally-recognised communities and the international community. First and foremost, the child has to be alive and have full agency to be able to undertake the responsibilities. Although explicit mention has been made of the duties to be undertaken subject to the age and ability of the child, they are expected, among other things, to use physical and intellectual abilities for the service of the community and contribute, to the best of their abilities, to the development of their nation. The realisation of children's rights to survival and development enables them to undertake these responsibilities in a skilful and effective manner, and contribute to sustainable development of their communities, nations and the continent at large.

In its General Comment 3, the African Children's Committee notes that responsibilities placed upon children are complementary to the enjoyment of their fundamental rights.<sup>49</sup> By placing responsibilities upon them, the Children's Committee argues, children are empowered to learn from an early age on how to contribute towards a better society and, thereby, promote an environment conducive to the enjoyment of their own rights. It also notes further that appropriate responsibilities, as envisaged by article 31, contribute to children's survival and development by equipping them with relevant tools and opportunities to maximise their potential from childhood into adulthood.<sup>50</sup>

#### 4 Links to other human rights treaties

The rights to life, survival, protection and development are fundamental human rights found in most regional and international instruments. The right to life, in particular, as a typical example of the 'first generation' of civil and political rights, features prominently in most human rights instruments.<sup>51</sup> Article 3 of the Universal Declaration of Human Rights (Universal Declaration), for example, is one of the first provisions that guarantee the right to life to everyone, including the rights to liberty and security. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) also guarantees every human being the inherent right to life and that no one shall be arbitrarily deprived of their life. As in article 5 of the African Children's Charter, it proclaims that this inherent right shall be protected by law.

The African Charter on Human and Peoples' Rights (African Charter) puts the right to life under the umbrella of the inviolability of human beings and entitles to every human being the right to respect for their life and the integrity of their person. It proclaims that no one may be arbitrarily deprived of this right. The African Commission on Human and Peoples' Rights (African Commission) has also clarified the application of the Charter's provision on the right to life through General Comment 3, describing the right to life as the 'fulcrum of all other rights'.<sup>52</sup>

Although the formulation of the provisions differs from article 5 of the African Children's Charter, article 6(1) of the Convention on the Rights of the Child (CRC) provides for inherent right to life for every child. The right to survival and development of the child in CRC was drafted with the aim of establishing a link between the rights of children to life and survival, and their development.<sup>53</sup> Article 5 of the African Children's Charter is stronger in that it qualifies the provision by obliging state parties to protect this inherent right by law.

49 African Children's Committee General Comment 3 on art 31 on the responsibilities of the child (2017) para 5.

50 African Children's Committee (n 49) paras 12 & 18.

51 F Viljoen 'International human rights law: A short history' (2012) 46 *UN Chronicle* 8-13, Nowak (n 15).

52 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights (The right to life (art 4)).

53 Nowak (n 19).



The provisions of article 5(2) of African Children's Charter and article 6(2) of CRC are almost similar except that the former has added the child's right to protection. The addition of 'protection' under article 5 of the African Children's Charter reflects its significance and linkage to the enjoyment of the right to survival and development and underscores the need, on the part of state parties, to have integrated interventions to ensure the realisation of these rights.

Article 5(3) of the African Children's Charter provides that the death sentence shall not be pronounced for crimes committed by children. Death sentencing against children is also prohibited, among others, under ICCPR (article 6(5)) and CRC (article 37(a)).

As in the right to life, the right to development features in the 'third generation' of rights, often referred to as solidarity rights.<sup>54</sup> The right to development in most other regional and international human rights instruments does not refer to personal development as is the case in the African Children's Charter and CRC. It refers to a collective entitlement that every human person is granted.<sup>55</sup> The most prominent provisions on the right to development include article 22 of the African Charter and the UN Declaration on the Right to Development (UNDRD). Article 1 of UNDRD articulates the right to development as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.<sup>56</sup>

Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also obliges state parties to the Covenant to take special measures of protection and assistance for children and young persons. It provides for their protection from economic and social exploitation, particularly engagement in work harmful to their morals or health or dangerous to life or likely to hamper their normal development. It emphasises that such practices should be punishable by law.

## 5 Legal interpretation of article 5

Article 5 of the African Children's Charter, technically, concerns three interrelated but distinct rights, namely, the inherent right to life, the right to survival, and the right to development of the child. The article not only guarantees all children the very basic right to life, but also places additional obligations on state parties to go beyond the preservation of the child's life and respect their rights to survive and develop. It empowers the child to grow and thrive into productive adulthood and also to be able to deliver on their responsibilities stipulated in article 31 of the African Children's Charter. It also demonstrates the synergy among civil, political, economic, social and cultural rights in ensuring the optimal development and achievement of the child's full potential.

### 5.1 The right to life

The right to life of any human being, whether a child or an adult, is sacred.<sup>57</sup> The sanctity of human life and the common understanding on the worth of the human person is not specific to any single culture.<sup>58</sup> It is universally recognised and valued.<sup>59</sup> It is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of

<sup>54</sup> Viljoen (n 51) 8-13.

<sup>55</sup> UNDRD adopted on 4 December 1986.

<sup>56</sup> As above.

<sup>57</sup> C Onuegbulam 'Right to life under legal and jurisprudential standards: Implications for Nigeria' (2015) 6 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 156-167.

<sup>58</sup> Universal Declaration of Human Rights.

<sup>59</sup> E Wicks *The right to life and conflicting interests* (2010) 22-47.

the nation.<sup>60</sup> The effective protection of the right to life is the prerequisite for the enjoyment of all other human rights. For this reason the right to life is regarded as fundamental and, as noted in previous parts, several laws are enacted towards its protection.

The expression ‘inherent right to life’ embedded in article 5 cannot properly be understood in a restrictive manner, and the protection of this right requires state parties to adopt positive measures designed to protect life. These include taking all possible measures to reduce child mortality and to increase life expectancy, especially in adopting measures to eliminate fatal childhood illnesses, malnutrition and other epidemics.<sup>61</sup> It also includes measures to prevent conflict and other circumstances detrimental to the life and development of the child.

No child should be deprived of their life arbitrarily, and this fundamental right should be protected by law.<sup>62</sup> Depriving children of their life involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. The law lays the foundation for state parties to respect and ensure the right to life and give effect to it through legislative and other measures. This means that states should put in place measures to prevent child mortality and ensure their survival. The law also provides the basis to ensure effective remedies and reparation are accorded to victims of violations of the right to life.

The negative obligation imposed on states in relation to article 5(1) amounts to a prohibition on their participation by not engaging in genocide, arbitrary killing or enforced ‘disappearances’ in respect of children. State parties are under an obligation to control the actions of their current and former agents and to investigate the circumstances surrounding the deaths of children even during times of unrest. The negative measures in general require state parties ‘to refrain from any action that may intentionally take the life of the child away’.<sup>63</sup>

Further, ensuring the right to life also involves abolishing the death penalty against children, which has clearly been stipulated under article 5(3). This sub-article is an important provision that seeks to abolish the death penalty pronounced for alleged crimes committed by children. The African Children’s Committee, as the custodian for the African Children’s Charter, has in various instances voiced its objection to the death sentencing of children, and called on state parties to revoke death penalties and ensure that no children are subjected to the imposition of the death penalty under article 5(3) of the Charter. A case in Sudan that was brought to the attention of the African Children’s Committee is particularly instructive.

The case concerned the pronouncement of the death penalty by the Constitutional Court of Sudan against three complainants (Abbas Mohamed AL-Nour Musa Al Emam, Modathir Alrayah Mohamed Badawi and Fadoul Almoula Aljaili Nourallah) for alleged crimes committed when they were all children (under the age of 18 years). All three were imprisoned with adult convicts on a death row and finally sentenced to death. While the death sentencing was not executed at the time complaint, it was made clear that there was no guarantee that it would not be implemented. The communication alleges violations of provisions of the African Children’s Charter, under articles 1 (on application of criminal law instead of the Law of the Child), 5(3) on pronouncement of the death sentence on minors, and 17 (detaining minors with adults). This section deals with the violations under article 5(3).<sup>64</sup>

60 HRC (n 3) para 2.

61 Sutherland (n 23) 279.

62 HRC (n 3) para 2.

63 Sutherland (n 27) 288-289.

64 The part on detention with adults is dealt with in ch 18 of this volume concerning juvenile justice.

In addressing this case on the pronouncement of death sentencing on minors, the African Children's Committee, in its decision on *Sudanese Death Penalty*,<sup>65</sup> made important references and linkages with violations of two other aspects of the Charter's article 5 provisions: upholding the inherent right of children to life (article 5(1)) and ensuring their maximum development (article 5(2)). Adopting a broader perspective to the right to development, which includes the right to physical, mental, spiritual, moral, psychological and social development, the Children's Committee made it clear that death sentences hamper development and run against the right to life, survival and development. This is evident in that the three complainants had not only been sentenced to death but also imprisoned for an extended period with adults. As the Committee noted, this would significantly affect their survival and development. Besides, linking death sentencing with violations to the right to life, the Committee contends that the state party (in this case the Sudanese government) bears an obligation to respect and protect the inherent right to life of children by prohibiting the use of the death penalty against minors.

In light of this, the African Children's Committee finally requested the Sudanese government to revoke the death sentencing of the three complainants, provide the necessary psychosocial support to them and ensure that no children would be subject to extended imprisonment and the death sentence. The decision underscores not only the illegality of death sentencing for crimes committed by children, but also the obligation of the state party to respect, protect and fulfil the rights of children to life, survival and development.

## 5.2 The right to survival

Child survival is often narrowly interpreted. First, too much emphasis is given to certain age groups, usually under five years of age. Children in their late childhood and adolescents are rarely mentioned in relation to child survival and child mortality statistics despite considerable risks to their survival due to accident and other causes of death. Second, given the narrow definition, child survival initiatives tend to focus on reducing the burden of disease for children under five years of age.<sup>66</sup> However, there are other factors affecting child survival, especially in the case of older children, such as the surrounding environment in which they live and where security and safety as well as access to clean water and sanitation facilities are equally important factors for the survival and development of children.<sup>67</sup>

The right to survival carries with it a more proactive connotation than the right to life. It implies positive steps that needed to be taken to ensure quality life of the child in every sense of the term. Survival, within the UN context, is a very broad concept that includes growth monitoring, oral rehydration and disease control, breastfeeding, immunisation, child spacing, food and female literacy.<sup>68</sup> Therefore, the right to survival should be supplemented by the healthy development of the child in all aspects of their lives.

Article 5(2) obliges state parties to ensure, to the maximum extent possible, the survival, protection and development of the child. This requires unpacking the phrase 'to the maximum extent possible' and understanding what it entails to ensure the survival of the child. The qualification 'to the maximum

65 *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 and Others v Sudan* 15/Com/003/2020 (2020), admissibility decision November 2021; decided on merits Nov/Dec 2022 (*Sudanese Death Penalty*), <https://www.acerwc.africa/en/communications/taha-fadul-nisreen-mustafa-somia-shampaty-and-nawras-elfatih-behalf-abbas-mohamed-al> (accessed 17 August 2024).

66 M Dutschke & K Abrahams K 'Rights in brief: Children's right to maximum survival and development' (2006) Children's Institute, Cape Town.

67 African Children's Committee General Comment 5 on art 1 on State party obligations under the African Charter on the Rights and Welfare of the Child and systems strengthening for child protection (2018) 40. Dutschke & Abrahams (n 66).

68 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Legislative history of the Convention on the Rights of the Child' (2007) 367.

extent possible' creates a caveat, particularly in resource-constrained and governance-wise challenged countries, to the fulfilment of these rights. This caveat, however, does not apply to the inherent right to life provided for in article 5(1). It would also mean that state parties must establish a legal framework to ensure the full enjoyment of the right to life by all children to give effect to it. This involves adopting appropriate laws or other measures in order to protect life from all reasonably-foreseeable threats, including from threats emanating from private persons and entities. The laws must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.<sup>69</sup>

Since deprivation of life by the authorities of the state is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of their life by those authorities, and state parties must ensure full compliance with all the relevant legal provisions.<sup>70</sup> The duty to protect by law the right to life also requires state parties to organise all state organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life.

State parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms, infanticide, 'honour' killings, lynching, violent hate crimes, blood feuds, ritual killings, death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity.<sup>71</sup>

The African Children's Committee has also made efforts to bring attention to gaps in the realisation of the right to survival by state parties in its Concluding Observations. For example, recalling the conflict in the northern part of Ethiopia that reportedly contributed to the killings of children during the 2020-2022 period, the African Children's Committee urged the Ethiopian government to undertake concrete steps to ensure that there is no further killing of children due to the conflict.<sup>72</sup> The Committee also recommended to the state party to ensure that actions are taken against perpetrators who were involved in killings of children. Beyond actions to protect loss of life and holding perpetrators accountable, it is also imperative that states provide compensation and reparation as appropriate.<sup>73</sup>

### 5.3 The right to development

The child developmental process, at least in its broad strokes, is universal and remains similar across cultures. It is a maturational and interactive process, resulting in an ordered progression of perceptual, motor, cognitive, language, socio-emotional and self-regulation skills.<sup>74</sup> Child development has the potential to touch almost all aspects of children's lives and, correspondingly, a vast array of obligations on states relating to them. As Sutherland notes, the danger of a provision that seeks to address such

69 HRC (n 3).

70 HRC (n 3) para 3.

71 United Nations Human Rights Committee 2019 General Comment 36 – Article 6: right to life, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life> (accessed 19 August 2024).

72 African Children's Committee 'Concluding recommendations by the ACERWC on the first periodic report of the Federal Democratic Republic of Ethiopia on the status of implementation of the African Charter on the Rights and Welfare of the Child' (2022), [https://www.acerwc.africa/sites/default/files/2022-06/Concluding-Observations\\_Ethiopia.pdf](https://www.acerwc.africa/sites/default/files/2022-06/Concluding-Observations_Ethiopia.pdf) (accessed 19 August 2024).

73 N Peleg & J Tobin 'Article 6: The rights to life, survival and development' in J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 186-236.

74 MM Black and others 'Early childhood development coming of age: Science through the life course' (2017) 389 *Lancet* 77-90.

a vast array of obligations is that it may fragment efforts and, hence, effectiveness, particularly in resource-constrained countries.<sup>75</sup>

Multiple factors influence child development, including health, nutrition, security and safety, responsive caregiving, and opportunities for early learning.<sup>76</sup> These factors interact with one another and can be mutually reinforcing through the process of development. The African Children's Committee notes that child development is a comprehensive process of realising children's rights in an environment where they grow up in a healthy and protected manner, free from fear and violence.<sup>77</sup> It further notes that it is a process to develop their personality, talents and mental and physical abilities to their fullest potential in accordance with their evolving capacities.<sup>78</sup> Likewise, the CRC Committee interprets child development as a concept that needs to be understood in its broadest and holistic sense, embracing the child's physical, mental, spiritual, moral and psychological development.<sup>79</sup> These elaborations reflect the multidimensional nature of the developmental process and its continuity in line with their age and the social, economic and cultural environment within which they live. Implementation measures to achieve child development, therefore, should be continuous and aim at achieving the optimal development for all children irrespective of their gender, place of residence, social status or any other ground of discrimination.

Children have varying needs at different stages of their growth and development. State parties should show their commitment to children's rights to development by making visible the parts of their budgets that affect children in different age groups. States should also consider all the factors required for children of different ages to survive, grow and develop.<sup>80</sup>

The obligations of state parties to fulfil the rights to survival and development should aim at ensuring the full and harmonious development of the child, including at the spiritual, moral and social levels. These involve supporting children to achieve their fullest potential and preparing them for a responsible life.

In general, the obligation to protect the child's inherent right to life, survival and development goes beyond the conventional understanding that the state protects the child from undue interference of right to life, survival and development by the state itself or other parties. It requires state parties to put in place a comprehensive legal and policy framework that encompasses criminal law, family law, and policy and labour law and the effective enforcement of these laws and policies.<sup>81</sup> It involves lowering preventable causes of child death through enhancing access to maternal and child health, clean water and adequate sanitation facilities. It also requires eliminating malnutrition and reducing traffic and other forms of fatal accidents to children.<sup>82</sup>

Underscoring the duty to take positive measures, the African Children's Committee, in its General Comment 5, notes that state parties should ensure that the death sentence, life imprisonment, indeterminate sentences and corporal punishment must be prohibited as sentences for children.<sup>83</sup> The

75 Sutherland (n 23) 282.

76 Black and others (n 74).

77 African Children's Committee (n 35) para 41.

78 As above.

79 CRC Committee General Comment 5 on general measures of implementation of the Convention on the Rights of the Child (arts 4, 42 & 44) (2003) para 6.

80 CRC Committee General Comment 19 on public budgeting for the realisation of children's rights (art 4) (2016) para 49.

81 Z Vaghri 'Article 6: The rights to life, survival, and development' in Z Vaghri and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child: An analysis of attributes* (2022) 35-36.

82 Vaghri (n 81).

83 African Children's Committee (n 6) 26.



African Children's Committee affirms that all rights provided for in the African Children's Charter progressively facilitate the proper development of children from childhood to adulthood and, hence, state parties are obliged to adopt a holistic approach facilitated through strengthening systems and mechanisms for implementation.<sup>84</sup>

Public budgets are important instruments for state parties to expedite and enhance the effectiveness of implementation efforts. To this effect, states should develop fiscal policies that ensure equal opportunities for all children to realise their rights. Particular attention should be given to investments in programmes that assist in reaching out to the poorest and most excluded children with essential services for their survival, protection and learning.<sup>85</sup>

The realisation of children's rights to survival, protection and development lends itself to the concept of 'progressive realisation', which emerged as a result of 'a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.<sup>86</sup> As the ESCR Committee has pointed out, this should not be misinterpreted as diluting the obligation, but rather an imposition to expedite and undertake it effectively to achieve full realisation.<sup>87</sup>

In its General Comment 5 the African Children's Committee notes that, irrespective of economic circumstances, state parties are required to undertake all possible positive measures towards the realisation of the rights of the child contained in the African Children's Charter. However, it recognises that the implementation of some rights may require progressive realisation, which must be understood in the context of the urgency required to fulfil these rights and not a postponement of implementation.<sup>88</sup>

Likewise, the CRC Committee recognised the evolution of the concept of 'progressive realisation' referred to in other core international human rights treaties, and underlines the need for states to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation to that effect.<sup>89</sup> The CRC Committee provides further guidance to state parties to use clear and consistent qualitative and quantitative goals and indicators to illustrate the progressive realisation of children's economic, social and cultural rights to the maximum extent of available resources.<sup>90</sup> They are also expected to regularly review and improve their measures to ensure the availability and maximisation of resources for the rights of all children, including the rights to survival, protection and development.<sup>91</sup>

The 'availability of resources', although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a state party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The CRC Committee has emphasised that, even in times of severe resource constraints, state parties must protect the most disadvantaged and marginalised members or groups of society by adopting relatively low cost-targeted programmes.

84 African Children's Committee (n 6) 12.

85 African Children's Committee (n 6) 40.

86 ESCR Committee General Comment 3 on the nature of state parties' obligations (1991) UN Doc E/1991/23 para 9.

87 As above.

88 African Children's Committee (n 6) 8.

89 CRC Committee (n 79) para 7.

90 CRC Committee (n 80) (2016) para 32.

91 As above.

As regards to the implementation obligation stated in article 1(1), the text in the African Children's Charter makes no distinction between different rights, and refers generally to the 'provisions of this Charter'.<sup>92</sup> This shows the underlying conviction that all rights are equally important and must be implemented immediately. The African Children's Committee also recognises that the enjoyment of economic, social and cultural rights is inextricably intertwined with the enjoyment of civil and political rights. In view of the emerging jurisprudence, the Children's Committee believes that economic, social and cultural rights should be justiciable in the same way as civil and political rights.<sup>93</sup>

States often fail to take steps to the maximum of available resources to fulfil children's rights to survival and development and use resource constraints as an excuse. As the ESCR Committee has reiterated, states must take deliberate, concrete and targeted steps within a reasonably short time period to progressively achieve the full realisation of these rights.<sup>94</sup> In assessing states' performance, such steps taken, and other considerations need to be examined to determine whether states are meeting their obligations in this regard. Some of the key considerations include a country's economic situation and overall development, whether low-cost options were considered, and cooperation and assistance from international community were sought and the time frame in which these efforts were made.<sup>95</sup>

## 6 Conclusion

The right to life means more than simply being alive. The quality of life is equally as relevant as its preservation. Even if the right to inherent life is respected, children could survive in very poor conditions that are detrimental to their well-being. The rights to life and survival of children are complementary and are not mutually exclusive. Child survival is also inextricably linked to child development. These rights refer to a continuum of life that begins at survival and progresses to an end point represented by the optimum development of the child. Violations of these basic rights affect children's physical growth and cognitive development and inhibit them from achieving their full human potential.

Article 5 of the African Children's Charter provides an adequate guarantee to children's inherent rights to life, survival and full development. The provisions are also complemented by other regional and international human rights laws that oblige states to respect, protect and fulfil the natural right to life of every human being, including children. Despite these legal safeguards, the political commitment to give effect to these fundamental rights is lacking. As a result, millions of children are deprived of their lives and a considerable number of those who survive experience challenges that jeopardise their enjoyment of most of their rights.

State parties must, therefore, respect, protect and fulfil the inherent rights of children to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. State parties must also ensure the right to life and exercise due diligence to protect the lives of children against deprivation caused by persons or entities whose conduct is not attributable to the state. The obligation of state parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in the loss of life. States parties may be in violation of article 5 even if such threats and situations do not result in the loss of life.

The linkages between article 5 and the various provisions of both the African Children's Charter and other regional and international human rights demonstrate the interrelated and interdependent nature of the right to survival and development with a range of other rights of children. These linkages

92 African Children's Committee (n 6) 7-8.

93 African Children's Committee (n 6) 6.

94 ESCR Committee 'An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the covenant' (2007) UN Doc E/C12/2007/1 para 3.

95 ESCR Committee (n 94) paras 8 & 9.

underscore the need for holistic and integrated interventions to ensure that children enjoy all their rights and fully develop to become active agents of change within their communities, nations and the continent.

The magnitude of child poverty and deprivation calls for a scaling-up of social protection schemes that are responsive to the fundamental rights of children to survival and development. Such schemes ensure children's access to nutritious food and healthcare services, including access to vaccines and medicines to avoid preventable child morbidity and mortality.

The limited investments being made in programmes that contribute to the realisation of children's rights are among the major gaps in implementation of article 5. To improve children's health and survival, for example, state parties should increase health financing through innovative and sustainable funding mechanisms. State parties that currently spend below the Abuja health spending target of 15 per cent of the national budget should immediately raise the budget for health to meet the target. Similar increments should also be made in education, social protection and other sectors benefiting children.

There is also a need for understanding the notion of 'progressive realisation' of children's rights to survival and development as a way of facilitating and expediting actions to give effect to these fundamental rights. It should not be interpreted to mean a delay in or postponement of actions, particularly when state parties are confronted with constraints and competing priorities.

State parties should fully respect relevant provisions of applicable international law relating to the rights and protection of children during armed conflict. State parties, in particular, must end impunity and bring to justice perpetrators of crimes against children in conflict situations. It is also equally important to exclude these crimes from amnesty provisions. In view of the high risk to life during armed conflict, state parties should also ensure that children are protected and have access to health care, including vaccines, nutritious food and other essential services. Post-conflict processes should also address serious abuses involving children.