

Book Review

***The African Charter on the Rights and Welfare of the Child: A Commentary*, Julia Sloth-Nielsen, Elvis Fokala and Godfrey Odongo (eds.), Pretoria University Law Press (PULP), Pretoria, 598 pp., hard copy and electronic version, ISBN: 978-1-0672371-7-2 e-ISBN: 978-1-0672371-8-9**

This is very first commentary on the African Charter on the Rights and Welfare of the Child (ACRWC). It showcases the breadth and depth of (South) African legal scholarship on children's rights. The Commentary marked the 25th anniversary of the entry into force of the ACRWC, back in 1999. It is a timely and very necessary complement to commentaries to the Convention on the Rights of the Child (CRC).¹

In the introduction, one of the co-editors, Sloth-Nielsen, provides an insightful historical background. A key point to remember is how the ACRWC was meant to complement the CRC as a 'home-grown continental treaty more reflective of African values, [footnote omitted] and African concerns. [footnote omitted]'.² Another remarkable point that Sloth-Nielsen makes is that 'little to no information could be located on the drafting history of the Charter, how the formulation of the rights developed, what was omitted and why. [footnote omitted]'.³ The absence of *travaux préparatoires* makes the Commentary all the more important as a guide to the ACRWC's interpretation and application.

The ensuing 37 chapters typically each discuss a particular ACRWC provision. Chapters 2–5 discuss the obligations of states parties, the definition of a child, non-discrimination, the best interests of the child and survival and development. The next five chapters discuss provisions on some civil rights of children, such as name and nationality; freedom of expression; association and peaceful assembly; and thought, conscience and religion as well as protection of privacy. From chapter 12 onwards, socio-economic rights, the rights of children with disabilities, protection against abuse and torture, and the administration of justice are covered. Chapters 19–24 and chapter 27 deal with what have been argued to be African values and concerns regarding protection of the family and parental roles, protection against harmful social and cultural practices, armed conflict, refugee children and protection against apartheid

¹ A. Alen and others (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers); J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019); W. Vandenhoe, G. Erdem Türkelli and S. Lembrechts, *Children's Rights: A Commentary on the CRC and Its Protocols* (2nd edn, Edward Elgar Publishing, 2024).

² Julia Sloth-Nielsen, 'Introduction' in J. Sloth-Nielsen, E. Fokala and G. Odongo (eds.), *The African Charter on the Rights and Welfare of the Child: A Commentary* (Pretoria University Law Press, 2024) 2 <<https://www.pulp.up.ac.za/catalogue/pulp-commentaries/the-african-charter-on-the-rights-and-welfare-of-the-child-a-commentary>>.

³ *ibid* 4.

and discrimination. Chapters 25 and 26 are dedicated to adoption and separation from parents. Chapters 28–30 address sexual exploitation and trafficking as well as drugs abuse. The discussion of substantive rights ends with a chapter on children of imprisoned mothers and one on responsibilities of the child. If the ordering logic of chapters is sometimes difficult to follow, this cannot be attributed to the editors or authors, but has solely to do with the order in which the Charter deals with those issues. Each chapter follows a similar template, with sections dealing explicitly with links to other Charter provisions and other human rights treaties, legal interpretation and domestication.

The procedural provisions of the ACRWC are discussed in chapters 33–37. The final chapter comments on Article 46 ACRWC, which mentions sources of inspiration for the Committee of Experts on the Rights and Welfare of the Child.

At the risk of doing a dishonour to the chapters that I do not discuss here explicitly, I would like to foreground some issues that speak to unique ACRWC features or provisions.

I. AFRICAN CHILDHOODS

The definition of a child is addressed in article 2 ACRWC (chapter 3). It introduces a straight 18 approach. The question arises whether the use of a strict chronological upper age can be reconciled with pleas in childhood studies to move away from or beyond chronological age. The chapter does not really engage with that question. It points out that the ACRWC considers the African conceptualisation of childhood to be unique, but that that unique nature cannot justify the imposition of undue responsibilities nor of discriminatory cultural practices (pp. 23–26). In other chapters too, (see e.g. chapter 4 and 32), the African conception of childhood is highlighted, in which dependence goes hand in hand with assuming responsibilities towards the family and the community. Chapter 32 analyses article 31 ACRWC on responsibilities of the child. It points out that ‘the concept of duties to the family, community and nation reflects a decidedly African conception of human rights’ and that ‘article 31 surely is the cardinal provision of the African Children’s Charter which gives this treaty its ‘soul’. [footnote omitted] (p. 454). It reflects the ‘communitarian philosophy of kinship solidarity prevailing in African thought. References in article 31 to social and national solidarity, to relationships with other members of society and to the promotion of African unity at all levels, reinforce these conceptions.’ (p. 457). At the same time, chapter 32 emphasizes that the provision on children’s responsibilities was intentionally placed at the end of the substantive rights enumerated in the ACRWC, and that Article 31 is not justiciable (p. 455). In other words, Article 31 cannot be (ab)used to water down the fundamental rights that children enjoy, nor can it justify exploitative work.

Unlike the CRC, the ACRWC is unequivocal about the end of childhood: ‘age thus is the singular and absolute marker for childhood. This means that other markers such as puberty, circumcision, pregnancy, marriage or parenthood can no longer be used in determining who is a child [...].’ (p. 29). The authors argue that

states would be justified in setting a higher minimum age in respect of activities that pose a high risk of bodily and psychological harm, abuse and exploitation to children, even though those activities could in some way advance their other rights such as their autonomy and ability to decide for themselves. Conversely, states would be justified in setting a lower minimum age with respect to activities that greatly advance and enhance the child’s autonomy and the enjoyment of their participation and provision rights, but which do not incur a high risk to their best interests and their life, survival and development. (pp. 29–30)

One area in which a lower minimum age is precluded more clearly by the ACRWC than the CRC is recruitment and participation in hostilities. The ACRWC applies a straight 18 approach and does not allow for any (lower) age exceptions, even not in instances of voluntary recruitment—unlike the Optional Protocol to the CRC on Children and Armed Conflict (pp. 33–34). The justification offered by the authors—“The continent has seen too many armed conflicts in which many children have been recruited and used in hostilities, exposing them to untimely deaths, abuse, loss of limbs, poverty, exploitation and other forms of harm”—is factually correct, but does not reveal how States have been convinced during the negotiations to adopt such a strong stance, which is for a number of them at odds with their practice. On this point, the lack of *travaux préparatoires* is particularly regrettable.

II. HARMFUL TRADITIONS

Another area in which the gap between lived realities and the legal standards in the ACRWC is glaring, is that of harmful traditions. Here too, it is emphasized that article 31 ‘must not be interpreted as perpetuating harmful cultural practices under the guise of responsibilities.’ (p. 461).

Chapter 22 unpacks article 21 ACRWC on the protection against harmful social and cultural practices such as female genital mutilation and early, forced and child marriage. This provision is reinforced by article 5 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol). Unlike the CRC, article 21 ACRWC explicitly mentions 18 as the minimum age for marriage.

On a personal note, I was a bit surprised to read how the authors of chapter 22 do not consider male circumcision a harmful cultural practice unless it is ‘unregulated and performed in unhygienic conditions’ (p. 306), whereas they list many practices of gender-based violence against girls as harmful practices. Would gender-based violence against girls become unproblematic if it was regulated and performed in hygienic conditions? Should the problematization of practices not be anchored mainly in bodily integrity and free consent, rather than in legal regulation and practical conditions?

III. CHILDREN AND WORK

Chapter 3 discusses children and work. On the one hand, there is the reality of working children in Africa (as elsewhere): ‘Child labour is a hugely controversial topic in Africa due in part to the fact that children are expected to play a role in the socio-economic well-being of their families and that of their own.’ (p. 34). On the other hand, working children and child labour cannot be equated: ‘child labour needs to be clearly defined in order to draw a distinction between what is permissible involvement of children in work and what is not.’ (p. 35). Indeed, very much like the CRC, ‘[t]he African Children’s Charter does not prohibit children from working; rather, it prohibits child labour that is detrimental to the child.’ (p. 460, see also pp. 220–221). Or to put it more correctly: ‘article 15(2)(a) of the African Children’s Charter requiring states to set the minimum age of employment seeks to prevent any involvement of children in any form work –light or not—before they reach the minimum age. In other words, both light work and child labour are prohibited for all children under the minimum age. Children above the minimum age, however, may be involved in light work, but not child labour’ (p. 35).

Chapter 16, commenting on article 15 ACRWC, nuances the sometimes blunt approach adopted to working children:

children also have certain responsibilities, including contributing to their communities through forms of work that are appropriate to their age and conditions. This approach acknowledges that not all forms of work are inherently harmful. In some cases, work can positively contribute to a child's development and well-being, depending on factors such as the child's age, the nature of the work and the conditions under which it is performed. (p. 221, footnotes omitted)

The reason is clear: 'Article 15 also involves issues that straddle the boundaries between cultural practices, economic necessity and international human rights standards. This highlights the challenges in addressing child labour in diverse cultural and socio-economic contexts.' (p. 221, footnotes omitted). In sum, '[i]t may be argued that the African Children's Charter took the provisions of CRC, refined them and slightly widened the scope of the state obligations and also gave it a regional context by explicitly including the informal sector.' (p. 228).

IV. PROTECTION AGAINST APARTHEID

Article 26 ACRWC offers protection against apartheid and similar discrimination regimes. The CRC does not do so explicitly, although apartheid can be addressed under the general non-discrimination provision in article 2 CRC. Apartheid refers to the institutionalized system of discrimination and segregation in South Africa until 1994. Given its profound impact on human rights (also of children) in South Africa and Africa more generally, its inclusion in the ACRWC is understandable and justified. Legally speaking, it may add little to the non-discrimination provision in article 3 ACRWC. As pointed out in the Commentary, 'the aim and purport of article 26 of the African Children's Charter [is] to ensure that children across Africa are protected against the violation of their rights to equality and non-discrimination.' (p. 386). Nonetheless, the Commentary claims that article 26 is not a redundant provision, for it 'is something of a "never again" clause that is aimed at providing protection against a very specific form of (racial or ethnic) discrimination—that is, apartheid.' [footnote omitted] (p. 387). Moreover, it is argued that 'a number of African countries are implementing *apartheid* laws and practices [...]', which article 26(2) covers.

V. INTERESTING FEATURES

The Commentary offers a thorough analysis of the ACRWC, in a systematic manner, and in dialogue both with African realities and the regional and universal human rights framework. It is a good read for those with a genuine interest in the ACRWC, but can also be usefully consulted by those looking for more specific information on some particular elements or features of the African Children's Rights Charter. At a practical level, a clickable table of contents as well as hyperlinks for the cross-references would increase the user's comfort when using the electronic version.

For those interested in the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child, it is worth mentioning that the Commentary devotes ample attention to the Committee's establishment, functioning and mandate. No less than four chapters are dedicated to the Committee's work. Chapter 35 offers a most useful systematisation of the reporting procedure and practice under the ACRWC, whereas chapter 36 provides an extensive overview of the Committee's complaints procedure and its case-law. The latter should not be overstated in terms of numbers (12 finalised communications out of 24 complaints submitted between 2011 and mid-2024), but has proven a 'meaningful safety net

to complement the protection of children's rights on the national level in Africa.' (p. 558). The author ends his chapter with diplomatically worded but legitimate critique on the 'manifest under use' of the procedure, in particular with regard to crucial rights issues such as the rights of children with disabilities and refugee children's rights; the Committee's lukewarm response to grave and urgent situations; and its backlog, to mention a few (p. 559).

This Commentary is published in the *PULP Commentaries on African Human Rights Law* series. The ACRWC Commentary is only the second commentary in the series, after the first one was published on the Maputo Protocol. It is remarkable that the series has not started with the mother treaty of the African Union, the African Charter on Human and Peoples' Rights (Banjul Charter), but it is also significant that the series has prioritized instruments on the rights of women and children. The reason was perhaps also pragmatic: on both occasions, there was an anniversary to celebrate. As far as the ACRWC is concerned, 2024 marked the 25th anniversary of the treaty's entry into force (p. xviii).

The book is available in print but also online in open access: <https://www.pulp.up.ac.za/catalogue/pulp-commentaries/the-african-charter-on-the-rights-and-welfare-of-the-child-a-commentary>. In the preface, the series editor Viljoen points out two important elements from a decolonisation perspective: the concern with an accessible source and wide dissemination, and the fact that the book has been published by an African-based and -focused publisher. This may be a pragmatic matter of gap-filling (Viljoen points out that only one commentary on an African treaty has been published by an 'established', read: European-based, publisher), but it also speaks to the growing self-awareness and self-reliance of African academia. A third element could be added to this decolonisation perspective: almost all commentators are from the African continent. Admittedly, many of them are based at or have strong ties with South African universities and a number of them are not or no longer based on the continent. It is nonetheless promising that so much academic expertise on children's rights and the ACRWC has been built among African scholars over the years.

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