# STATE OF HARMONISATION OF LAWS ON CHILDREN IN AFRICA

African Committee of Experts on the Rights and Welfare of the Child
ACERWC
CAEDBE
Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant

African Child Policy Forum
ACPF

## AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

The African Committee of Experts on the Rights and Welfare of the Child is an 11-member body of the African Union which was established in 2001, drawing its mandate from Articles 32–46 of the African Charter on the Rights and Welfare of the Child which was adopted by the heads of state and government of the Organisation of African Unity on 11 July 1990 and came into force on 29 November 1999.The committee's main goal is to work towards making Africa a continent that is fit for children by protecting and respecting their rights.

African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

P.O. Box 3243,

Roosevelt Street, Addis Ababa,

Ethiopia Tel: +251-11 551 77 00

Email: info@acerwc.org

Website: www.acerwc.africa / www.au.int

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## AFRICAN CHILD POLICY FORUM

African Child Policy Forum is an independent, not-for-profit, pan-African centre of policy research and advocacy on the African child. We were established in 2003 out of concern about the situation of the African child, and the need for us Africans to recognise our collective responsibility to ensure the realisation of all rights for all children. The major focus of our work is the promotion of state accountability. We are convinced that sustained change can come about only through vigorous state action, and that vigorous action in turn requires advocacy especially by African civil society.

African Child Policy Forum (ACPF)
P.O. Box 1179, Addis Ababa, Ethiopia
Telephone: + 251 116 62 81 92/96/97/99
Fax: +251 116 62 82 00
E-mail: info@africanchildforum.org
Website: www.africanchildforum.org
www.africanchildinfo.net

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**Abbreviations and Acronyms**

| | |
|---|---|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACHPR | African Commission on Human and Peoples' Rights |
| ACPF | African Child Policy Forum |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| AU | African Union |
| CAR | Central African Republic |
| CEDAW | Convention on the Elimination of all forms of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| CRC Committee | United Nations Committee on the Rights of the Child |
| CRIN | Child Rights International Network |
| DRC | Democratic Republic of Congo |
| EAC | East African Community |
| ECOWAS | Economic Community of West African States |
| FGM | Female genital mutilation |
| IDP | Internally displaced people |
| ILO | International Labour Organization |
| OPAC | Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict |
| OPIC | Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure |
| OPSC | Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography |
| SADC | Southern African Development Community |
| SADR | Sahrawi Arab Democratic Republic |
| UN | United Nations |
| UNFPA | United Nations Population Fund |
| UNHCR | United Nations High Commissioner for Refugees |
| UNICEF | United Nations Children's Fund |
| SADC | Southern Africa Development Community |

# CHAPTER 1. INTRODUCTION

## 1.1 Background and objectives

In 2015, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) adopted its Strategic Plan (2015–2019). Among other things, this plan sought to ensure that national laws and policies align with the standards enshrined in the African Charter on the Rights and Welfare of the Child (ACRWC) and the Convention on the Rights of the Child (CRC). Three years later, the ACERWC adopted its "General Comment No. 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" (ACERWC 2018a). This underscores the need for "*timely enactment and continuous review of national legislation*" to ensure compatibility with the ACRWC and other relevant international norms and standards on children.

Since its inception in 2003, the African Child Policy Forum (ACPF) has conducted studies on harmonisation of laws on children, producing various reports focused on sub-Saharan Africa. Between 2019 and 2020, the ACERWC and ACPF collaborated to develop this analyses the status of domestication of the ACRWC and other key international instruments on child rights. Unlike previous ACPF studies, it also covers North Africa. The review is timely, as 2020 marks 30 years of adopting the ACRWC. This report therefore provides a basis for State parties to take stock of their progress in ensuring the appropriate domestication of the rights enshrined in the ACRWC.

## 1.2 Scope and methodology

The study covers all 55 African states and follows the African Union (AU)'s geographic grouping of its member states (Table 1.1). The research comprised a review of national laws, policies, reports and publications on children, including State party reports to the ACERWC and the Committee on the Rights of the Child (CRC Committee) and their Concluding Recommendations and Observations. The review was complemented by information from the responses received from a questionnaire sent to all State parties.[1] The questionnaire sought to assess the domestication status of the ACRWC and CRC and the challenges states face in harmonising their own laws with international and regional standards.

One of study limitations was the lack of recent information on harmonisation of children's laws in North Africa. Some countries in the region have not recently submitted reports to treaty bodies — for example, Egypt and Libya have not submitted reports to the ACERWC since their initial reports in 2008 and 2010, respectively. The last reports Algeria, Egypt and Libya submitted to the CRC Committee were in June 2009, December 2008 and August 2000 (CRC Committee 2011a, 2010a and 2002) respectively. Sahrawi Arab Democratic Republic (SADR) has yet to ratify the ACRWC and it is not a member of the United Nations (UN). As such, it has not submitted any reports to child rights treaty bodies. Morocco and Tunisia are also not party to the ACRWC.

[1] Although the AU sent the questionnaire to all member states, only Benin, Democratic Republic of Congo (DRC), Equatorial Guinea, Mali, Rwanda, Senegal, Togo and Zimbabwe responded.

**Table 1.1 List of countries per region**

| Region | Countries |
|---|---|
| **Central Africa** | 9 countries: Burundi,[2] Cameroon, Central African Republic, Chad, Congo Republic, DRC, Equatorial Guinea, Gabon, São Tomé and Príncipe |
| **East Africa** | 14 countries: Comoros, Djibouti, Ethiopia, Eritrea, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, South Sudan, Sudan, Tanzania, Uganda[3] |
| **North Africa** | 7 countries: Algeria, Egypt, Libya, Mauritania, Morocco, SADR, Tunisia |
| **Southern Africa** | 10 countries: Angola, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia, Zimbabwe |
| **West Africa** | 15 countries: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo |

*Source: African Union (2020a)*

## 1.3 Structure of the report

The harmonisation status overview presented in this report is based on the thematic clusters of the ACERWC and CRC Committee used in their State party reporting guidelines (Table 1.2). The discussion includes an analysis of the role of domestic courts and child rights treaty bodies in promoting the harmonisation of laws on children.

**Table 1.2 ACERWC and CRC Committee Child Rights Clusters**

| Cluster | ACERWC | CRC Committee |
|---|---|---|
| **General measures of implementation** | Article 1 | Articles 4, 42 and 44(6) |
| **Definition of the child** | Article 2 | Article 1 |
| **General principles** | Articles 3, 4, 5, 7, 12 and 26 | Articles 2, 3, 6 and 12 |
| **Civil rights and freedoms** | Articles 6-10 and 16 | Articles 7, 8, 13-17, 28(2), 37(a) and 39 |
| **Family environment and alternative care** | Articles 16, 18(3), 19(2-3), 20 and 25 | Articles 5, 9-11, 18(1-2), 19-21, 25, 27(4) and 39 |
| **Health and welfare (ACERWC)/ Disability, basic health and welfare** (CRC Committee) | Articles 5, 13, 14, 20(2) and 26 | Articles 6, 18(3), 23, 24, 26 and 27 (1-3) and 33 |
| **Education, leisure and cultural activities** | Articles 11 and 12 | Articles 28-31 |
| **Special protection measures** | Articles 5(3), 15-17, 21-23, 25, 26-30 | Articles 22, 30, 32-36, 37 (b)-(d), 38, 39 |
| **Responsibilities of the child** | Article 31 | None |

## 1.4 Conclusion

The report summarises the extent to which national laws and policies on children are harmonised with regional and international standards. It also outlines the key challenges that states face in their efforts to align their laws with the ACRWC and other child rights instruments, identifies emerging issues that have implications for implementing children's

[2] With regard to regional economic communities, Burundi is part of the East African Community (EAC) and the Economic Community of Central African States (ECCAS); the DRC is part of the Southern African Development Community (SADC).

[3] Madagascar, Mauritius and Seychelles are part of SADC; Uganda is a member of both the EAC and SADC.

rights in Africa and makes recommendations for strengthening their legal protection. In particular, it:

- Assesses the status of ratification of instruments related to children in all African states.
- Identifies areas where State parties to the ACRWC have made progress and the factors contributing to such progress.
- Identifies gaps in legal and policy frameworks related to children in Africa.
- Assesses the implementation of ACERWC recommendations on law reform and alignment of national laws with the ACRWC.
- Provides an update on the status of domestication of the ACRWC and other related instruments on children in Africa.
- Highlights the most urgent issues concerning domestication and implementation of the ACRWC that require follow-up and intervention by the ACERWC.
- Makes recommendations for states to strengthen their legal and policy frameworks on children in line with the ACRWC and other related instruments.

Running through the analysis is the importance of considering gender dimensions in child law reform to ensure that they sufficiently incorporate the interests of both girls and boys.

## CHAPTER 2. GENERAL MEASURES OF IMPLEMENTATION

### 2.1 Introduction

Human rights standards applicable to children have undergone significant development since the adoption of the ACRWC in 1990. Protecting children's rights is not just about human rights; it is also about the impact that human rights violations have on development and the huge costs these have on the wellbeing of children (ACPF 2018). As such, both the ACRWC and the CRC place an obligation on State Parties to undertake legislative and other measures to ensure the effective implementation of the rights contained within them.[4] The ACERWC and CRC Committee have both adopted general comments — referred to as general measures of implementation —that expound this point.

In 2018, the ACERWC adopted its "General Comment No. 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection" (ACERWC 2018a). This General Comment recognises the CRC Committee's "General Comment No. 5 on General Measures of Implementation of the Convention of the Rights of the Child" (CRC Committee 2003), and "General Comment No. 19 on Public Budgeting for the Realization of Children's Rights" (CRC Committee 2016a), both based on Article 4 of the CRC.

The ACERWC's General Comment No. 5 describes implementation as the process whereby governments take the necessary legal, policy, budgetary, administrative and other appropriate measures to ensure the full realisation of all children's rights in the ACRWC, the CRC and other relevant national, regional and international human rights instruments pertaining to children to ensure the wellbeing of all children.[5] Consequently, the wide range of measures needed for effective implementation includes developing special structures, monitoring, training and undertaking other activities in government, parliament and the judiciary at all levels (CRC Committee 2003, para 1). Because these measures are interconnected, they require a holistic approach (ACERWC 2018a).

**Table 2.1 Summary of general measures of implementation (ACERWC General Comment No. 5)**

| **Key principles** |
|---|
| Non-discrimination in implementing the rights contained in the ACRWC (Article 3) |
| The best interests of the child (Article 4(1)) |
| The right to survival, development and protection (Article 5) |
| Participation (Article 4(2) and Article 7) |
| **Member states' obligations under Article 1(1) of the ACRWC** |
| Recognising the rights, freedoms and duties enshrined in the ACRWC |
| Undertaking necessary steps in accordance with constitutional processes |
| Adopting legislative and other measures to give effect to the ACRWC |
| **Other measures** |

[4] Article 1, ACRWC; Arts. 4, 42 and 44(6), CRC.

[5] Although the committee has expressed awareness of the fiscal realities in African countries, especially that social spending proceeds from a low base, it has not permitted states to claim that they do not have any resources for implementing social and economic goods for the fulfilment of children's rights. Spending quotas set for each state, irrespective of their economic resource base, are: 15 percent of GDP on health (Abuja Declaration); 9 percent of GDP on education according (Dakar Declaration); and 20 percent of overseas development assistance on basic social services (ACERWC 2018a, para 3.4).

Strengthening child protection systems
Coordination
Budgeting, efficient resource use and domestic revenue
Data collection
Training, capacity building and awareness raising
Policy development
Collaborating with civil society organisations, community-based organisations and the private sector
Child participation and the role of the state
Independent monitoring
Discouraging customs, traditions, cultural and religious practices that are inconsistent with the rights, duties and obligations under the ACRWC, Article 1(3)

Besides laying out the general measures, the ACERWC's General Comment No. 5 also interprets the concept of strengthening child protection systems and unpacks its constituent elements. However, for purposes of this report, we focus on the legislative aspect of general measures of implementation.

## 2.2 The obligation to take legislative measures

Article 1 of the ACRWC on obligations of State parties provides the overarching obligation to implement the charter, and has cross-cutting implications for the ACRWC as a whole (ACERWC 2018a). Specifically, it provides:

1. Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.
3. Any 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.

It contains the essence of the implementation obligation for Member States, taking account of regional specificities, good practices, and matters of particular concern regarding the fulfilment of children's rights in Africa. Its text differs slightly from Article 4 of the CRC, which provides as follows:

> "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".

ACERWC's General Comment No. 5 interprets Article 1 from a regional perspective, and elucidates the differences between the ACRWC and CRC's implementation requirements (ACERWC 2018a). This is in line with "Agenda 2040: Fostering an Africa fit for children" (Agenda 2040), which recognises the need for effective implementation of the ACRWC, the AU Agenda 2063 and the Sustainable Development Goals, whose aspirations, targets and indicators have a direct bearing on the rights contained in the ACRWC (ACERWC 2018a). Where State Parties have agreed higher standards at international or regional level, including

in General Comments, or adopted and ratified new treaties, they must account to these higher standards (para 3.11).

Put together, the guidance from the ACERWC and the CRC Committee on the key issues to consider when undertaking the legislative review process is that states should:

a. Put in place efficient and expeditious law-making processes to ensure timely enactment of laws and related administrative guidance on children, as prolonged delays are not in children's best interests.
b. Ensure that law enactment processes are participatory and consultative, especially considering children's views.
c. Ensure continuous and comprehensive review of national legislation and related administrative guidance to ensure their compatibility with relevant international norms and related standards.
d. Consider the impact of all legislation being tabled on children's rights and welfare.
e. Consider the relevant instruments — not only article by article, but also holistically — recognising the interdependence and indivisibility of human rights.
f. Recognise that ratifying relevant human rights instruments is key to undertaking legislative measures and thus strive to maintain as comprehensive a ratification record as possible, including The Hague Conventions related to children.
g. Ensure that all relevant sectoral laws (on education, health, justice, and so on) consistently reflect international and regional principles and standards on child rights.
h. Build the review process into the machinery of all relevant government departments.
i. Ensure independent review by parliamentary committees and hearings, national human rights institutions, nongovernmental organisations, academics, affected children and young people and other relevant actors.
j. Develop consolidated children's rights statutes that highlight and emphasise the general principles on child rights identified in the ACRWC (Articles 3 and 7) and the CRC (Articles 2,3,6 and 12).
k. Set out entitlements for children in domestic law in enough detail to ensure non-compliance remedies are effective.
l. Enact and implement legal provisions that are more conducive to realising children's rights than those contained in the ACRWC, CRC and other instruments.

Article 1(3) of the ACRWC discourages customs, traditions, cultural and religious practices that are inconsistent with the rights contained in the charter. This is complimented by Article 21, which calls for elimination of harmful social and cultural practices. General Comment No 5 (paras 7.1 and 7.2) identifies the practices that are potentially inconsistent with the ACRWC and obliges states to:

a. Adopt a proactive stance towards discouraging practices that are inconsistent with the rights enshrined in the ACRWC.
b. Identify and promote the continuance of practices that are consistent with the ACRWC and foster a child's enjoyment of a child's culture and heritage.
c. Seek collaborative relationships with communities, traditional and religious leaders who wield influence and support a rights-based approach to cultural and religious practices.
d. Subject to penal sanctions all actions that violate the ACRWC on reliance of cultural or religious norms.
e. Permit private prosecutions against perpetrators of harmful practices against children.

One important factor to consider when domesticating regional and international standards on children is that the extent of applicability differs in states where the principle of "self-execution" (monism) applies and others where the instruments need to be first incorporated into domestic law (dualism) (CRC Committee, 2003, para 19; see Table 2.2).

Once they have been incorporated, all relevant domestic law must be brought into compliance with the provisions of the relevant instruments, which can be directly invoked before the courts and applied by national authorities. Where there is conflict with domestic legislation or common practice, the applicable regional and international instruments should prevail (CRC Committee 2003, para 20).

**Table 2.2 Application of international law in national legal systems, by region**[6]

| Region | Monist states | Dualist states |
|---|---|---|
| **North Africa** | Algeria, Egypt, Libya, Mauritania, Morocco, SADR, Tunisia | None |
| **Central Africa** | Burundi, Cameroon, Central African Republic, Chad, Congo Republic, DRC, Equatorial Guinea, Gabon, São Tomé and Príncipe | None |
| **East Africa** | Comoros, Djibouti, Eswatini, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, South Sudan, Sudan, Tanzania | Eritrea, Uganda |
| **West Africa** | Benin, Burkina Faso, Cabo Verde, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Senegal | Côte d'Ivoire, Ghana, Nigeria, Sierra Leone, Togo |
| **Southern Africa** | Angola, Mozambique, Namibia | Botswana, Eswatini, Malawi, Lesotho, South Africa, Zambia, Zimbabwe |

In monist legal systems, ratified treaties such as the ACRWC are automatically part and parcel of the domestic legal system and prevail over national legislation in cases of conflict. Theoretically, this means that the ACRWC can be invoked before domestic courts, but this rarely occurs in practice.

## 2.3 Constitutional measures

According to the ACERWC, it is continental best practice for State parties to the ACRWC to undertake necessary steps to enshrine a detailed array of rights for children in their constitutions (ACERWC, para 5.2). Since the obligations incurred under the charter are ongoing, it is important that implementation concerns constitutional law-making, as this is the height of legislative progress required for implementing the ACRWC (ACERWC 2018a).[7]

Including sections on child rights in national constitutions helps to underline the key message that children are also holders of human rights; but this inclusion must be followed up with additional legislative and other measures (CRC Committee 2003, para 20). As such, in terms

[6] Like Table 1.1, this table uses the AU's regional categorisation of countries. See African Union (2020a).
[7] Paras 5.2 and 17. This is not an absolute requirement though.

of the constitution, entrenched rights for children must also be justiciable and children must have access to effective legal remedies for violations of their rights.[8]

The ACERWC recognises that the full potential of constitutional litigation to enforce children's rights and address violations is in its infancy. As such, it urges State parties to ensure they appoint judges who are sensitive to child rights, and that judicial training includes modules on the rights contained in the ACRWC (ACERWC 2018a, para 5.2).

Contemporary national constitutions contain bills (or declarations) of rights or clauses that promote, protect or ensure child rights, thus according justiciability and legal force to child rights proclamations.[9]

**Table 2.3 The constitutionalisation of child rights in Africa[10]**

| Approach to child rights | Countries |
|---|---|
| **Refer to children in the constitution** | All countries **except** Liberia, Mauritania, SADR, Djibouti, Botswana |
| **Elaborate provisions on children in the Bill of Rights** | Burundi, Cabo Verde, DRC, Ethiopia, Eswatini, Gambia, Ghana, Kenya, Malawi, Mozambique, Namibia, Somalia, South Africa, South Sudan, Tanzania, Uganda, Zambia, Zimbabwe |
| **Refer to children only in the preamble to the constitution** | Cameroon, Comoros, Mali, Tunisia |

Table 2.3 shows that almost all African countries' constitutions incorporate provisions dealing with the rights of the child or the duties of parents and/or the state towards children. However, the breadth of provision varies from a restrictive scope in the preamble to extensive provision in the Bill of Rights. Burundi and Ethiopia specifically incorporate the ACRWC and CRC as an integral part of their laws.[11]

Constitutional proclamation of child rights accords primacy to norms such as the principle of the best interests of the child. The justiciability of constitutional rights has also facilitated constitutional litigation, challenging regressive laws, customs and practices. The often constructive engagement between treaty bodies and states has also yielded constitutional reviews and reforms to further harmonise national children's rights laws with international child rights standards.[12]

[8] State-funded legal aid systems should include the possibility of funding for children's rights litigation based on constitutional imperatives (ACERWC 2018a, para 5.2).

[9] Examples include: The Preamble to the Constitution of the Federal Islamic Republic of the Comoros, 2018; Article 36, Constitution of the Federal Republic of Ethiopia; Article 29, Provisional Constitution of the Federal Republic of Somalia, 2012; Section 34, Constitution of the Republic of Uganda, 1995 (amended); and Article 19 , Constitution of the Republic of Rwanda, 2015.

[10] For details of specific constitutions, see ACPF (2019).

[11] See, for example, Section 9(4), Constitution of the Federal Democratic Republic of Ethiopia.

[12] See, for example, CRC Committee 2017a on the review of the Constitution of the Republic of Malawi, 1994 as amended in 2017. Constitutional amendments that have a bearing on children's rights have ushered in transformation in African states. For example, in 2013, Zimbabwe repealed its Lancaster House Constitution of 1979. The significance of the entrenchment of children's rights in the new constitution was sealed by the landmark Constitutional Court decision in January 2016 outlawing child marriage and declaring invalid Section 22 of the Marriages Act, which set the minimum age of marriage at 16 years for girls and 18 years for boys. See *Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs & Others* Judgment no. CCZ 12/2015, Const. Application no. 79/14.

## 2.4 Status of ratification

The general measures are based on a State Party having ratified the relevant instrument, thereby subjecting itself to accountability to children to protect, respect and fulfil their rights (UNICEF 2011). So, it is important to first examine the ratification status of child-related instruments in Africa. As of September 2020, 50 African states had ratified the ACRWC (São Tomé and Príncipe in June 2019; the DRC in December 2020), and all states except SADR (which is not a UN member state) had ratified the CRC.

Ratification is an important first step to protecting children, as it obliges governments to harmonise their domestic laws and implement them in line with the treaties' standards and principles (OHCHR 2012). African governments have generally made significant progress in ratifying relevant international and regional child rights treaties (Table 2.4).

**Table 2.4 Ratification status of child-related instruments in Africa**

| Treaty | Ratified | Not ratified |
|---|---|---|
| African Charter on the Rights and Welfare of the Child (ACRWC), 1990 | 50 countries | Morocco, SADR, Somalia, South Sudan, Tunisia |
| African Charter on Human and Peoples' Rights, 1981 | 54 countries | Morocco |
| Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol), 2003 | 42 countries | Botswana, Burundi, Central African Republic (CAR), Chad, Egypt, Eritrea, Madagascar, Morocco, SADR, Niger, Somalia, South Sudan and Sudan |
| Protocol to the African Charter on Human and Peoples' on the Rights of Persons with Disabilities, 2018 | 9 countries: Angola, Burkina Faso, Cameroon, CAR, Gabon, Madagascar, Rwanda, South Africa and Togo; but the protocol has not entered into force. | 46 Countries |
| African Youth Charter, 2006 | 39 countries | Algeria, Botswana, Burundi, CAR, Comoros, DRC, Eritrea, Equatorial Guinea, Liberia, Madagascar, Morocco, SADR, Sierra Leone, Somalia South Sudan, Sudan |
| OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 | 46 countries | Djibouti, Eritrea, Madagascar, Morocco, Mauritius, Namibia, SADR, Somalia, Sao Tome & Principe |
| Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009 | 31 countries | Algeria, Botswana, Burundi, Cape Verde, Comoros, DRC, Egypt, Equatorial Guinea, Eritrea, Ghana, Guinea, Kenya, Libya, Madagascar, Moroco, Mauritius, Namibia, South Africa, Senegal, Seychelles, Sao Tome & Principe, Sudan, Tanzania, Tunisia |

| | | |
|---|---|---|
| AU Convention on Cybersecurity and Personal Data Protection, 2014 | 8 countries: Angola, Ghana, Guinea, Mauritius, Mozambique, Namibia, Rwanda, Senegal | |
| Convention on the Elimination of all forms of Discrimination against Women (CEDAW), 1979 | 52 countries | Somalia, South Sudan<br>SADR (not a UN member) |
| Convention on the Rights of the Child (CRC), 1989 | All | |
| Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC), 2000 | 48 countries | Comoros, Equatorial Guinea, Liberia, Mauritania, São Tomé and Príncipe, Somalia and Zambia |
| Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000 | 48 countries | Cameroon, Ghana, Kenya, Liberia, São Tomé and Príncipe , Somalia and Zambia |
| Optional Protocol to the CRC on a Communications Procedure, 2011 | 3 countries: Benin, Gabon, Tunisia | Signed but not ratified: Cabo Verde, Côte d'Ivoire, Ghana, Guinea-Bissau, Madagascar, Mali, Mauritius, Morocco, Senegal, Seychelles |
| Convention on the Rights of Persons with Disabilities, 2006 | 49 countries | Botswana, Cameroon, Equatorial Guinea, Eritrea and South Sudan |
| Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 | 30 countries | Algeria, Botswana, Cabo Verde, Cameroon, Chad, Côte d'Ivoire, Comoros, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Liberia, Madagascar, Malawi, Mauritius, São Tomé and Príncipe, Somalia, South Sudan, Senegal, Seychelles, Sierra Leone and Zambia |
| International Labour Organization (ILO) Convention 182 on Worst Forms of Child Labour, 1999 | 55 countries | |
| ILO Convention 138 on Minimum Age of Employment, 1973 | 53 countries | Liberia and Somalia |
| ILO Convention 169 on Indigenous and Tribal Peoples Convention, 1989 | 1 country: CAR | 54 countries |
| ILO Protocol of 2014 to the Forced Labour Convention, 2014 | 11 countries: Côte d'Ivoire, Djibouti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Zimbabwe | |

| | | |
|---|---|---|
| Hague Convention on Inter-country Adoption, 1993 | 21 countries: Benin, Burkina Faso, Burundi, Cabo Verde, Congo, Côte d'Ivoire, Eswatini, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, South Africa, Togo, Zambia | |
| Hague Convention on International Child Abduction, 1980 | 11 countries: Burkina Faso, Gabon, Guinea, Lesotho, Mauritius, Morocco, Seychelles, South Africa, Tunisia, Zambia, Zimbabwe | |
| Hague Convention on Child Support, 2007 | None | Signed but not ratified: Burkina Faso |
| Hague Convention on Parental Responsibility and Protection of Children, 1996 | 2 countries: Lesotho, Morocco | |

It is important to note, however, that although ratifying international and regional instruments is important, it does not automatically prove commitment. Without political will and government action, ratification does not automatically translate into reality (ACPF 2018).

## 2.5 Reservations

Ratification is sometimes accompanied by reservations concerning specific provisions. Article 2 of the Vienna Convention on the Law of Treaties defines "reservation" as a "*unilateral statement, whereby a State purports to exclude or to modify the legal effect of certain provisions of a Treaty in their application to that State, upon its ratification*". Reservations must not, however, be "*incompatible with the object and purpose of the treaty*",[13] as the provisions of a state's internal law may not be invoked as justification for failure to perform the obligations imposed by a treaty.[14]

In reality, reservations entered on treaties affect the level of harmonisation of laws at the domestic level, as countries that have entered reservations have no obligation to implement the provisions on which they have entered reservations. The 1993 World Conference on Human Rights requested the review and withdrawal of reservations; — a call consequently echoed by the CRC Committee (CRC Committee 2003, para 13) and the ACERWC (ACERWC 2018a, para 5.3.6). The reservations countries have entered on the ACRWC show how these can have a negative impact on the harmonisation of laws with ratified treaties. Sudan, for example, which entered a reservation on Article 21 prohibiting child marriage, has one of the lowest minimum ages of marriage in Africa (see Figure 3.1).

**Table 2.5 Reservations to the ACRWC**

| Country | ACRWC | Issue |
|---|---|---|
| **Botswana** | Article 2 | Definition of a child |
| **Egypt** | Article 24 | Adoption (under review; Egypt has already removed a similar reservation to the CRC) |
| | Article 30 (a-e) | Special treatment of children of imprisoned mothers |
| | Article 44 | ACERWC mandate to receive communications |

[13] CRC, Article 51(2); Vienna Convention on the Law of Treaties, Article 19.
[14] Vienna Convention, Article 27.

| | | |
|---|---|---|
| | Article 45(1) | ACERWC mandate to conduct investigations in member states |
| **Mauritania** | Article 9 | Right to freedom of thought, conscience and religion |
| **Sudan** | Article 10 | Protection of privacy |
| | Article 11(6) | Education of girls who become pregnant before completing their education |
| | Article 21(2) | Child marriage |

*Source: ACERWC*[15]

## 2.6 Consolidated children's statutes

Overall, there has been considerable progress in Africa in adopting and developing legal and policy instruments for the protection of children (ACPF 2012a), and there has been increased momentum towards promulgating, revising or reviewing children's statutes. Every African country has a range of child-related laws (see ACPF 2019), statutory frameworks that are usually intended to give effect to these rights in national constitutions.[16]

**Table 2.6 Countries with and without consolidated children's statutes**

| SN | Country | Statute |
|---|---|---|
| **1.** | **Algeria** | Law No. 15-12 on Child Protection |
| **2.** | **Angola** | Law on the Protection and Integral Development of Children- Children's Act 2012 |
| **3.** | **Benin** | Children's Code 2015 |
| **4.** | **Botswana** | Children's Act No 8 of 2009 |
| **5.** | **Burkina Faso** | Draft Law on Protection of the Child |
| **6.** | **Burundi** | Draft Child Protection Code |
| **7.** | **Cabo Verde** | Child and Adolescent Statute (Law 50 of 2013) |
| **8.** | **Cameroon** | Draft Child Protection Code[17] |
| **9.** | **Chad** | Draft Child Protection Code[18] |
| **10.** | **CAR** | Child Protection Code 2020 |
| **11.** | **Comoros** | Child Protection Code 2005 |
| **12.** | **Congo Republic** | Law No. 4-2010 on the Protection of the Child 2010 |
| **13.** | **Côte d'Ivoire** | None[19] |
| **14.** | **DRC** | Child Protection Code 2009 |
| **15.** | **Djibouti** | Code on the Legal Protection of Minors (Act No. 95/AN/15/7 L) of 2015 |
| **16.** | **Egypt** | Child Law No. 126 of 2008 |
| **17.** | **Equatorial Guinea** | None |

[15] http://www.acerwc.org/reservations/.
[16] See, for example, preamble to the South African Children's Act, 2005 (as amended).
[17] Cameroon has a Civil Code which is being drafted to include, in a harmonized way, to be named Child Protection Code and Persons and Family Code.
[18] Under discussion (Global Initiative to End All Corporal Punishment of Children 2020a).
[19] A draft Code of Children and Family was mentioned during the ACERWC's examination of Côte d'Ivoire in July 2017 (Global Initiative to End All Corporal Punishment of Children 2019).

| | | |
|---|---|---|
| **18.** | **Ethiopia** | None |
| **19.** | **Eritrea** | None |
| **20.** | **Eswatini** | Child Protection and Welfare Act No. 6 of 2012 Draft Children's Code |
| **21.** | **Gabon** | Law No. 5 of 1997 on Child Protection |
| **22.** | **Gambia** | Children's Act 2005 |
| **23.** | **Ghana** | Children's Act 560 of 1998 (as amended, 2019) and Juvenile Justice Act 2003 (as amended, 2019) |
| **24.** | **Guinea** | Children's Code of 2008 (under revision) |
| **25.** | **Guinea-Bissau** | None |
| **26.** | **Kenya** | Children's Act 8 of 2001 (Under revision) |
| **27.** | **Lesotho** | Children's Protection and Welfare Act No. 7 of 2011 |
| **28.** | **Liberia** | Children's Law of Liberia 2011 |
| **29.** | **Libya** | Law No. 5 of 1997 on Child's Protection |
| **30.** | **Madagascar** | Law No. 2007-023 on the Rights and Protection of Children |
| **31.** | **Malawi** | Child Care, Protection and Justice Act, 22 of 2010 |
| **32.** | **Mali** | Child Protection Code, Order N ° 02-062 / P-RM of 05 June 2002 |
| **33.** | **Mauritania** | General Child Protection Code |
| **34.** | **Mauritius** | Child Protection Act No 40 of 1994, as amended in 2005 and 2008 |
| **35.** | **Morocco** | None |
| **36.** | **Mozambique** | Law for the Promotion and Protection of the Rights of the Child No. 7 of 2008; and Law of Legal Organisation of Minors No. 8 of 2008 |
| **37.** | **Namibia** | Child Care and Protection Act 6 of 2015 |
| **38.** | **Niger** | None |
| **39.** | **Nigeria** | Child Rights Act 2003 |
| **40.** | **Rwanda** | The Law Relating to the Rights and Protection of the Child, No. 54 of 2011 |
| **41.** | **São Tomé and Príncipe** | Juvenile Justice Law; child protection laws under review |
| **42.** | **SADR** | None |
| **43.** | **Senegal** | Draft Children's Code |
| **44.** | **Seychelles** | Children's Act 1982, as amended until 2016 |
| **45.** | **Sierra Leone** | Child Rights Act 7 of 2007 |
| **46.** | **Somalia** | Child Rights Bill drafting process launched in 2017 |
| **47.** | **South Africa** | Children's Act 37 of 2005, amended in 2016 |
| **48.** | **South Sudan** | Children's Act, Act 10 of 2008 |
| **49.** | **Sudan** | Children's Act 2010 |
| **50.** | **Tanzania** | Law of the Child, 2009 |

| | | |
|---|---|---|
| **51.** | **Togo** | Law No. 2007-017 (Children's Code), 6 July 2007 |
| **52.** | **Tunisia** | The Code of Child Protection 1995 (amended 2006) |
| **53.** | **Uganda** | Children's Act Cap 59, as amended 2016 |
| **54.** | **Zambia** | Draft Children's Code Bill (tabled for parliament) |
| **55.** | **Zimbabwe** | Children's Act Cap 5:06 (currently under revision) |

Some countries have gone further, revising their consolidated children's statutes to align them with recent developments at regional and international levels. Notably, Uganda effected a comprehensive amendment to its Children's Act of 1997 in 2016, and South Africa amended its Children's Act of 2005 in 2016. Subject-specific frameworks are also emerging — including on female genital mutilation (FGM) — as discussed in Chapter 6. Such normative structures have further translated into national policies, regulations, plans of action and programmes that propagate each country's strategy on children's issues.

The ACERWC has urged Eritrea to enact specific legislation promoting and protecting children's rights and dealing with issues concerning trafficking of persons (ACERWC 2017, para 4). The CRC Committee has also urged Zambia to adopt and implement a consolidated statute on children (CRC Committee 2016, para 6). Despite being one of the first countries to have a draft Children's Code Bill (2006), Zambia is currently still devising its policy frameworks, including its National Plan of Action and National Child Policy.

## 2.7 National plans of action for children

All Central African states have a national action plan on children and a specific coordinating body mandated to enforce and implement laws pertaining to children. Coordinating bodies that implement children's rights include the DRC's Ministry for Gender, Children and Family, Cameroon's Ministry of Women's Empowerment and Family and Chad's Ministry of Women, Family and National Solidarity. All West African states except Gambia have a national action plan on children and a specific coordinating body mandated to implement laws on children. The only exception is The Gambia where there is an action plan but no coordinating agency.

Other countries have adopted the approach of developing thematic action plans in relation to children. For instance, using countries in East and Southern Africa as illustrative examples, Malawi enacted a law establishing the National Children's Commission and has a host of thematic action plans and strategies related to children — on early childhood, adolescent girls, ending child marriage and many more (see Republic of Malawi 2020). Lesotho has a National Policy on Orphan and Vulnerable Children. Tanzania adopted the Plan of Action to End Violence against Women and Children 2017 to 2022, while Uganda's National Action Plan for Child Wellbeing 2016–2021 aligns five goals — survival, development, protection, participation and implementation — with the Sustainable Development Goals.

## 2.8 Reporting to treaty bodies

Ratifying the ACRWC and the CRC and its Optional Protocols creates an obligation to submit State party reports to the relevant treaty bodies.[20] The treaty bodies require State parties to

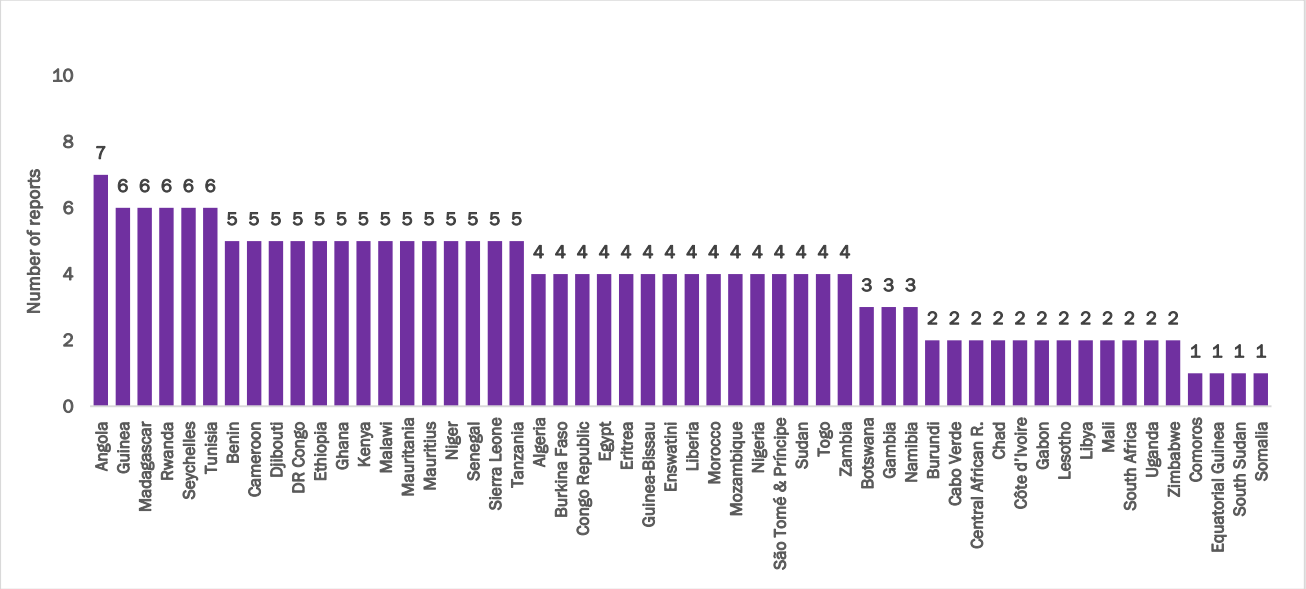
[20] ACRWC, Article 43; CRC, Article 44.

make the content of the treaties widely known to children and adults[21] and to make reports widely available within the state.[22] To this end, reports to the CRC Committee must be:

a. Made widely available upon submission, including all the other documentation of the examination of the reports
b. Constructively debated at national level among various stakeholders, including children, to ensure they have substantial impact on children's lives, and
c. Genuinely accessible — for example, translated into all languages, into appropriate forms for children and for people with disabilities, and so on (CRC Committee 2003 para 71–73).

As of September 2020, all African UN member states had submitted at least their initial report to the CRC Committee; 12 had reported twice; seven had submitted their third or fourth reports; 25 had submitted their fifth or sixth reports; and only one (Angola) had submitted its seventh report (see Figure 2.1). In Southern Africa, more than half of all countries have reported to the CRC Committee beyond the sixth periodic reports (albeit combined at times). In North Africa, Tunisia has submitted five periodic reports; the least number of reports submitted to the CRC Committee from the region is two (Libya). In East Africa, Djibouti, Mauritius and Seychelles are among the 20 countries that have reported at least five times.

**Figure 2.1 Number of reports submitted to the CRC Committee, by country**




In this regard, while States Parties to the CRC have all submitted at least an initial report to the CRC Committee, only 40 of the 50 State parties to the ACRWC have submitted a report to the ACERWC; only ten States having reported twice; and only two — Burkina Faso, and Kenya — having reported three times (see Figures 2.2 and 2.3). Nine countries have yet to submit their initial reports, while the reporting period for Sao Tome and Principe and DRC is not due yet.

[21] In terms of Article 4, read with CRC Article 42.
[22] In terms of Art 44(6) (UNCRC 2003, para 2).

Since the last ACPF publication on the harmonisation of children's laws in Central and West Africa (in 2012), Ghana, Guinea, Liberia, Sierra Leone and Chad finally submitted their initial reports to the ACERWC in 2014; Benin submitted its initial report more recently, in 2017. Cabo Verde, CAR, Equatorial Guinea, Gambia and São Tomé and Príncipe have yet to submit their initial reports. Only Cameroon has submitted a second report.

In East Africa, Djibouti and Mauritius have yet to submit any reports to the ACERWC. But they are among the 20 countries that have reported at least five times to the CRC Committee. In Southern Africa, no country has reported up to three times to the ACERWC. In North Africa, no country has reported twice.

**Table 2.7 Number of reports submitted to the ACERWC, by country (June 2020)**

| NO. | COUNTRY | NUMBER OF REPORTS |
|---|---|---|
| 1 | Algeria | Initial Report only |
| 2 | Angola | Initial Report only |
| 3 | Benin | Initial Report only |
| 4 | Botswana | None |
| 5 | Burkina Faso | Initial Report, first and second periodic reports |
| 6 | Burundi | Initial Report only |
| 7 | Cameroon | Initial Report, first periodic report |
| 8 | Cape Verde | None |
| 9 | Chad | Initial Report only |
| 10 | Central African Republic | None |
| 11 | Cote D'Ivoire | Initial Report only |
| 12 | Comoros | Initial Report only |
| 13 | Congo | Initial Report only |
| 14 | Djibouti | None |
| 15 | DRC | Reporting period not yet due |
| 16 | Egypt | Initial Report Only |
| 17 | Equatorial Guinea | None |
| 18 | Eritrea | Initial Report, First Periodic Report |
| 19 | Ethiopia | Initial Report, first periodic report |
| 20 | Gabon | Initial Report only |
| 21 | Gambia | None |
| 22 | Ghana | Initial Report only |
| 23 | Guinea Bissau | Initial Report only |
| 24 | Guinea | Initial Report only |
| 25 | Kenya | Initial Report, First and second periodic reports |
| 26 | Lesotho | Initial Report only |
| 27 | Libya | None |
| 28 | Liberia | Initial Report only |
| 29 | Madagascar | Initial Report only |
| 30 | Malawi | Initial Report only |
| 31 | Mali | Initial Report only |
| 32 | Mauritania | Initial Report only |
| 33 | Mauritius | None |

| | | |
|---|---|---|
| 34 | Mozambique | Initial Report only |
| 35 | Namibia | Initial Report only |
| 36 | Niger | Initial Report, First periodic report |
| 37 | Nigeria | Initial Report, First periodic report |
| 38 | Rwanda | Initial Report, first periodic report |
| 39 | Sao Tome& Principe | Initial Report not yet due |
| 40 | Senegal | Initial Report only |
| 41 | Seychelles | Initial Report Only |
| 42 | Sierra Leone | Initial Report only |
| 43 | South Africa | Initial Report, first periodic report |
| 44 | Sudan | Initial Report only |
| 45 | eSwatini | Initial Report only |
| 46 | Tanzania | Initial Report, first periodic report |
| 47 | Togo | Initial Report only |
| 48 | Uganda | Initial Report only |
| 49 | Zambia | Initial Report only |
| 50 | Zimbabwe | Initial Report only |

**Table 2.8 Countries that have not submitted reports to the ACERWC**

| Country | Year of ratification |
|---|---|
| **Botswana** | 2001 |
| **Cabo Verde** | 1993 |
| **CAR** | 2016 |
| **Djibouti** | 2011 |
| **DRC** | 2020 |
| **Equatorial Guinea** | 2002 |
| **Gambia** | 2000 |
| **Mauritius** | 1992 |
| **São Tomé and Príncipe** | 2019 |
| **Seychelles** | 1992 |

## 2.9 Summary

After ratifying regional and international instruments, State Parties are expected to align their national laws with them. The process of ensuring compatibility of national legislation with applicable international standards is called harmonisation. However, ratifying child rights instruments and consolidating children's laws does not always mean full harmonisation with international and regional standards; gaps remain even after states adopt consolidated statutes on children (ACPF 2012a).

Harmonisation of national laws typically requires a comprehensive review of legislation affecting children's rights, amending or replacing existing provisions that do not meet the State Party's treaty commitments and introducing new legislation as appropriate to fulfil elements not covered by existing measures. States may also have to align the provisions of national, customary, religious or other laws with international laws to *"eliminate inconsistencies, contradictions or gaps*" (Doek 2007).

There is no internationally prescribed method for harmonising national laws with the provisions of the ACRWC and other international instruments. Every state approaches the

process in a manner that is compatible with its legal and political system.[23] Nevertheless, it typically starts with a comprehensive review of domestic legislation and related administrative guidance to ensure full conformity with the provisions and principles of the applicable treaty.

It has been suggested that, to achieve and maintain full compliance with the ACRWC, CRC and other relevant standards, State parties should adopt a comprehensive national plan or policy on harmonisation (Doek 2007, pp. 2–7). The main elements of such a policy should include:

- An analytical, in-depth review of existing legislation on children to identify provisions that are not in conformity with the ACRWC, CRC and other instruments, as well as deficiencies and gaps. The review should be undertaken by a multi-sector national review body comprising representatives from government, civil society and independent experts.
- An effective system to scrutinise all proposed legislation to ensure its compliance with all applicable international children's rights instruments. This system should be led by a small unit of experts within the government department responsible for ensuring compliance with human rights commitments.
- An outline of the format and structure of the legislative measures required to bring national laws into conformity with international standards. While a number of states have adopted comprehensive children's rights legislation as part of their harmonisation efforts, this is a time-consuming activity because it is not easy to cover all the provisions of the relevant international or regional human rights treaty in a single statute. In this context, the CRC Committee has emphasised the importance of ensuring that all relevant sectoral laws (on education, health, justice, etc) reflect the principles and standards of the CRC.
- The requirement for every proposal for a change in existing law or introduction of a new law to clearly indicate the human, financial and other resources needed for its effective implementation.

More importantly, as underscored by both the ACERWC and CRC Committee, the review of all domestic legislation and related administrative guidance to ensure full compliance with treaty obligations needs to be a continuous process, covering both proposed and existing legislation (CRC Committee 2003, para 18; ACERWC 2018a, para 5.3; Doek 2007).

Having discussed the general measures of implementation in this chapter, the following chapters provide an overview of the status of harmonisation, by examining the extent to which the substantive provisions of the ACRWC, CRC and other instruments related to children have been domesticated into national laws in Africa.

[23] Thus, for example, Article 1(1) of the ACRWC requires State parties to "…*undertake the necessary steps in accordance with their Constitutional processes and with the provisions of the present Charter*" (own emphasis).

## CHAPTER 3. DEFINITION OF A CHILD

### 3.1 Introduction

Article 2 of the ACRWC defines a child as every human being below the age of 18. This definite and non-qualified definition of a child differs from the CRC, which defines a child as every human being below the age of 18 but also allows for a different definition where, under the law applicable to the child, majority is attained earlier (Article 1). To ensure children enjoy the full protection of their fundamental rights, there must be a law defining their ages in line with regional and international standards. To this effect, both the ACERWC's and CRC Committee's guidelines for State party reports include "definition of a child" as one of the clusters of child rights. The definition of a child is a complex aspect of children's rights that determines the category of persons to whom certain rights apply (Odala 2012). Within the harmonisation process, the need to adopt a standard definition of a child cannot be over-emphasised: states "*should explicitly, by law, define a child as any person below the age of 18 years*" as this ensures that children's rights as enshrined in the ACRWC and the CRC are applicable to all persons under the age of 18 years (ACPF 2012b).

In line with Article 2 of the ACRWC and Article 1 of the CRC, all African countries except for Libya define a child as a person aged under 18 years, though some define a child as a person under the age of majority, which is no less than 18 years (see Table 3.1). Although most follow the ACRWC standard, Congo Republic, Mali, Mauritius and Tunisia have adopted the CRC definition of a child as a person under 18 years, unless majority is attained earlier on other grounds (ACPF 2013).

**Table 3.1 African countries' definitions of a child**

| Countries | Definition of a child |
|---|---|
| **Algeria, Botswana, Cameroon, Central African Republic, Congo Republic, DRC, Egypt, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zimbabwe** | A person below the age of 18 |
| **Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Chad, Comoros, Cote d'Ivoire, Djibouti, Equatorial Guinea, Eswatini, Guinea-Bissau, Eritrea, Ethiopia, Morocco, Niger, Senegal, Somalia, Zambia** | A person below the age of majority (no less than 18 years) |
| **Libya** | A person below the age of 16 (although the age of majority is 18) |

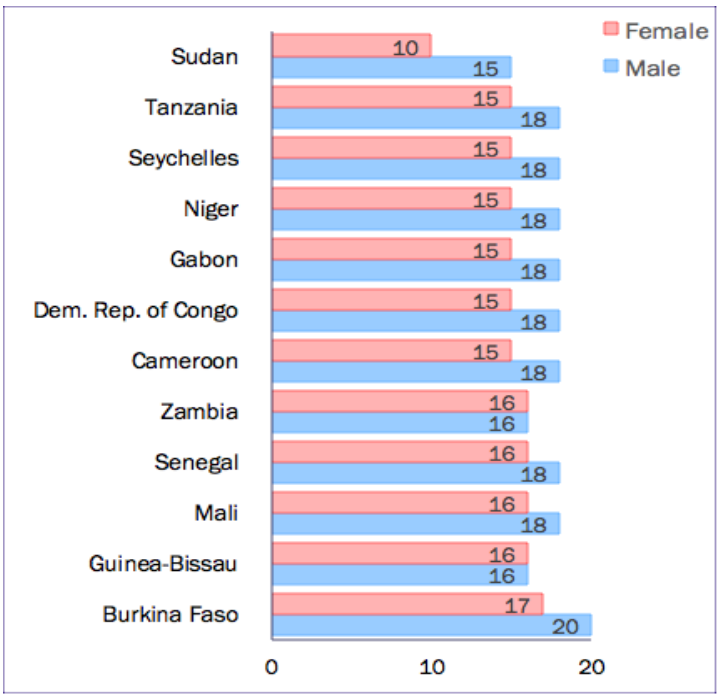
There has been some progress in harmonising different minimum age categories with regional and international standards, as outlined in the following sections. While this is commendable, enhanced harmonization of laws on definition of the child in common law and customary law is needed in some countries. For instance, the Committee raised this issue with South Africa in its concluding observations and recommendations to the State Party in its first periodic report.

## 3.2 Minimum age of marriage

Article 21(2) of the ACRWC sets the minimum age of marriage at 18 years and prohibits the betrothal of children. Article 6(b) of the Maputo Protocol also prohibits child marriage. Recognising that child marriage has a serious impact on the enjoyment of human rights and fundamental freedoms, particularly for girls, the ACERWC and ACHPR adopted a Joint General Comment on Child Marriage in 2017 as an interpretive guide to elaborate on the nature of State party obligations (ACHPR and ACERWC 2017, paras 1–4). In line with this, most African governments have generally set the minimum age of marriage at 18 years or above, with a few exceptions.

Algeria, Lesotho and Rwanda have a higher minimum age with no gender discrimination. Burundi, Congo Republic, Côte d'Ivoire and Togo have all set the minimum age at 18 years or older for females, but higher for males (ACPF 2018). In some other countries, however, the minimum age is below 18 years — either for both girls and boys or for girls only (Figure 3.1). Of these, Cameroon's draft law on children sets the minimum age of marriage at 18 for both boys and girls and will explicitly prohibit child marriage once adopted (CRC Committee 2016, para 13). To ensure the protection of children in this context, the all countries should set the minimum age of marriage no lower than 18 years.

**Figure 3.1 African countries with a minimum age of marriage below 18 years**




*Source: Compiled by ACPF from the laws/policies of African countries*

In recent years, some countries have made commendable progress in bringing their laws on minimum age of marriage in line with international standards (ACPF 2018). Zimbabwe's Constitutional Court unanimously ruled in 2016, that section 22 of the Marriages Act, which set the minimum age of marriage at 16 years for girls and 18 years for boys, was unconstitutional and therefore invalid, as neither girls nor boys should marry before 18.

However, its parliament has yet to act on this decision and amend the Marriages Act.[24] In Malawi, an ACERWC decision in a communication brought by the Institute for Human Rights Development in Africa on the definition of a child[25] led the government to amend the Constitution's definition of a child to a person under 18 years.[26] The amendment also repealed the provisions that allowed children to marry at 15 years with parental consent. This provision had been at odds with the Marriage, Divorce and Family Relations Act of 2015, which set the minimum age of marriage at 18 years for both boys and girls.

Other countries have set the minimum age of marriage at 18 years in law still allow marriage below this age with parental consent or authorisation from a judicial officer, minister of government or public officer, or by way of customary law. These include Angola, Benin, Chad, Comoros, Ethiopia, Guinea, Madagascar, Mauritius, Morocco, Mozambique, Namibia, São Tomé and Príncipe, Somalia, South Africa and Tunisia. Sudan has different minimum ages — which are both discriminatory and below the regional standard — for Islamic and non-Islamic marriages.[27] In some countries like Ethiopia, a person married below the age of 18 after obtaining the necessary authorization will no more be treated as a minor. In such instances the age of marriage set below 18 does not only violate the prohibition of child marriage but completely disregards the childhood of a person.

## 3.3 Minimum age of sexual consent

The minimum age of sexual consent refers to the age at which the national law of a country determines that it is lawful for a person to engage in sexual intercourse. Invariably, in all countries, the minimum age of sexual consent is expressed in the negative — that is, national criminal laws provide that it is unlawful to have sex with a person below a specific age, regardless of consent. The assessment reveals that no country has explicitly provided for minimum age of sexual consent in its laws. Rather, it is inferred through the criminalisation of sex with an individual below a specific age. Figure 3.2 shows the minimum age of sexual consent by country.

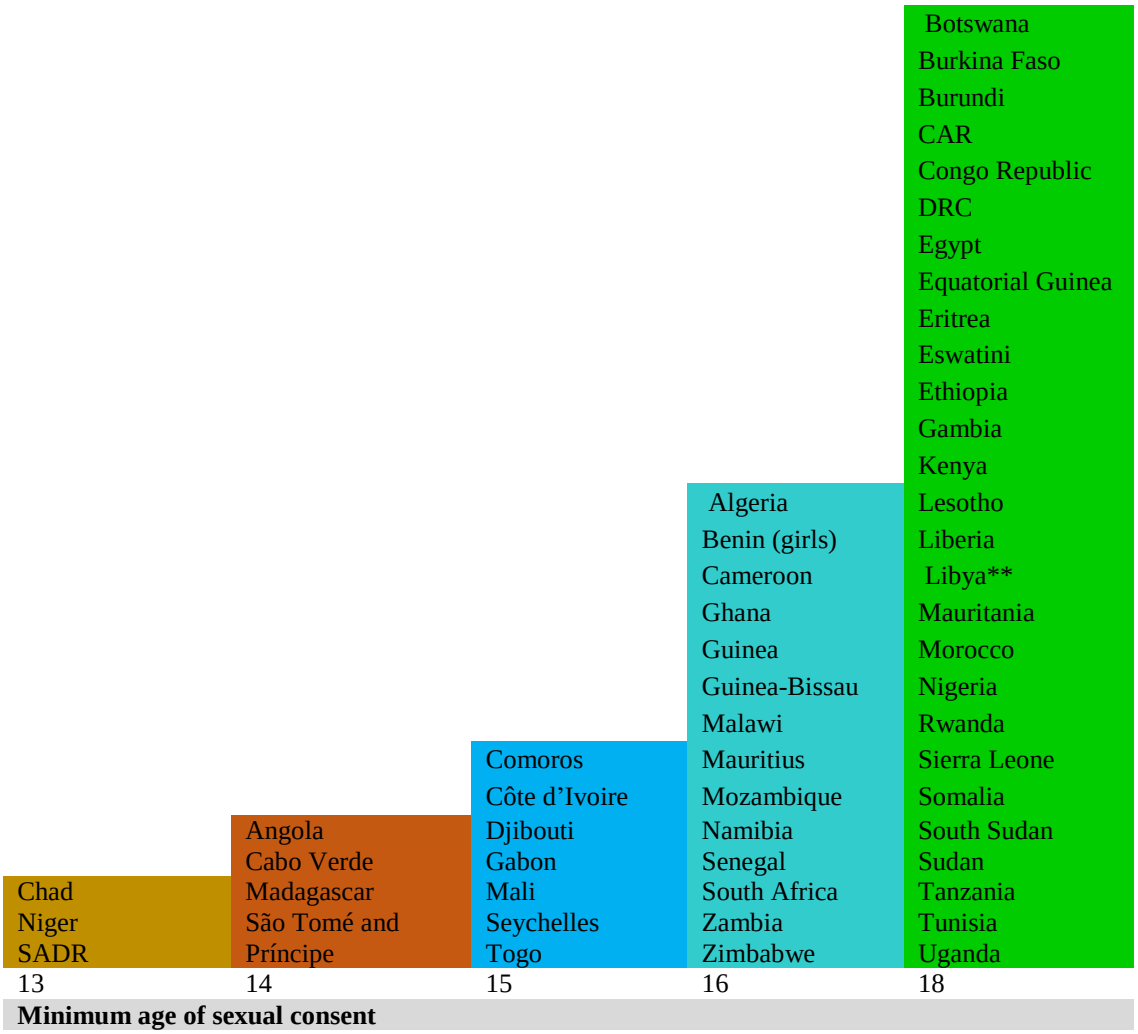
[24] *Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs & Others* Judgment No. CCZ 12/2015, Const. Application No. 79/14.

[25] *Institute of Human Rights and Development in Africa v Malawi*, a communication brought under Article 44 of the ACRWC.

[26] Constitution (Amendment) Act No. 3 of 2016; Malawi Constitution (1994).

[27] In Sudan, Article 34 of the Personal Status of Muslims Act of 1991 states that "*a guardian may give a mature woman in marriage if she consents to the husband and to the dowry. Her statement of her maturity is accepted unless it is conspicuously false. Maturity is determined on the attainment of puberty or the appearance of unmistakable physical signs*". Article 40 of the Act permits the marriage of a person of discretion, which is acquired at 10 years of age. A 10-year-old male is therefore permitted to marry if it is demonstrated that the marriage is likely to be in his best interest. A guardian may not, however, give a 10-year-old girl in marriage without the consent of a judge, based on considerations of advantage and good reason, provided that the husband is suitable and the dowry equals that of the girl's peers. For non-Muslims, Article 10 of the Marriage of Non-Muslims Act of 1926 provides that a competent court may invalidate a marriage entered into under the Act by a male under 15 years of age or a female under 13 years of age. Article 29 provides that if either one of the couple to be married is under 21 years of age and is not widowed or divorced, written and signed consent of the father must be obtained, or of the mother (or guardian) if the father (or both parents) is (are) deceased, delinquent or outside the country.

**Figure 3.2 Minimum age of sexual consent in Africa, by country**




** Age 16 for girls with parental consent

*Source: Compiled by ACPF from World Population Review (2020) and ACPF (2019)*

A minimum age of marriage that conflicts with a minimum age of sexual consent poses several challenges to eradicating child or forced marriage. In Sudan, for example, the minimum age of sexual consent for a girl is 18 years. But girls can marry at 10 years and the law specifically protects husbands from prosecution for sex within marriage to a girl under 18 years (ACHPR n.d., para 41.4).[28] Ordinarily, consummation is a prerequisite for a valid marriage; governments should therefore act to ensure the minimum age of marriage is set higher than that of sexual consent. In fact, where such consent is allowed for children aged below 18 years, it must never be given in the context of abuse or exploitation of the child.

The African Commission on Human and Peoples' Rights (ACHPR) has stated that the age of sexual consent must not be below 16 years (ACHPR n.d., para 41.4). Under international law, countries are required to provide for a specific minimum age of sexual consent. The CRC Committee notes that states that have ratified the CRC are required to ensure that specific legal provisions are adopted under domestic law that clearly set a minimum age of sexual consent

[28] Also, Section 316(a), Sudanese Penal Code, 2003.

(CRC Committee 2013a). It also notes that the minimum age of sexual consent must be the same for males and females and should reflect the evolving capacity, age and maturity of the child (CRC Committee 2003, para 9). The UN Committee on Economic, Social and Cultural Rights stresses the need for non-discrimination in the context of the right to sexual and reproductive health (CESCR 2016, para 23). On this basis, laws governing the minimum age of sexual consent should also apply uniformly to all persons, irrespective of gender.

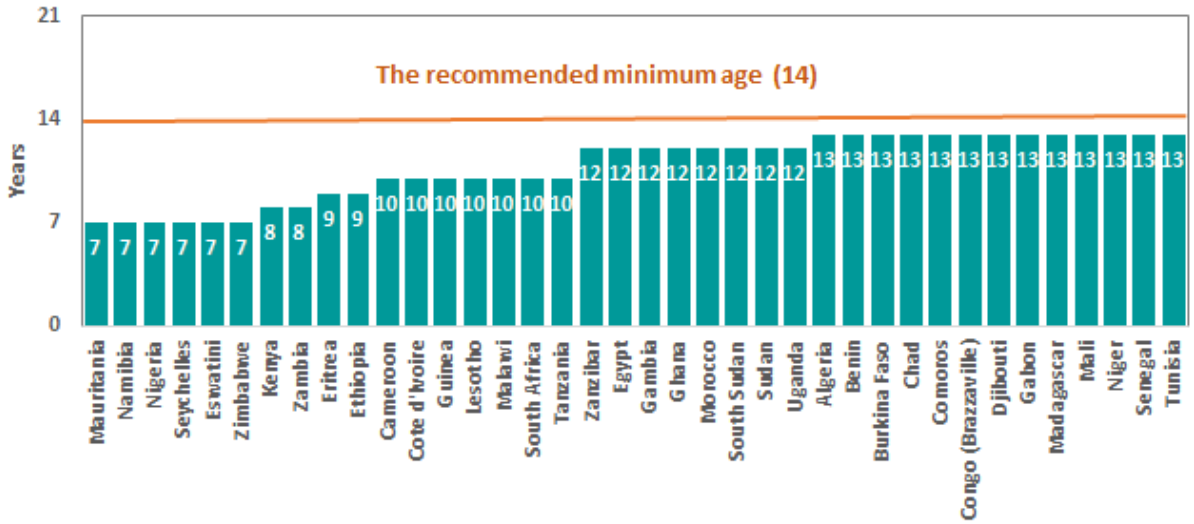
## 3.4 Minimum age of criminal responsibility

Neither the ACRWC nor the CRC sets a specific minimum age of criminal responsibility. The AU Principles and Guidelines on Fair Trial Rights set the minimum age of criminal responsibility at 15 years (principle O(d)). The CRC Committee recommends an absolute minimum age of criminal responsibility of 14 years (CRC Committee 2019, para 22), revised up from previous recommended minimum of 12 years (CRC Committee 2007, paras 32–33).

In 2011, ACPF and Defence for Children International developed the "Guidelines on Action for Children in the Justice System in Africa", which were endorsed by the ACERWC in 2012. These guidelines note the CRC Committee's 2007 recommended minimum age of 12 years, and recommend states to adopt this while endeavouring to progressively raise it to at least 15 years, in line with AU principles and guidelines.

Cabo Verde, Equatorial Guinea, Guinea-Bissau, Liberia, Mozambique and São Tomé and Príncipe have already set a higher minimum age of criminal responsibility at 16 years. The CRC Committee's 2019 upward revision to 14 years brings many countries into disparity with international standards. Before this revision, only 13 countries fell short of the international standard; now, 38 countries need to revise their laws.

**Figure 3.3 African countries where the minimum age of criminal responsibility is below 14 years**




*Source: Compiled by ACPF from the laws/policies of African countries*

## 3.5 Minimum age of employment

The ILO Convention 138 sets the general minimum age of employment at 15 years, but allows developing countries to set it at 14 years — or 13 years for light work. The domestic laws of all African countries except Kenya, Sierra Leone and Uganda are in line with the ILO Convention; and 29 have gone further, setting a minimum age of employment that is higher than 14 years (Table 3.2). Congo Republic, DRC and Gabon, for example, have set it at 16 years. In practice, however, poor enforcement means many children start work very young, and child labour continues to be widespread (ACPF 2018).

**Table 3.2 Minimum age of employment**

| 14 years | Above 14 years | Below 14 years for light work |
|---|---|---|
| **Angola, Benin, Botswana, Cameroon, CAR, Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Guinea-Bissau, Malawi, Mauritania, Namibia, Niger, Nigeria, São Tomé and Príncipe, Sudan, Tanzania** | Algeria, Burkina Faso, Burundi, Cabo Verde, Comoros, Congo Republic, DRC, Djibouti, Egypt, Eswatini, Gabon, Gambia, Ghana, Guinea, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Rwanda, Senegal, Seychelles, Somalia, South Africa, Togo, Tunisia, Zambia, Zimbabwe | Burundi, Egypt, Kenya, Lesotho, Mauritania, Somalia, South Sudan, Uganda, Zambia<br><br>Liberia allows employment of children below the specified age of employment but does not give the lowest age limit[29] |

Despite complying with international and regional standards, the following elements of national employment laws may affect compliance:

- Burkina Faso, Côte d'Ivoire, Cameroon, CAR, Gabon, Niger, Senegal, Seychelles and Sudan all allow for an exception to the minimum age of employment.
- Algeria and Mozambique allow employers to hire minors over specific ages with parental consent.
- Article 15(3) of the Namibian Constitution (1998) allows Parliament to legislate on circumstances justifying the hiring of a child under 14 years in a factory or mine, while Article 3(2) of the Labour Act (2007) prohibits the employment of children under 14 years.

## 3.6 Minimum age for army recruitment

Almost all countries meet the ACRWC and OPAC recommendation of 18 years as the minimum age of compulsory recruitment into the army (Table 3.3). This includes some countries that have not yet ratified the Optional Protocol.

[29] "It shall be unlawful for any person to employ or hire any child under the age of sixteen years during the hours when he is required to attend school in any portion of any month when school is in session; provided, however, that a person may employ minors under sixteen if he keeps a register and the school certificates of such employees open to inspection which certificates shall show that each of the said minors listed in the register is attending school regularly and is able to read at sight and write simple sentences legibly". Section 74, Labour Code 1956.

**Table 3.3 Minimum age for army recruitment**

| Minimum age | Countries |
|---|---|
| **Above 18 years** | Angola, Algeria, Benin, Ethiopia, Gabon, Morocco |
| **At 18 years** | Botswana, Burkina Faso, Burundi, CAR, Chad, Comoros, Congo Republic, Côte d'Ivoire, Djibouti, DRC, Egypt, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Lesotho, Madagascar, Mali, Malawi, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe |
| **Below 18 years** | Cameroon, Cabo Verde, Libya |
| **At 18 years, with parental consent** | Congo Republic, Kenya, Malawi, São Tomé and Príncipe, Seychelles. |
| **Not provided for in law** | Niger |

However, there are many countries in African that allow the voluntary recruitment of persons below the age of 18 with or without parental consent. The below table summarizes the data on voluntary recruitment of children into the army.

| Country | Minimum age | Remark |
|---|---|---|
| Algeria | 17 | - |
| Burundi | 16 | - |
| Cabo Verde | 17 | With parental consent |
| Djibouti | 16 | For military training |
| Egypt | 16 | |
| Guinea Bissau | 16 | With parental consent |
| Kenya | Under 18 | With parental consent |
| Lesotho | 17 | |
| Mauritania | 16 | With parental consent |
| Sao Tome and Principe | 17 | |
| Seychelles | Under 18 | With parental consent |
| Sierra Leone | Under 18 | With parental consent |
| Zambia | 16 | With parental consent |

Source: Child Soldiers: A Global Recruitment Index, Wold Vision

Cameroon has not yet ratified the OPAC. Congo Republic allows for a child below 18 years to consent to recruitment, with the consent of their parents or legal guardian.[30] Despite ratifying the OPAC, the minimum age in Cabo Verde and Libya is below 18 years, and Niger has no legal minimum age. Although Comoros, Eswatini and Zimbabwe have not yet ratified the OPAC, their minimum age is aligned with regional and international standards. But despite countries' consistency with regional and international standards, in practice, many children are recruited into militia forces across Africa.

[30] Article 49, Child Act of 2010.

# CHAPTER 4. GENERAL PRINCIPLES OF CHILD RIGHTS, CIVIL RIGHTS AND FREEDOMS

## 4.1 General principles

The AU and UN bodies recognise four general principles of children's rights: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to be heard. These principles shape the enjoyment of children's rights across the African continent.

### 4.1.1 Non-discrimination

Every child is entitled to enjoy the rights and freedoms recognised and guaranteed in the ACRWC and CRC, irrespective of their or their parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.[31] Any distinction, exclusion or restriction made on any of the above, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by a child, on the basis of equality with another child, of their human rights or fundamental freedoms, amounts to discrimination.

According to the ACERWC, non-discrimination is a non-derogable right that does not allow trade-off decisions and practices (ACERWC 2018c). The rule against discrimination accommodates favourable differential treatment of children with special needs and/or disabilities. The non-discrimination obligation requires State parties to actively identify individual children and groups of children whose recognition and realisation of rights may demand special measures, including the poorest and most marginalised (rural children, children with disabilities, children of imprisoned mothers, children on the move and many others).

In principle, the rule against discrimination is a standard constitutional imperative in African countries that also finds expression in legislation and policy documents. It is generally prohibited to subject children to discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.

However, various aspects of law and traditional practices remain discriminatory, and girls continue to suffer unfair disadvantage 30 years after the adoption of the ACRWC. For example:

- Although the 2001 Constitution of Comoros recognises gender equality, many of its legal texts do not recognise this principle. In matters of inheritance, for example, boys benefit twice as much as girls.
- The Family Code of Comoros makes no provision to ensure that children born outside of wedlock enjoy the same rights as those born in wedlock.
- The ACERWC held that the Sudanese Nationality Act discriminates by gender because it treats children born to Sudanese men differently from those born to Sudanese women (ACERWC 2018c). The former gets automatic nationality, while latter have to undertake administrative processes to be considered as nationals by birth. An amendment to the Nationality Act automatically revoking Sudanese nationality to children born to South Sudanese parents was also held as discriminatory as it arbitrarily deprived these children of Sudanese nationality on the basis of their parents' origin.

[31] Article 3, ACRWC; Art 2, CRC.

- The ACERWC also found that the government of Kenya's requirement for Kenyan Nubians to provide verification of their grandparents' origin to obtain identity documents is unfair discrimination on account of ethnic and religious affiliations (ACERWC 2011a).
- The CRC Committee has expressed concern about provisions of the Algerian Family Code "which continue to discriminate against girls and to maintain severe gender discrimination that negatively impact on child rights" (CRC Committee 2012, paras. 11, 29 and 30).
- The ACERWC found that pregnant girls are discriminated in the education sector and has raised the same concern with Tanzania and Mozambique, among others.
- The ACERWC also found that some countries discriminate against children born out wedlock by not protecting protection against the customary norms that discriminate children born out of wedlock. The ACERWC for instance recently raised the issue of lack of law on the protection of children born out of wedlock in Zambia.

Although many African laws are in conflict with the basic principles in the ACRWC and other human rights treaties, some states are changing their laws to eliminate segregation and promote affirmative action. For example, Kenya amended its Citizenship and Immigration Act of 2011 in 2012 and 2015 to permit the registration of children of all registered citizens, irrespective of parent's gender. This reversed the discrimination of children born to foreign fathers under the Births and Deaths Registration Act.

In most countries, customary norms and practices perpetuate discrimination in succession, marriage and asset ownership. This is exacerbated when the legislative framework allows customary laws to operate parallelly in these areas of life. In Burundi inheritance is governed by customary law which discriminates against girls. In Zambia and Botswana, customary laws are allowed to operate in cases of inheritance and the customary norms discriminates against girls. Another example is girls in Lesotho are excluded from succession, and there is stark disparity in services available to urban and rural children, in several countries (see, for example, ACERWC 2014b). Children born out of wedlock in Lesotho face discrimination by being given derogatory and embarrassing names, complicating their social development and wellbeing (ACERWC 2015b, para 22). In 2015, Lesotho agreed with the ACERWC recommendation to criminalise discrimination by making it a justiciable offence under the Child Protection and Welfare Act 2011 in the near future.

In South Africa, a High Court ruling declared that the customary law of succession's principle of primogeniture is in clear conflict with the Constitution.[32] In its decision, the court explained that the Reform of Customary Law of Succession Act (RCLSA) 11 of 2009, which came into operation in 2012, introduced a new era into the customary law of succession, harmonising the common and customary laws of intestate succession and providing for differences depending on a person's cultural affiliations. For example, if a person lived under a customary law system and died without a valid will, his or her estate had to devolve in terms of the Intestate Succession Act, but with certain modifications typical to customary law. Illustrating that customary law can be tamed, the RCLSA specifically includes women and children in its definition of "the descendant".

[32] See *M and Another v. M and Another* (63462/12) [2014] ZAGPPHC 1026 (10 December 2014) paras 18 and 19.

Although all countries have some provision on non-discrimination, there is a major gap in around disability. Only 21 countries — Algeria, Angola, Burundi, Egypt, Eritrea, Eswatini, Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Rwanda, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Uganda, Zambia, Zimbabwe — have included non-discrimination on the grounds of disability in their constitutions. Tanzania and Togo prohibit discrimination on grounds of disability in their children's statutes.

### 4.1.2 The best interests of the child

Most countries' normative frameworks embrace and include the best interests of the child as a primary consideration in all matters concerning children. The "best interest" serves as a foundational principle of both the CRC and ACRWC. Article 4 of the ACRWC states that "*the best interest of the child shall be the primary consideration in all actions concerning the child*", implying that this principle takes priority over all other considerations. Article 3(1) of the CRC states that "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest shall be a primary consideration*". The ACRWC's standard is firmer and stronger than the CRC's.

The best interests principle originated in family law, in the context of custody and guardianship issues in matrimonial clauses (ACPF and EAC 2018). The ACRWC and CRC both elevated the importance of this principle by extending its application to all matters relating to children in all spheres of their lives (ACPF and EAC 2018). The best interests principle endeavours to keep the child at the forefront of all judicial, administrative and legislative activities. Box 4.1 has details of the 43 African countries that recognise the principle in their constitutions and child-centred legislation.

**Box 4.1 African countries that provide for the best interests principle in law**

Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Congo Republic, DRC, Egypt, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

Of these, the following recognise the best interests principle as a paramount, rather than a primary, consideration when dealing with children:

- Burundi
- Congo Republic (Articles 3 and 4 of the Children's Protection Law of 2010)
- DRC (Article 6 of the Child Protection Act (2009) of DRC)
- Ethiopia
- Kenya
- Rwanda (Law No. 54/2001 Relating to the Right and Protection of the Child)
- São Tomé and Príncipe (Article 89 of Law 2/77, legally regulating family institutions)
- South Sudan (Child Act 2008)
- Tanzania (The Law of the Child Act 2009)
- Uganda

In Malawi, the principle was first applied by the Supreme Court in an adoption case, and later incorporated into the Child Act.[33]

[33] In *Re: The Adoption of Children Act, CJ a female infant, MSCA Adoption*. Appel Number 28 of 2009.

In Senegal, the principle is provided for in the Law on HIV.[34]
In Zambia, it is provided for in the Matrimonial Causes Act.[35]

Despite this legal recognition, the human rights treaty bodies are concerned that the principle is insufficiently integrated into policies, programmes and decision making. For example, the ACERWC has expressed concern that the Algerian Family Law provision that the father is the guardian of a minor — only recognising the mother as guardian upon the father's death — undermines the best interests of the child in the context of child custody decisions (ACERWC 2015a, para 15).[36] In Eritrea, the ACERWC has lamented that the best interests principle is not properly represented in legal provisions relating to child rights and is therefore relegated by judicial and administrative bodies (ACERWC 2017, para 7). In a similar vein, the CRC Committee indicated its concern that the principle was "*not well understood and known among [Egyptian] State authorities and remain(ed) insufficiently integrated into policies, programmes and decision-making processes*" (CRC Committee 2011b, paras. 36 and 37).[37]

### 4.1.3 The right to life, survival and development

Article 5 of the ACRWC states that every child has an inherent right to life, which shall be protected by law. It requires State parties to ensure, to the maximum extent possible, the survival, protection and development of children, and prohibits the death penalty for crimes committed by children.

The ACERWC has further elaborated on this right by calling upon State parties to aim their implementation measures towards achieving optimal physical, mental, spiritual, moral, psychological and social development for all children (ACERWC 2018a, para 4.3). In line with this, all African countries have entrenched the right to life into their constitutions as an inviolable right. Although they do not specifically mention children, it is a right that applies to all persons, including children. The survival and physical, psychological and spiritual development of the child is also a priority consideration in child rights governance discourse. However, while all African states have laws on the right to life, more remains to be done in terms of legislative measures regarding children's survival and development.

**Box 4.2 Legislative provisions on children's right to survival and development**

**Egypt**: Article 3(3) of The Child Law 2008 provides for children's right to life, survival and development in a supportive family environment.

**Ethiopia** and **Eritrea**: The father and the mother are jointly required to perform the functions of guardian and tutor of the child.

**Ghana**: Section 6(3)(b) of the Children's Act 1998 places responsibilities on parents towards their children, including the duty to provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development.

**Kenya**: Section 54(1)(e) of the constitution provides for the child's right to parental care and protection, with "*equal responsibility of the mother and father to provide for the child, whether they are married to each other or not*".

**Lesotho**: Section 22(c) of the Child's Protection and Welfare Act 2011 declares that the State has a duty to formulate policies that will ensure a child's survival and development.

[34] Article 12, Law on HIV/AIDS, 2010.
[35] Section 71(1)(b)(i), Matrimonial Causes Act, 2007.
[36] See also CRC Committee 2010b, para. 30.
[37] See also CRC Committee 2014a, para. 26.

**Malawi**: Section 3(1)(b)(ii) of the Child Care, Protection and Justice Act 2010 requires parents to provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including adequate diet, clothing, shelter and medical attention.

**South Africa**: Section 13 of the Maintenance Amendment Act 2015 states that a person who fails to make any particular payment in accordance with a maintenance order is guilty of an offence and hence subject to a fine or imprisonment.

**Tanzania**: The Law of the Child Act also provides for the payment of maintenance, stating that an application for maintenance may be made against any person who is eligible to maintain or contribute towards the welfare and maintenance of a child.

Forty-two countries have abolished capital punishment. The exceptions are Botswana, Comoros, DRC, Egypt, Ethiopia, Lesotho, Malawi, Nigeria, Somalia, South Sudan, Sudan, Uganda and Zimbabwe, although in most of these countries, it does not exist in practice (Amnesty International 2019). Capital punishment against children is prohibited in all countries except Egypt and Nigeria. In Zimbabwe, this prohibition extends to persons under 21.[38] In Botswana, it is subject to determination at the President's pleasure.[39] In Gambia, the government imposed a moratorium on capital punishment with a view to abolishing it by law.

### 4.1.4 The right to be heard

As subjects rather than objects, children have views about matters that affect them. Article 7 of the ACRWC provides for their freedom of expression, stating that "*every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws*". Article 12(1) of the CRC obliges State parties to ensure that children who are capable of forming their own views have the right to express those views freely in all matters that affect them (CRC Committee 2009, para 15). Both treaties consider the child's age and maturity and apply to a broad spectrum of settings, including judicial and administrative proceedings affecting the child[40] in: the family; institutions offering alternative care; in health care; in education and schools; in play, recreation, sports and cultural activities; the work place; immigration and asylum proceedings (CRC Committee 2009, paras 90–131).

Child participation efforts and processes should comply with nine basic principles and be: transparent and informative; voluntary; respectful; relevant; child-friendly; inclusive; supported by training for adults; safe and sensitive to risk; and accountable (CRC Committee 2017b, 13–14). The CRC obliges State parties "*to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress"* (CRC Committee 2017b, para 48). Some countries have made progressive steps towards entrenching respect for the views of children in law (Boxes 4.3 and 4.4).

**Box 4.3 African countries that have enshrined respect for the views of the child in law**

Angola, Benin, Botswana, Burkina Faso, Cabo Verde, Congo Republic, Côte d'Ivoire, DRC, Egypt, Eswatini, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique,

[38] Section 48(2)(c)(i), Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[39] The Penal Code of Botswana, Sections 26(2) and 32(1), 10 June 1964, as updated through to 2005. Criminal Procedure and Evidence Act of Botswana, Section 304, 1 January 1939, as updated through to 2005. See Death Penalty Database (2020). Botswana, Information current as of: April 22, 2020.
[40] Article 4(2), ACRWC; Art 12(2), CRC.

Namibia, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda, Zimbabwe.

**Box 4.4 Notable legal measures on respect for the views of the child**

**Kenya**: Section 16 of the Prevention of Torture Act No.12 of 2017 provides for intermediaries to serve as a protective measure of vulnerable witnesses such as child survivors of torture.[41]

**South Africa**: Promotes the role of intermediaries by facilitating children's participation in judicial proceedings.[42] An intermediary is a person with special skills in communicating with children who ensures that questions by the court are conveyed in a manner that the child can comprehend and that the child's answers are conveyed in a manner that the court can understand.[43] By law, male children may refuse circumcision, depending on their age and maturity.[44] Children aged 12 years and above with sufficient maturity and competent understanding may also consent to medical treatment or performance of surgical operations under specified circumstances.[45] A child may lodge an application for the enforcement of their rights in either the Bill of Rights of the South African Constitution or the Children's Act. Section 10 of the Children's Act 2005 (as amended) provides that every child with the age, maturity and stage of development to be able to participate in any matters concerning them has the right to participate in an appropriate way, and views expressed by the child must be given due consideration.

**Benin, Cabo Verde, Guinea, Liberia** and **Togo**: Explicitly enshrine the principle of "respect for the views of the child" in their child law statutes.

**Tanzania**: Section 11 of Law of the Child Act 2009 stipulates that a child has the "*right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his [or her] well-being*".

**Egypt**: The Child Law 2008 protects the right of the child to form and express their views and be heard in all matters affecting them.

**Zambia**: Although the law does not yet specifically provide for the views of the child to be solicited or considered in the various sectors concerning children (CRC Committee 2016b, para 29), this may be addressed when the Draft Children's Code is passed into law.

## 4.2 Civil rights and freedoms

### 4.2.1 Name, nationality and birth registration

Article 6(4) of the ACRWC provides all children with the rights to a name and nationality. State parties to the Charter are required to ensure their constitutional legislation recognises that a child, who at the time of birth is not granted nationality by any other state in accordance with its laws, acquires the nationality of the state in the territory of birth. The ACERWC expounds this right in General Comment No. 2 on Article 6 of the ACRWC on the Right to Birth Registration and Nationality. In the General Comment, the Committee ensures that the right to birth registration entails the provision of a universal and free birth registration for children immediately after birth.

Although all African states have established rules providing for the conferral of their nationality in their constitutions or legislation, these do not always translate into a commitment to avoid statelessness as there are hundreds of thousands of stateless people living in Africa. Indeed, in

[41] Section 16, The Prevention of Torture Act No.12 of 2017.
[42] *K v Regional Magistrate* 1996 (1) SACR 434 E.
[43] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* [2009] ZACC 8 para 164.
[44] Section 12(10), Children's Act 38 of 2005.
[45] Section 129 (2) and (3), Children's Act 38 of 2005 (as amended) of South Africa.

certain states, nationality laws conflict with the principles of the ACRWC and other human rights instruments (ACERWC 2014a, paras 4 and 5).

Civil rights — including the rights to a name and nationality, freedom of assembly, freedom of association, freedom of religion and privacy — are constitutionally guaranteed across many African countries. Birth registration is mandatory in all African states, however, it is not free in most African Countries. Some levy fee for registration and some others impose sanctions for non-registration of children. For example, in Mauritania, failure to report the birth of a child within 20 days is punishable by imprisonment, a fine of 40,000 ouguiyas (about USD 1,099.35) or one of two penalties.[46] Late birth registration is fined with a fee in South Africa, Mozambique, Niger, Senegal, Eswatini, Ethiopia, Cote D'ivoire, Angola (there is also fee for registration), Burundi, Guinea, among others. In Seychelles, if a birth is not declared within 30 days, it can only be registered upon a judge's order and payment of a fine not exceeding 100 rupees (about USD4.72).[47] In Tunisia, failure to register the birth of a child within 10 days of delivery is punishable by six months' imprisonment.[48] In Madagascar registration is allowed in the first 12 days after which there is criminal penalty. In Liberia, birth registration is free for children under five years, whereas children above 5 years of age are charged a fee of USD 7.00. Similarly, in Zimbabwe the registration of children below 6 years is free while children above 6 years of age are charged nominal fee of USD 2.00. Some African countries like Benin, Burundi, and Lesotho charge fees for birth certificate even if birth registration is free. Some countries have taken steps to remove fines and penalties. For instance, Rwanda and Tanzania removed fines on late registration and fees on birth certification following the recommendations of the ACERWC.

There have been positive developments across the 11 or so states in West Africa that do not charge for registering a birth and issuing a birth certificate, or apply waivers for children of a certain age. The exceptions are Burkina Faso, Guinea, Gambia and Togo. The ACEWRC has recommended enhanced training for service agents and increasing public awareness about these rights to counteract remaining obstacles to more efficient birth registration.

Several North African states have legislation giving children the right to a name, nationality and registration at birth. These include Egypt's Child Law 2008 and Morocco's Family Code. However, there are concerns regarding birth registration for children born out of wedlock in some states, such as Algeria, and the high number of children that remain unregistered in countries such as Morocco.

Granting nationality is another problematic area. Many African children are undocumented, making it difficult for them to obtain recognition of their parents' nationality or the state where they are born or reside. The Comorian Nationality Law, for example, provides no legal protection for children born in the country who would otherwise be stateless (OHCHR 2018, para 58). In 2018, Sudan was found to be in violation of Article 3 of the ACRWC after it introduced an amendment to its Nationality Act of 1994 arbitrarily depriving children of their Sudanese nationality on the basis of their parents' South Sudanese origin (ACERWC 2018c, para 59). The selective application of this development rendered it discriminatory; Sudan is one of the few African states that discriminate between men and women's right to confer their nationality on their children (ACEWRC 2014, para 6).

[46] Article 1, Ordinance on the Judicial Protection of the Child, 2005.
[47] Section 15(2), The Civil Status Act, 1893.
[48] Article 25, Act Regulating Civil registration, 1957.

There are also doubts about the observance of due process in procedures around the recognition, conferral and withdrawal of nationality, which leads to arbitrary decision making (ACEWRC 2014). All Southern African states except South Africa and Lesotho are prepared to accord nationality or citizenship status to all children under the age of five in their jurisdictions. But childhood statelessness is increasing in South Africa, due to its descent-based system of conferring citizenship. The law provides no nationality rights to children of foreign parents, even if they are born in the territory.

Although constitutions across East Africa guarantee nationality rights, the ACERWC and UNCRC have both drawn attention to gaps in Kenya's birth registration practices that have left several categories of persons — including children born out of wedlock, children of minority groups and children of refugees, asylum-seeking or migrant families — unregistered (ACERWC 2011a). In 2009, the ACERWC urged the Kenyan government to implement the decision in the Nubian community's case against the state[49] and grant nationality to Nubian children (ACERWC 2009, para 23). Kenya consequently revised its immigration laws, leading to the Kenya Citizenship and Immigration Act, Cap. 172 in 2015, which standardises the processes and requirements for acquiring citizenship. There is no further evidence of fundamental change to the system — for example, conferral of nationality is still descent-based.

### 4.2.2 Other civil rights

Generally, civil and political rights are provided for as general rights applicable to all persons (adults and children). There is a need for laws and policies to be more specific on children when providing for these rights, to ensure they cater for children's specific needs and offer sufficient protection from harm and exploitation in exercising these rights.

**Table 4.2 Civil rights provision in African law**

| Nature of rights | ACERWC reference | Status in African countries | Comments |
|---|---|---|---|
| **Freedom of thought, conscience and religion** | Article 9 | All African countries | Comoros and Somalia have only one officially recognised religion |
| **Right to privacy** | Article 10 | All African countries | Exposure on social media is a threat to children's privacy that needs to be addressed in contemporary legislation |
| **Freedom from torture or other cruel, inhuman or degrading treatment or punishment** | Article 16 | All African countries except Libya and Tunisia | In Algeria, Egypt and SADR, the prohibition on torture is linked to human dignity |

Customary and religious beliefs in Africa sometimes infringe on children's civil rights and freedoms, but regulating religion is a controversial and sensitive issue. In Lesotho, the ACERWC has recommended that children be accorded the freedom to follow different religious beliefs than their parents and noted that religious beliefs are sometimes used to defend criminal offences such as bodily injury for luck (ACERWC 2015b, para 26). The committee

[49] The *Nubian Community in Kenya v. The Republic of Kenya: Summary of Complaint.* Communication 317/2006.

has also raised concerns around the voodoo religion affecting children's education in Benin (ACERWC 2019, para 50).

Rwanda is progressively developing a unique religion-regulating profile in the region. Article 13 of its Law No. 27/2001 Relating to Rights and Protection of the Child against Violence expresses children's right to belong to a religion of his or her choice, subject to the good guidance and advice of their parents, for the sake of the interests of the child.

### 4.3 Responsibilities of the child

Article 31 of the ACRWC provides for responsibilities of the child. This is one of the unique features of the ACRWC that distinguishes it from the CRC. According to Article 31, "*every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community*". Subject to their age, ability, and other limitations contained in ACRWC, children have a duty to:

- Work for the cohesion of the family, respect their parents, superiors and elders at all times and assist them in case of need.
- Serve their national community by placing their physical and intellectual abilities at its service.
- Preserve and strengthen social and national solidarity.
- Preserve and strengthen African cultural values in their relations with other members of society, in the spirit of tolerance, dialogue and consultation, and contribute to the moral wellbeing of society.
- Preserve and strengthen their country's independence and integrity.
- Contribute to the best of their abilities, at all times and all levels, to promoting and achieving of African unity.

These duties reflect the values of respect, family integrity, service, patriotism and solidarity at all levels of social organisation. Other responsibilities of the child — such as respecting the environment and the human rights of other children — prompt children's participation in the affairs of their countries, reinforcing their rights to development, wellbeing and education.

Some African countries have specifically harmonised their laws and policies in line with this provision (Table 4.3).

**Table 4.3 Legal provisions on children's responsibilities in African countries**

| Country and law | Legal provision |
|---|---|
| **Benin** | Children are obliged to, among other things, honour their parents, respect national identity and values and assist their parents in case of need (Article 44 of the Children's Code) |
| **Burkina Faso** | Children have the duty to respect and assist their parents (Article 23 of the Constitution) |
| **Congo Republic** | Children have the duty to respect and honour their parents, care for their parents, treat other children with respect and dignity, and respect human rights generally (Article 46 of the Constitution) |
| **DRC** | Children have the duty to assist their parents (Article 40 of the Constitution) |
| **Eswatini** | Children have the duty to respect their parents at all times and maintain those parents in case of need (Article 29 of the Constitution of 2005)<br>Children have the duty to work for family cohesion, respect their parents, serve the national community, preserve and strengthen social and national solidarity, and |

| | |
|---|---|
| | uphold the positive values of the community (Section 20, Children Protection and Welfare Act of 2012) |
| **Gambia** | Responsibilities of the child are set out as provided for in Article 31 of the ACRWC (Section 23 of the Children's Act of 2005) |
| **Kenya** | Stipulates that due regard should be accorded to the responsibilities of the child in the application of the provisions of the Children Act, and in any matter before a court of law concerning any child (Section 21, Children Act of 2001, revised edition 2018) |
| **Liberia** | Children have a duty to contribute to diligence towards studies and work (Children's Act 2011)<br>The act also provides for social values that a parent, teacher and any person responsible for providing guidance and direction to a child should promote when giving guidance and education to the child (Section 1, Article VI)<br>It also calls for relatives to guide the child, based on their best interests, using tradition and cultural standards to develop the child's sense of responsibility, subject to their evolving capacity. |
| **Lesotho** | Children have a responsibility towards family, community and country (Section 21, Children's Protection and Welfare Act 2011) |
| **Malawi** | In the application of the provisions of this act, and in any matter concerning a child, due regard shall be had to duties and responsibilities of the child (Section 4, Child Care, Protection and Justice Act of 2010) |
| **Mali** | All children have duties to their parents, family, society, government and other legally recognised communities and the international community (Article 21, Child Protection Code of 2002) |
| **Mozambique** | Law on the Promotion and Protection of the Child Act No. 7/2008 |
| **Namibia** | Children have responsibility towards family, society, the state and the international community (Article 31, Child Care and Protection Act No. 3 of 2015) |
| **Nigeria** | All children have responsibilities toward their family and society, the Federal Republic of Nigeria and other legally recognised communities nationally and internationally (Section 19, Child's Rights Act of 2003) |
| **Sierra Leone** | Subject to age and ability and evolving capacities, all children shall contribute towards family cohesion, respect parents and other people, exhibit diligence towards studies and work, and strengthen the positive cultural values of their community (Article 45, Child Rights Act)<br>Parents', relatives' and service providers' guidance of the child shall include the use of tradition and cultural standards to develop their sense of responsibility (directed towards the child's own current and future welfare, respect of parents and elders, the welfare of others, family, society, country and humanity in general), subject to their evolving capacities (Article 44, Child Rights Act) |
| **Rwanda** | Children have a responsibility to respect their parents, guardians, teachers, other children and all those older than them; they must help their parents and guardians, as long as this does not harm their health; they must love their nation and serve it depending on their ability; they are obligated to attend primary school and any level of school their parents, guardians or the state manages to access for them (Articles 25–28, Law No. 27/2001 on the Rights and Protection of the Child from Violence) |
| **South Africa** | All children have responsibilities appropriate to their age and ability towards their family, community and the state (Article 16, Child Act of 2005) |
| **South Sudan** | All children, subject to their age and ability, have a duty and responsibility to: work for family cohesion; respect their parents, guardians, superiors and elders and assist them in case of need; serve the community by placing their physical and intellectual abilities at its service; preserve and strengthen social and national solidarity; and uphold the positive values of their community and maintain good and cordial relations with other community members (Article 37, Child Act of 2008) |

| | |
|---|---|
| **Togo** | All children have duties towards their parents, family, society, state and every other legally recognised community including the international community; according to their age and capacity and with due recognition of related restrictions contained in the code, all children have the duty to respect: their parents, superiors and older persons under all circumstances, and if the need arises, assist them; other children; their identity, language, cultural and national values; their national environment and endeavours for its protection; the Constitution and other laws of the Republic; and the rights of humans and the child (Articles 428–429, Children's Code) |

*Source: Copies of the laws cited are available at ACPF (2019)*

Among the 19 countries that provide for the responsibilities of the child, the most comprehensive provisions — from Gambia, Kenya, Liberia, Mali, Malawi and South Sudan — are modelled after Article 31 of the ACRWC. Unlike the ACRWC, which is gender-neutral, some countries have drafted their laws in gender-sensitive terms, referring to "his/her". No North African country has legally embraced the duties and responsibilities of the child.

## CHAPTER 5. EDUCATION, HEALTH AND FAMILY ENVIRONMENT

### 5.1 Education

Article 11(2) of the ACRWC provides that every child has the right to an education, which is directed to promoting the development of the child's personality, talents and mental and physical abilities to their fullest potential. Among other things, the charter specifies that the education provided must preserve and strengthen positive African morals, traditional values and cultures. [50] t also outlines that State parties must take all appropriate measures to: provide free and compulsory basic education; encourage the development of secondary education in its different forms and progressively make it free and accessible; and take special measures for female, gifted and disadvantaged children, to ensure all sections of the community have equal access to education.[51]

Education is both an empowering tool and a protective measure against child marriage, child labour and other practices that disrupt childhood development. A movement towards universal primary (basic) education is sweeping the continent, mainly characterised by fee waivers and cost subsidies. Free and compulsory education, particularly primary education, plays an important role in ending exploitative child labour and securing children's future livelihoods, as *"children at school are less likely to be in full-time employment, while children with no access to education have little alternative but to enter the labour market, often exposing them to work that is dangerous and exploitative"* (ACPF 2012b, 108).

According ACPF background research, most African nations' constitutions[52] guarantee education as a substantive right; however, some countries — such as Benin, Ethiopia, Lesotho, Liberia and Nigeria — merely recognise it as a duty of government or a principle of national policy, and not expressly as a right (ACPF 2018). But constitutional recognition does not necessarily mean that education is free, compulsory or inclusive (Table 5.1). Extraordinarily, under Article 7 of its constitution, the CAR provides free education for all persons at all levels.

**Table 5.1 Provision of free, compulsory and inclusive education in Africa**

| Approach to primary education | Countries |
|---|---|
| **Free** | All except Comoros, Mozambique, South Africa |
| **Free and compulsory** | 47 countries: Algeria, Angola, Benin, Botswana, Burundi, Burkina Faso, Cameroon, Cabo Verde, CAR, Chad, Congo Republic, Côte d'Ivoire, DRC, Djibouti, Egypt, Equatorial Guinea, Eritrea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, South Sudan, Sudan, Swaziland, Togo, Tunisia, Uganda, Zambia, Zimbabwe, Mozambique |
| **Free, compulsory, and inclusive** | 23 countries: Algeria, Angola, Benin, Burkina Faso, Cameroon, CAR, Congo Republic, Côte d'Ivoire, Egypt, |

[52] Algeria, Angola, Cameroon, Cabo Verde, CAR, Chad, Congo Republic, DRC, Egypt, Equatorial Guinea, Eritrea, Gambia, Ghana, Guinea-Bissau, Kenya, Liberia, Libya, Madagascar, Malawi, Mali, Morocco, Mozambique, Namibia, Niger, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo and Uganda.

| | |
|---|---|
| | Ethiopia, Ghana, Kenya, Lesotho, Liberia, Libya, Morocco, Namibia, Sierra Leone, Somaliland, South Sudan, Sudan, Tanzania, Uganda, Zambia |
| **Right to inclusive education provided for in the constitution** | Algeria, Angola, Côte d'Ivoire, Kenya, Libya, Morocco |
| **Right to inclusive education provided for in Education Act** | Zambia |
| **Right to inclusive education provided for in Children's Act** | Benin, Liberia, Namibia, South Sudan, Sudan |
| **Right to inclusive education provided for in statute on persons with disabilities** | Burkina Faso, Cameroon, CAR, Congo Republic, Egypt, Ghana, Morocco, Tanzania, Uganda |
| **Right to inclusive education provided for in education policies** | Ethiopia, Lesotho, Malawi, Namibia, Sierra Leone, Somaliland, |

*Source: Compiled by ACPF from thematic summaries on harmonisation of laws on children (ACPF 2019)*

Some countries where education is compulsory impose a penalty for denying a child the right to education. For example, parents in Uganda, Zambia, Zimbabwe and Nigeria who fail to send a child to school face penalties ranging from a fine to imprisonment (ACPF 2018; Table 5.2).

**Table 5.2 Penalties for contravening compulsory education provisions**

| Country | Penalty range | Statute |
|---|---|---|
| **Nigeria** | Reprimand or fine to two months' imprisonment | Article 2(4), Compulsory, Free, Universal Basic Education Act 2004 |
| **Uganda** | 50-unit fine to one year's imprisonment | Article 51, Education Act No. 13 2008 |
| **Zambia** | A fine not exceeding 100,000 penalty units to imprisonment for a period not exceeding one year, or both | Article 17(4), Education Bill 2011 |
| **Zimbabwe** | A fine not exceeding level six or imprisonment for a period not exceeding two years | Section 5(2), Education Amendment Act 2020 |

*Source: Compiled by ACPF from thematic summaries on harmonisation of laws on children (ACPF 2019)*

But free and compulsory education alone is not enough if governments do not set a common minimum age for leaving school and starting work. Any discrepancy between the two can result in children failing to complete compulsory schooling or starting work before the legal minimum age (ACPF 2018). To ensure this does not happen, most countries have a minimum age for completing primary education that is consistent with the legal minimum age for entering into employment. Table 5.3 lists those that do not.

**Table 5.3 Countries with a discrepancy between the minimum age for starting employment and for ending compulsory education**

| Country | Age for ending compulsory education (years) | Minimum age for starting employment (years) |
|---|---|---|
| **CAR** | 15 | 14 |
| **Côte d'Ivoire** | 16 | 14 |
| **Morocco** | 18 (full time up to 15 years) | 15 |
| **Malawi** | Article 13 of the constitution provides for compulsory primary education, but Article 25 limits this to at least five years of primary education. As such, the maximum age depends on the age at starting school; in rural areas, children often start late. | 14 |
| **Namibia** | 16 | 14 |
| **Niger** | 16 | 14 |
| **Seychelles** | 17 | 15 |

*Source: Compiled by ACPF from thematic summaries on harmonisation of laws on children (ACPF 2019)*

Although many states constitutionally and/or legislatively guarantee the right to free and compulsory basic education, some schools — for example, in Zimbabwe — heavily charge parents through other means, such as exorbitant levies and examination fees. Further, due to a lack of budgeting for children's rights and related infrastructure, children with disabilities and other vulnerable groups do not have equal access to education.

Enhancing children's education is broader than merely waiving fees. It requires holistic approaches that address multi-sectoral challenges, and efforts are needed to ensure access to inclusive education, including special needs education (see, for example, ACERWC 2009, para 47 highlights). In Malawi, school dropout rates are high among children with albinism due to fear of attacks and inadequate provision for their needs (SADC 2015, para 5.1).

ACERWC has called for minimum standards for all educational institutions to address the high disparity in quality of education between private and public schools (ACERWC 2009). Regional economic communities have also adopted their own frameworks for promoting quality education in their partner states. In 2015, the Southern African Development Community (SADC) devised a policy framework on care and support for teaching and learning, to legally enable education for all, guarantee access to and retention within the system and assure quality teaching and learning for optimal outcomes. This framework provides a basis for future action by Ministries of Education in promoting, protecting and fulfilling the right of all children to education (SADC 2015, para 5.1). The EAC recognises education as compulsory and has worked on harmonising its education systems and training curricula since 2008.

Article 11(6) of the ACERWC requires states to take "*all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability*". Elsewhere, governments are urged to ensure that pregnant students can continue their education during pregnancy and after birth by eliminating expulsion, suspensions or waiting periods for pregnant girls (CEDAW Committee & CRC Committee 2014; CRC Committee 2017e; CRC Committee 2015). There have been positive developments in countries that have affirmed, by law or policy, the right of pregnant children not to be expelled from school. Gender parity has been largely achieved in primary-level enrolments, but girls' education remains at risk of disruption from early

marriage, teenage pregnancy and sexual abuse (SADC 2015, para 2.4.2; see also ACERWC 2009, para 47 and CRC Committee 2016b, para 53b). Treaty monitoring bodies have found that forcing girls to undergo pregnancy testing in schools, expelling them when pregnant and denying re-entry after childbirth violates girls' rights to education, equality and non-discrimination. For example, the CRC Committee and the CEDAW Committee have both called on states to establish scholarships to facilitate young mothers' re-entry into school (CEDAW Committee 2016). Girls are sometimes forced into marriage with the perpetrators (ACERWC 2009, para 47).

**Table 5.4 School re-entry policies for pregnant girls in African countries**

| Approach in law and policy | Countries |
|---|---|
| **Expulsion policies or decrees** | Equatorial Guinea, Sierra Leone, Tanzania, Togo[53] |
| **Conditional re-entry policies** | Botswana, Burundi, Cameroon, Gambia, Kenya, Liberia, Madagascar, Malawi, Mozambique, Namibia, Senegal, South Africa, Swaziland, Zimbabwe |
| **Policies or strategies to provide continuation** | Cabo Verde, Gabon, Côte d'Ivoire, Rwanda |
| **Laws, but no policies, protecting their right to stay in school or resume education** | Benin, DRC, Lesotho, Mauritania, Nigeria, South Sudan, Zimbabwe |
| **Laws or practices that criminalise girls and young women who become pregnant outside marriage** | Algeria, Egypt, Libya, Mauritania, Morocco, SADR, Sudan, Tunisia |
| **No laws or policies related to retention of pregnant girls or adolescent mothers in schools** | Angola, Burkina Faso, CAR, Chad, Comoros, Congo Republic, Djibouti, Eritrea, Ethiopia, Ghana, Guinea, Guinea-Bissau, Mauritius, Niger, São Tomé and Príncipe, Seychelles, Somalia, Uganda |

*Source: ACPF and Plan International (2019) Getting Girls Equal: The African Report on Girls and the Law, p22.*

## 5.2 Basic health and welfare

Article 14 of the ACRWC provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. The charter lists the measures that states are required to undertake to fulfil of this obligation, including: reducing infant and child mortality rate; promoting the development of primary healthcare; providing adequate nutrition and safe drinking water; applying appropriate technology to combat disease; integrating basic health service programmes in national development plans; and supporting the mobilisation of local community resources to develop primary healthcare for children. Constitutional and statutory frameworks embody the right to health, which entitles children to medical and healthcare.

Every state in Africa has developed some form of policy related to child healthcare and programmes to ensure better access to quality healthcare services for children. However, it is not enough to incorporate the right to health for children in laws and policies. States must also ensure that the principles of availability, accessibility, acceptability and quality are legally entrenched as essential elements of the right to health. The ACERWC has also noted that children with disabilities — such as children with autism — are disadvantaged in healthcare services (ACERWC 2009, para 40). These are the hidden forms of neglect of children's right

[53] Togo declared to UN bodies that it no longer abides by a regulation that forbids pregnant girls from going to education facilities, but it has not officially abrogated it or replaced it with a positive continuation or re-entry policy (HRW 2018a); see also CEDAW Committee 2012.

to health and governments must ensure that the legal framework for children sufficiently addresses all areas.

## 5.3 Adolescent health rights

Adolescents account for a large proportion of Africa's population: as of 2017, there were around 315 million of adolescents living in Africa (WHO 2017). However, their sexual and reproductive health needs and rights are mostly unmet. This often stems from significant discrimination and barriers in law and practice that prevent them from accessing information, goods and services on reproductive health (Center for Reproductive Rights 2019).

Article 14 of the Maputo Protocol reaffirms Article 14(1) of the ACRWC — which guarantees that *"[e]very child shall have the right to enjoy the best attainable state of physical and mental health"* — by providing that girls have the right to enjoy their best attainable state of physical and mental health. Some of the key issues for domestic law to consider around adolescent health are: comprehensive sexuality education (CSE); maternal mortality and morbidity; access to contraceptives; and retaining pregnant girls in schools.

CSE should be considered the most important thing in promoting adolescents' reproductive health rights because knowledge empowers them to take appropriate measures regarding their reproductive health. According to the African Commission, states are "*required to provide complete and accurate information"* which should be *"based on clinical findings, rights-based, without judgment and take into account the level of maturity of adolescent girls and youth*" (ACHPR 2014, para 51). This information should be provided in educational settings at all levels, including private and religious schools, and should reach young people who are out of school.

The ACHPR and ACERWC further affirmed adolescents' right to access sexual and reproductive health information in their Joint General Comment on Ending Child Marriage, which states that CSE should provide "*age appropriate information about what constitutes consent to sex, gender and social norms and stereotypes that perpetuate it, gender inequality and its manifestations, sexuality, sexual and reproductive health rights and sexually transmitted infections, including HIV and AIDS*" (ACHPR and ACERWC 2017, para 36).

**Box 5.1 Comprehensive sexuality education in Africa**

Some countries have taken progressive measures around CSE. In 2013, health and education ministers from 20 countries in East and Southern Africa committed to increase access to and quality of CSE programmes within their own countries by signing the "Ministerial Commitment on CSE and Sexual and Reproductive Health Services for Adolescents and Young People in Eastern and Southern Africa" *(*Pranchaud et al. 2019). Of these, 15 countries have implemented CSE or life skills education in 40 percent of primary and secondary schools (Cousins 2018).

In 2014, Zambia rolled out its national CSE curriculum for Grades 5 to 12, covering relationships; values, attitudes and skills; culture, society and human rights; human development; sexual behaviour; and sexual and reproductive health (UNFPA Zambia 2017). The curriculum is not delivered as a standalone subject. Instead, the six thematic issues are taught through other subjects, including Biology, Civic Education, Home Economics, Integrated Science and Religious Education (UNESCO 2017).

There is a connection between high maternal mortality rates and early pregnancy, especially when girls are subjected to child and forced marriages. Complications from pregnancy are the leading cause of death among adolescents aged 15–19 years (CEDAW Committee 2014, ESCR

2014a). This imposes on states the obligation to "*develop a national public health plan with comprehensive sexual and reproductive health services, protocols, guidelines and standards*" established in accordance with WHO standards (ACHPR 2014, para 29).

Article 14 of the Maputo Protocol places an obligation on states to protect the reproductive rights of adolescents, by authorising "*medical termination of pregnancy in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the [pregnant girl] or the life of the [pregnant girl] or the foetus*". This includes removing legal and administrative barriers that prevent girls from accessing the service legally, as laws that criminalise abortion are discriminatory and a barrier to access to reproductive healthcare (see Center for Reproductive Rights 2020). The CRC Committee has urged states to decriminalise termination of pregnancy and "*review legislation with the view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions*" (CRC Committee 2016c, para 60). Of the 26 countries worldwide that prohibit termination of pregnancy under any circumstances, six (23 percent) are in Africa.

**Table 5.4 Status of laws on termination of pregnancy in Africa**

| Approach to termination of pregnancy | Countries |
|---|---|
| **Not allowed under any circumstances** | 6 countries: Congo Republic, Egypt, Gabon, Madagascar, Mauritania, Senegal |
| **Allowed when the pregnancy endangers the mother's life** | 9 countries: Côte d'Ivoire, Nigeria, Libya, Malawi, Somalia, South Sudan, Sudan, Tanzania, Uganda |
| **Allowed on health grounds (includes mental health in nine countries)** | 22 countries: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, CAR, Chad, DRC, Equatorial Guinea, Eritrea, Ghana, Guinea, Kenya, Liberia, Morocco, Namibia, Niger, Sierra Leone, Togo, Zimbabwe (only to preserve the woman's physical health) |
| **Allowed on the grounds of at least one of the following: rape, incest and foetal impairment** | 12 countries: Angola, Benin, Burkina Faso, CAR, Chad, DRC, Eswatini, Guinea, Liberia, Lesotho, Namibia, Togo |
| **Allowed on additional grounds** | 5 countries: CAR, Ethiopia, Eritrea, Ghana, Rwanda |
| **Allowed with parental consent** | 3 countries: Ethiopia, Rwanda, South Africa |

*Source: Compiled by ACPF from research by the Center for Reproductive Rights (2020)*

Some countries have specific provisions regulating pregnancy termination for adolescents. For example, Rwanda and Ethiopia allow adolescents to legally terminate pregnancy because of their age,[54] while Equatorial Guinea requires parental authorisation. In South Africa, a minor is required to "*consult, with her parents, guardians, family members or friends*" before terminating pregnancy, but healthcare providers cannot refuse a termination if she decides not to consult anyone.[55]

Multiple regional and international human rights instruments — including Article 14 of the Maputo Protocol — protect adolescents' right to access contraceptives. It is, therefore, "*administrative laws, policies, procedures and practices, as well as socio-cultural attitudes and standards that impede access to contraception*" that violate adolescents' rights, exposing them to early and unwanted pregnancy (ACHPR 2014, para 25). States are obligated to ensure

[54] Ethiopia Abortion Provisions.
[55] Choice of Termination of Pregnancy Act: No. 92, 1996.

that their laws and policies aimed at facilitating access to contraceptive services are respected and implemented (ACHPR 2014). The ACERWC and ACHPR require services to be "*integrated, rights-based, and youth-centered"*, affirming the need to ensure reproductive health services are youth-friendly (ACHPR and ACERWC 2017).

Recognising that adolescents encounter particular barriers to accessing contraception (see, for example, CRC Committee 2013b, paras 67–68; CEDAW Committee 1999, para 23) — including stigma about sexuality (CRC Committee 2014b, para 57) and legal restrictions[56] — the CRC Committee has also called on states to address these challenges (CRC Committee 2017c, paras. 42 and 53). On way to do this is introducing *the* "*legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services*" (CRC Committee 2016c, para 39). Other treaty monitoring bodies have also concluded that there should be no third-party authorisation requirements — including spousal and parental consent — for accessing contraceptives (ESCR Committee 2014, para 33; CEDAW Committee 2007, para 17).

A 2017 United Nations Population Fund (UNFPA) assessment found that most countries do not have clear laws and policies specifying the age of consent for access to and use of contraceptives. This leads to confusion around when adolescents can access these services independently (UNFPA 2017).

### 5.4 Family environment

There is a consensus among states on the need to protect the family as the best environment in which to nurture children. With limited state resources to facilitate social security mechanisms, the family also remains the predominant childcare setting in Africa (see, for example, ACERWC 2014b, para 31). In many countries. family rights are entrenched in the constitution or addressed in specialised legislation. Parents' primary responsibilities are to raise, maintain and provide children with an education.

The ACERWC has advocated for alternative protective measures and mechanisms for the care of children where the family is disintegrated or the child has to be removed from the family for any other reason. It has also called for the effective enforcement of maintenance orders because fathers' failure to pay maintenance affects children's socioeconomic status and wellbeing (ACERWC 2009, para 33; ACERWC 2014b, para 27). Many countries have established specialised children's courts and accorded powers to quasi-judicial institutions such as national human rights commissions, enhancing access to justice in such matters.

All African countries' constitutions contain provisions relating to aspects of the family environment and alternative care. Their laws also enshrine children's right not to be separated from their parents. However, many countries do not have social protection policies for abandoned children, street children and others who cannot be supported by their parents.

[56] This type of restrictions can, for example, be based on marital status: CRC Committee (2014c, paras. 49–50).

**Table 5.5 Status of children's right to a family in Africa**

| Nature of rights | Countries |
|---|---|
| **Children's right to a family environment** | All countries |
| **Parents are legally responsible for maintaining their children for their survival and development, and for ensuring they have access to education and healthcare services** | All countries' constitutions provide for this, except Cameroon, which only provides for it in statutory law |
| **Laws protecting children deprived of a family environment** | All countries have adopted legislative measures on alternative care measures such as adoption, foster care, guardianship, *Kafala* (in Islamic countries) and institutional care |

Adoption is one of the four types of alternative care expressly recognised by international instruments. But of the 20 African countries that have ratified the Hague Convention on Intercountry Adoption,[57] none are in North Africa. Every country has, however, laid out a regime for legal adoption and the conditions under which adoptions can take place under a specific adoption, family or civil law statute. North African countries follow Islamic Law, under which the principal forms of alternative care are guardianship, *Kafala* and institutional care (ACPF 2012, p 87). This may explain why no North Africa country has ratified the Hague Convention on Intercountry Adoption.

Despite these developments, many challenges remain, including outdated laws that continue to discriminate against certain categories of children — for example, those born out of wedlock — poor institutional capacity, weak law enforcement, and a lack of adequate infrastructure to house children in precarious situations (CRC Committee 2017d, para 32).

[57] Benin, Burkina Faso, Burundi, Cabo Verde, Côte d'Ivoire, Eswatini, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, South Africa, Togo, Zambia.

# CHAPTER 6. SPECIAL PROTECTION MEASURES

## 6.1 Introduction

The ACRWC and CRC entitle children to special protection measures[58] and oblige states to take specific legislative, administrative, social and educational measures to protect children from all forms of torture, inhuman or degrading treatment — especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse — while in the care of any person.[59] States must take all appropriate measures to eliminate harmful social and cultural practices that affect the welfare, dignity, normal growth and development of children.

Harmful practices are committed to various degrees against children (mostly girls) across the continent. These are usually linked to culture and tradition and negatively affect a child's right to life, health, dignity, education and physical integrity (ACHPR and ACERWC 2017, p 5). Although there are many harmful practices — such as forced virginity testing, pledging of girls to appease spirits, forced wife inheritance, breast ironing and sexual intercourse between fathers-in-law and newly married daughters-in-law (CEDAW Committee 2019, para 37) — this report focuses on child marriage and FGM, as these are commonly practiced across Africa.

Despite the ACRWC, Maputo Protocol, CRC, CEDAW and other instruments obliging states to eliminate such harmful practices, they persist to the detriment of girls and sometimes boys, who are also the victims of child marriage. In many countries, strong customs, traditions and religious laws that encourage these practices prevent domestic legislation from being enforced (ACPF and Plan International 2019).

## 6.2 Child marriage

Child marriage is a harmful practice that violates children's rights, depriving them from attaining aspirations like education (African Union 2014-2017) and impacting on their rights to health, dignity, survival and development. Despite the decline in child marriage rates across the continent, many girls across Africa are still married off before they reach 18 (UNICEF 2017). Article 21(2) of the ACRWC prohibits child marriage and the betrothal of girls and boys. It also calls for effective action, including passing legislation specifying 18 as the minimum age of marriage and compulsory registration of all marriages in an official registry. Article 6 of the Maputo Protocol also prohibits child marriage, and Article 8 of the African Youth Charter recognises the right of all young men and women to freely consent to marriage.

To enhance the implementation of AU policy and legal instruments related to child marriage and accelerate the end of child marriage in Africa, the AU launched its Campaign to End Child Marriage in Africa during the Fourth AU Conference of Ministers of Social Development in May 2014. Initially set to last for two years until 2016 and targeting 10 high-burden countries, the campaign was extended for another two years to 2018 and to 30 high-prevalence countries. The AU consequently developed a new campaign strategy for 2019–2023 (UNICEF 2018).

African states have adopted numerous measures to combat this scourge, with varying levels of success. Some have adopted a minimum age for marriage; others — including Cameroon, CAR, Chad, Congo Republic, DRC and Gabon — have adopted specific laws or policies prohibiting or criminalising child marriage (Table 6.1). Chad enacted a specific statute on the

[58] Articles 16, 21, 27 and 28 ACRWC; Articles 19, 28(2) and 37(a) CRC.
[59] Article 16 ACRWC; Article 19 CRC.

prohibition of child marriage in 2015.[60] Equatorial Guinea is the only Central African state with no explicit prohibition of child marriage.

While most child marriage laws in Africa have been brought in line with international human rights standards, many challenges remain that prevent their implementation or the review of existing legislation. Conflicts between customary, *sharia* and civil law systems, for example, create myriad problems for enforcing laws to eliminate child marriage (Girls Not Brides 2020). Table 6.1 shows the different legislative approaches to child marriage in Africa.

**Table 6.1 Approaches to child marriage in Africa**

| Legislative approach | Countries |
|---|---|
| **Criminalises child marriage (but define child marriage differently)** | Botswana, Burkina Faso, Cameroon, CAR, Chad, Congo Republic, DRC, Egypt, Equatorial Guinea, Ethiopia*, Gabon, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Nigeria, Rwanda, Senegal, Sierra Leone, South Sudan, Swaziland, Togo, Zambia, Zimbabwe |
| **Invalidates child marriage without penal sanctions** | Angola*, Burundi, Cabo Verde, Gambia, Mauritius, Mozambique, Namibia, São Tomé and Príncipe*, South Africa, Tanzania, Uganda |
| **Minimum age of marriage without stipulating consequences** | Algeria, Benin, Comoros, Côte d'Ivoire, Djibouti, Eritrea, Guinea, Guinea-Bissau, Lesotho, Libya, Madagascar, Morocco, Niger, Seychelles, Tunisia |
| **(*) Allows exceptions to the minimum age of marriage, with consent from or approval by a judge or other public official** | Algeria, Angola, Burundi, Cabo Verde, Ethiopia, Republic of Congo, São Tomé and Príncipe , Senegal, Seychelles, Madagascar, Mali, Morocco, Tanzania, Togo |
| **Minimum age of marriage below 18 years with discrimination between girls and boys** | Burkina Faso, Cameroon, DRC, Gabon, Guinea-Bissau, Mali, Niger, Seychelles, Sudan, Tanzania, Zambia |
| **Prohibits forced marriage or marriage through abduction** | Equatorial Guinea, Somalia, Sudan |

## 6.3 Female genital mutilation and other harmful traditional practices

FGM, a severe violation of girls' rights, is practised in at least 29 African countries.[61] Somalia, Guinea, Djibouti, Egypt, Eritrea, Mali and Sierra Leone have the highest prevalence of FGM in the region (UNFPA 2018; see also UNICEF n.d.). Most countries where FGM is practiced have laws prohibiting the practice and some have enacted specific laws against it (Table 6.2). Guinea was one of the first countries to introduce legislation prohibiting FGM in 1965 (28 Too Many 2018; ACPF 2019).

[60] Law No. 029/PR/2015 of 21 July 2015.

[61] Benin, Burkina Faso, Cameroon, CAR, Chad, Côte d'Ivoire, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda.

**Table 6.2 Countries with separate statutes or policies on FGM**

| Country | Statute |
|---|---|
| **Benin** | Law No. 2003-03 on the Suppression of Genital Mutilation of Women in Benin Republic |
| **Chad** | Act No. 06/PR/2002 of 15 April 2002 on the promotion of Reproductive Health |
| **CAR** | Order No. 66/16 of 22 February 1966 on Abolition of Excision |
| **Côte d'Ivoire** | Law on Female Genital Mutilation (1998) |
| **Eritrea** | Proclamation 158/2007 of 2007 to Abolish Female Circumcision |
| **Guinea-Bissau** | Law No 14/2011 to Prevent, Fight and Suppress FGM |
| **Kenya** | Prohibition of Female Genital Mutilation Act No. 32 of 2011 |
| **Nigeria** | Enugu State FGM (Prohibition) Law of 2004<br>Edo State Female Genital Mutilation (FGM) Prohibition Law 2000<br>Bayelsa State FGM (Prohibition) Law of 2004 |
| **Sudan** | The Penal Code Act, 2008 and many state level pieces of legislation |
| **Togo** | Act No. 98-016 of 17 November 1998 Prohibiting Female Genital Mutilation in Togo |
| **Uganda** | Prohibition of Female Genital Mutilation Act No. 5 of 2010 |

*Source: Compiled by ACPF from the laws/policies of African States (ACPF 2018) and (ACPF 2019)*

As seen in Table 6.2, Eritrea, Kenya, and Uganda are the only East African countries with specific FGM statutes. North and Southern African countries are conspicuously missing from the list, probably due to FGM not largely being practiced in those regions. Liberia, Mali and Sierra Leone are the only West African countries that has no prohibition on FGM.

Sanctions for FGM range from fines to imprisonment and the death penalty. Some countries specify that consent of the victim cannot be a defence for the perpetrator, while in Benin, Djibouti and Eritrea, failure to report FGM is a criminal offence (ACPF 2018; ACPF 2019). Gabon and São Tomé and Príncipe do not specifically criminalise FGM — apparently because FGM is not a common practice there (UNICEF 2017).

**Table 6.3 Criminalisation of FGM in Africa**

| Country | Law | Penalties |
|---|---|---|
| **Benin** | Article 3 of the Law No. 2003-03 on the Suppression of Female Genital Mutilation in the Republic of Benin prohibits FGM except where required for irrefutable medical reasons and legally appropriate conditions | 6 months' to 3 years' imprisonment and a 100,000–200,000 CFA franc (USD 200–400) fine<br>If the survivor is a child under 15 years old, 3–5 years' imprisonment and a fine of up to 3,000,000 CFA francs (USD 6,300)<br>If death ensues, 5–20 years' hard labour and a 3–6 million CFA francs (USD 6,300–12,600) fine<br>Accomplices — including those who assisted in the act or asked the circumciser to carry out the circumcision — receive the same penalty as the principal perpetrator<br>Non-denunciation of the practice is punishable by a 50,000–100,000 CFA francs (USD 105–210) fine |
| **Burkina Faso** | Article 380, Penal Code | 6 months' to 3 years' imprisonment and/or a 150,000–900,000 CFA francs (USD 315–1,890) fine<br>If death occurs, 5–10 years' imprisonment |
| | Article 381, Penal Code | If the offender is medical or paramedical staff, they will receive the maximum penalty and be banned from |

| | | |
|---|---|---|
| | | exercising their profession for a period not exceeding 5 years |
| | Article 382, Penal Code | Failure to report knowledge of FGM to the relevant authorities is punishable with a fine of between 50,000 and 100,000 CFA francs (US$88–177) |
| **Djibouti** | Article 333, Penal Code 1995 | 5 years' imprisonment and 1,000,000 francs (USD 5,500) fine |
| **Eritrea** | Article 4, Proclamation No. 158/2007 to Abolish Female Circumcision 2007 | 2–3 years' imprisonment and a 5,000–10,000 nakfa (USD 325–650) fine<br>If death occurs, 5 -10 years' imprisonment<br>6 months' to 1 year's imprisonment and a 3,000 nakfa (USD 200) fine for requesting, inciting or promoting FGM<br>An aggravated penalty and suspension from practice for a maximum of 2 years for medical professionals<br>Up to 1,000 nakfa (USD 65) fine for failing, without good cause, to warn or inform the authorities promptly about FGM |
| **Ghana** | Article 69A (1) of amended Criminal Code, 2007 | FGM is a second-degree felony punishable by imprisonment of not less than three years<br>In 2007, Parliament amended the criminal code to include the offence of FGM. The law attracts a penalty of five to ten years imprisonment for FGM offenders. |
| **Guinea** | Article 407-409, Child Code 2008 | 3 months' to 2 years' imprisonment and/or a 300,000–1,000,000 Guinean franc (USD 30–100) fine<br>If FGM results in disability, 5–10 years imprisonment and a 1–3 million Guinean franc (USD 100–300) fine<br>If death ensues, 5–20 years imprisonment |
| **Kenya** | Sections 19-25 and 29, Prohibition of Female Genital Mutilation Act 2011 | 3 years' imprisonment and/or a fine of up to 200,000 shillings (USD 2,000)<br>Life imprisonment if death ensues and the offender is a medical practitioner<br>6 months' imprisonment or more, or a fine of no less than 50,000 shillings (USD 500) for using derogatory or abusive language that is intended to ridicule, embarrass or otherwise harm a woman for having not undergone FGM, or a man for marrying or supporting a woman who has not undergone FGM |
| **Mauritania** | Article 12, Ordinance on the Judicial Protection of the Child 2005 | 1–3 years' imprisonment and a 120,000–300,000 ouguiya (USD 300–750) fine<br>Increased penalty of 4 years' imprisonment and a 160,000–300,000 ouguiya (USD 400–750) fine if the offender is a medical or paramedical professional. |
| **Senegal** | Article 299 of the Penal Code Amendment 1999 | 6 months' to 5 years' imprisonment for infringing or attempting to infringe on the integrity of the genital organ of a female by total or partial ablation, infibulation or rendering it "*insensible*"[62] |

[62] The framing of this sanction can be described as an attempt to capture the issue of the loss of sexuality and sexual pleasure that might be engendered by FGM.

| | | |
|---|---|---|
| | | maximum penalty for medical personnel; where cutting results in death, penalty is hard labor for life. |
| **South Sudan** | Article 30, Child Act 2008 | Up to 7 years' imprisonment, or a fine, or both; may also be liable to pay compensation to the child as the court deems fit and just |
| **Sudan** | Section 284(A), Penal Code 2003 | Up to 10 years' imprisonment, or a fine, or both |
| **Tanzania** | Section 158(1), Child Act 2009 | A fine of not less than 500,000 shillings (USD 200) or 6 months' imprisonment or both. |
| **Togo** | Article 360, Children's Code (Law No. 2007-017 on the Children's Code) | Any form of female genital cutting, including partial or total ablation of the external genital organs of girls aged under 18 years or another operation undertaken on these organs will be punished according to the law pertaining to female genital mutilations (see Penal Code). |
| | Law No. 98-016 of 17 November 1998 prohibits FGM in Togo Article 3 - 4 | 2 months–5 years' imprisonment and a 100,000–1,000,000 CFA franc (USD 201–2,100) fine, or either of the two penalties for practicing, favouring or participating in female genital cuttings, whether by traditional or modern methods |
| | Article 6 | 20,000–50,000 CFA francs (USD 42–105) for failure to report an excision to the relevant authorities |
| **Uganda** | Article 2, The Prohibition of Female Genital Mutilation Act 2010 | Up to 10 years' imprisonment |
| **Zambia** | Section 4, Domestic Violence Act 2006 | A fine not exceeding Level 14 or up to 10 years' imprisonment, or both |

*Note: All USD equivalents are approximate.*

Although FGM is commonly practiced in Cameroon, Guinea and Mali, these countries' laws do not expressly penalise FGM. Rather, their Penal Code provisions pertaining to bodily integrity are assumed to apply to FGM. They need to follow the example set by countries like Senegal and Benin, which have similar legal and cultural traditions and do have laws on FGM on top of those on bodily integrity. The three countries must go a step further and put in place laws that explicitly and comprehensively prohibit FGM and penalise its perpetrators. It is worth noting, however, that Guinea's 1965 Constitution prohibits the mutilation of men's and women's genital organs and the country issued a decree condemning FGM in 1989 (Ashenafi 2019).

Although the practice of FGM is not explicitly declared illegal in Mali, it is recognised as a form of violence of against children, and therefore punishable by 1–5 years' imprisonment (up to 10 years in some cases) and a 200,000–500,000 CFA franc (USD 42–1,050) fine.[63] Pursuant to various provisions of the Criminal Code, it can be considered an offence equivalent to wounding with intent (CRC Committee 1997). Mali also adopted the Reproductive Health Act, which considers FGM in the context of reproductive health, and issued circular letter prohibiting FGM in any medical environment.[64]

[63] Article 207, Penal Code, "anyone who voluntarily strikes blows, causes wounds or commits any other violence or assault shall, if the result is sickness or inability to work for more than 20 days, be punishable by imprisonment for one to five years and a fine of CFA 200,00 [~ USD 42] up to CFA 500,000 [~ USD 1050]. When the violence, wounds or blows result in mutilation, amputation, loss of the use of a member or sense, blindness, loss of an eye or other disability or disorder, the penalty shall be five to 10 years' imprisonment".
[64] No. 02-044 of 24 June 2002.

In Cameroon, although no law directly prohibits or criminalises FGM, the courts use several provisions of the Penal Code to punish perpetrators. This includes Section 277, which provides that "*whoever permanently deprives another of the use of the whole or of any part of any member, organ or sense shall be punished with imprisonment ranging from 10–20 years*" (UN 2008).

## 6.4 Freedom from torture and prohibition of corporal punishment

### 6.4.1 Freedom from torture

With the exception of Comoros, Libya and Tunisia, all African states recognise freedom from torture and cruel, inhuman and degrading treatment or punishment as a fundamental right in their constitutions. There are two trends in the manner of entrenchment of the right to be free from torture and violence. The first is a child-centred constitutional provision for children's right to physical and moral integrity or prohibition of various forms of violence and exploitation, inhuman and degrading treatment in relation to children. The other is a general protection of individuals' physical and moral integrity and freedom from torture, inhuman and degrading treatment or from violence of any kind, which applies to all persons.

For example, the constitutions of DRC and CAR provide that individuals or state agents that carry out acts of torture or inhuman treatment are to be held accountable for such acts. The DRC Constitution is quite specific, with Article 41 providing that every child is entitled to protection from abandonment and maltreatment, particularly paedophilia, sexual abuse and the charge of engaging in witchcraft.[65] The constitutions of Ghana and Cabo Verde specifically prohibit the torture of vulnerable groups such as children and oblige parents to take care of their children and ensure their protection from any act of violence within or outside the parental home. In 2006, Equatorial Guinea introduced a specific law on the prohibition of torture but affords no explicit protections to children against corporal punishment at home or in school.

In line with Article 5 of the African Charter on Human and Peoples' Rights, 11 African constitutions[66] link the right to freedom from torture to human dignity, while 14 recognise dignity as a distinct, and in many instances, non-derogable, right.[67] Various laws define abuse or violence against children in different ways.

**Box 6.1 Selected legal provisions on protecting children from torture**

Among others, Article 5 of the **Côte d'Ivoire** Constitution expressly lists the types of prohibited violence and abuse, which include "*moral torture, physical violence and mutilation and all forms of debasement of the human being*".

Article 41 of the **DRC** Constitution uniquely provides for the child's right to be protected from — and the state's responsibility to hold criminally liable a person responsible for — abandonment and maltreatment of children, particularly paedophilia, sexual abuse and the charge of engaging in witchcraft. It also places a duty on parents to take care of their children and ensure their protection from any act of violence.

[65] Article 41.
[66] Algeria, Egypt, Eritrea, Ghana, Namibia, Nigeria, Seychelles, Sudan, Swaziland, Tanzania, Uganda
[67] Angola, Burundi, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Ghana, Madagascar, Malawi, Nigeria, Sierra Leone, South Africa, Zimbabwe, Tanzania, Togo.

Article 5(2), of **Uganda's** Children Act states that a parent's or custodian's duty to maintain a child includes protecting them from discrimination, violence, abuse and neglect (chapter 59).

Article 50 of **Mali's** Child Act[68] considers a child to be in danger if they face habitual abuse, sexual exploitation or abuse, beggary or economic exploitation, get involved in organised crime or armed conflict or are exposed to practices that adversely affect their health.

Section 28(1)(d) of the South African Constitution protects children from neglect, maltreatment, abuse and degradation and Section 12(1)(e) provides for the right not to be treated or punished in a cruel, inhuman or degrading way.

Sections 81 and 52 of the Zimbabwean Constitution are similarly worded.

Some countries' constitutions — including Benin, CAR, DRC and Djibouti — provide for holding accountable individuals or state agents who carry out acts of torture or any treatment prohibited under the constitution.

### 6.4.2 Corporal punishment

There has been little progress in terms of comprehensively outlawing corporal punishment in all settings, and it remains common practice (ACPF 2018), with only nine African countries outlawing corporal punishment in all settings (Global Initiative to End All Corporal Punishment of Children 2020). Corporal punishment is still practised in schools in more than half of all African countries, under the guise of "reasonable chastisement". As Table 6.4 shows, the vast majority prohibit it as a sentence for crimes.

**Table 6.4 Status of corporal punishment in Africa**

| Legal status of corporal punishment | Country |
|---|---|
| **Outlawed in all settings** | 9 countries: Benin, Cabo Verde, Congo Republic, Kenya, Seychelles, South Africa, South Sudan, Togo, Tunisia (Kenya and South Sudan contain the prohibition in their constitutions) |
| **Prohibited as a sentence for a crime** | 45 countries |
| **Not prohibited in the penal justice system** | 6 countries: Botswana, Eritrea, Lesotho, Libya, Mauritania, Mainland Tanzania |
| **Prohibited in schools** | 28 countries: Algeria, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Chad, Congo Republic, Djibouti, DRC, Ethiopia, Gabon, Guinea-Bissau, Lesotho, Libya, Kenya, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, Somalia, Sudan, Togo, Tunisia, Uganda |
| **Not prohibited** | 4 countries: Algeria, Botswana, Libya, Mauritania |
| **Partially prohibited** | 4 countries: Somalia, Nigeria, Zimbabwe, Tanzania |
| **Allowed as disciplinary action against children** | 2 countries: Ethiopia,[69] Sierra Leone.[70] |

*Source: Compiled by ACPF from the laws and policies on children in Africa and information from Global Initiative to End All Corporal Punishment of Children.*

[68] Order No 02-062/P-RM, 5 June 2002, on the Code of Child Protection.

[69] Articles 68, 576, Criminal Code of Ethiopia 2004: The taking, by parents or other persons having similar responsibilities, of a disciplinary measure that does not contravene the law, for purposes of proper upbringing, is considered as an act acts reasonably done in exercising the right of correction or discipline.

[70] Article 33, Child Right Act of Sierra Leone 2007: Correction is justifiable if it is reasonable in kind or in degree according to the age, physical and mental condition of the child and the child by reason of tender age or otherwise is capable of understanding the purpose of the correction.

## 6.5 Children in emergency situations

Emergency situations are mainly caused by conflict and natural disasters. Article 22 of the ACRWC obliges State parties to:

- Respect and ensure respect for rules of international humanitarian law applicable in armed conflicts that affect children
- Take all necessary measures to ensure that no child takes a direct part in hostilities
- Refrain from recruiting any child into the armed forces
- Protect the civilian population in armed conflicts
- Take all feasible measures to ensure the protection and care of children who are affected by armed conflicts, as well as children in situations of internal armed conflicts, tension and strife.

Conflict, tensions and strife are some of the major issues that drive children to seek asylum as refugees or into internal displacement.

### 6.5.1 Refugee children

Article 23 of the ACRWC provides for the protection of refugee children and obliges State parties to take all appropriate measures to ensure that a child who is seeking refugee status or considered a refugee in accordance with applicable international or domestic law receives appropriate protection and humanitarian assistance. This is regardless of whether the child is unaccompanied or accompanied by parents, legal guardians or close relatives. Refugee children should therefore be included in national child protection legal frameworks, policies and standards (UNCHR 2017).

The number of refugees in the Middle East and North Africa has more than doubled in recent years and more than half of these refugees are children (UNCHR 2014, 6). In several North African countries — including Algeria, Libya and Morocco — there have been reports of refugee and asylum-seeking children being deprived of the protection of their human rights as recognised under international law (see, for example, HRW 2018b; Taylor 2018; ACERWC 2015a, para 36). Particular challenges include discrimination; arbitrary arrest; detention and deportation; abuse and torture; loss of identity, name and nationality; child labour; trafficking and exploitation; and a lack of or insufficient access to education and healthcare (see, for example, ACERWC 2018b).

Despite these challenges, no country appears to have comprehensive legislation that specifically guarantees the protection and rights of children in emergency situations, including refugees and asylum seekers. In some countries, general legislation affords protection, although its effectiveness is debatable. For example, Morocco's Migration Act provides for the protection of children from exploitation and deportation;[71] Algeria's Law No. 15-12 of 2015 on the protection of children provides for the protection of children in emergencies, disasters and armed conflicts; and Libya's Child Protection Act of 1997 affords some protection. Egypt's Child Law of 2008 establishes a mechanism for a multi-sectoral approach to child protection issues, while other domestic laws offer some protection to children in emergency situations.[72] But despite these laws, children have been deported from Morocco; and concerns have been raised at the lack of legal protection of refugee children in Egyptian domestic law (CRC Committee 2011b, para 76). Morocco has been developing a new law on asylum since 2014

[71] Law No. 02-03, Articles 26 and 29.

[72] These include Decree 199 (No. 24) of the Minister of Education and Decree No. 147 (2003).

(CRC Committee 2014a), but its fate remains unclear. In Mauritania, a draft National Asylum Law has been pending since 2014 (CRC Committee 2018, para 38).

In East Africa, Uganda is a unique and good example for creating a conducive environment for refugees. In 2019, it approved the implementation of the Education Response Plan for Refugees and Host Communities (Education Response Plan 2018-2021).

### 6.5.2 Internally displaced children

Internally displaced children are also affected by humanitarian circumstances. Internal displacement is caused by many factors, including armed conflict, natural disaster and climate change. Internal displacement reduces resilience and increases the vulnerability of populations living in already dire economic situations. Article 23(4) of the ACRWC obliges states to take all appropriate measures to ensure that a displaced child receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the charter and other international human rights and humanitarian instruments to which the states are party. It is one of the first binding instrument to explicitly do so.

The UN's Guiding Principles on Internal Displacement were adopted at international level in 1988 to serve as an international standard to guide governments, international organisations and all other actors providing assistance and protection to internally displaced people (IDPs) (UN 1998). The guiding principles make several specific references to the rights of displaced children. Principle 4.1 makes clear that "*[t]hese Principles shall be applied without discrimination of any kind, such as age or on any other similar criteria*". Specific references to children and their special need for protection include:

- The need for special protection and assistance for, among others, unaccompanied minors and mothers with young children (Principle 4)
- The prohibition of recruiting displaced children (Principle 13)
- The right to know the fate and whereabouts of missing relatives (Principle 16)
- The right to a family life and facilitation of family reunification (Principle 17)
- The right to be issued a birth certificate (Principle 20)
- The right to education (Principle 23) (UN 1998 and SCI 2016).

In 2009, the AU adopted the Kampala Convention, which provides for protecting and helping IDPs (see Table 2.4). This was the world's first independent legally binding regional instrument to impose on states the obligation to protect and assist IDPs. The Kampala Convention recognises the UN's Guiding Principles, also prohibiting the recruitment of displaced children and referring to the need for special protection for children, facilitating family reunification and the right to a birth certificate.

African countries have not made much headway in terms of legally protecting internally displaced children. Only Angola, Kenya, Niger, Sudan and Liberia have adopted laws on internal displacement; of these, Kenya and Niger have specific statutes dedicated to internal displacement. Sierra Leone, Zambia, Uganda and Somalia have adopted policies on internal displacement. Mali, Nigeria, CAR, DRC, Burundi and Nigeria are developing relevant instruments (Global Protection Cluster 2016). The DRC criminalises the arbitrary displacement of people under 18 years and has enshrined displaced children's right to protection in its 2009 Child Code; Chad's 2017 Penal Code also criminalises arbitrary displacement; and in 2004, Liberia adopted an instrument to recognise the UN's Guiding Principles (IDMC 2019).

Figure 6.1 gives a timeline of the development of legal and policy frameworks on IDPs in African countries.

Main policies and laws as per http://www.globalprotectioncluster.org/global-database-on-idp-laws-and-policies/ last updated on 9 October 2019.

**Figure 6.1 Timeline of the adoption of IDP policies in African countries**

*Source: IDMC 2019.*

**Table 6.5 Main policies relating to internal displacement in Africa**

| Country | Year | Title | Government level | Type |
|---|---|---|---|---|
| Angola | 2000 | Norms on the Resettlement of Displaced Populations Decree Number 1/01 | National | Policy |
| | 2002 | Implementation of Norms - Standard Operational Procedures Decree Number. 79/02 | National | Policy |
| Burundi | 2004 | Programme National de Réhabilitation des Sinistrés | National | Policy |
| | 2010 | Stratégie Nationale de Réintégration Socio-économique des personnes affectées par le conflit | National | Policy |
| | 2017 | Stratégie Nationale de Réintégration Socio-Economique des Personnes Sinistrées au Burundi: Document de la Stratégie révisée sur la base des Solutions Durables | National | Policy |
| CAR | 2015 | Politique nationale sur la Protection et l'Assistance aux Personnes déplacées internes en Centrafrique (draft) | National | Ongoing |
| Côte d'Ivoire | 2018 | Lobby for adoption of a national framework on internal displacement | National | Ongoing |
| DRC | 2014 | Projet de Loi Portant Protection et Assistances aux Personnes Déplacées Internes | National | Ongoing |
| | 2016 | Stratégie Nationale de Solutions Durables pour les Populations Déplacées Internes et les Rapatriés | National | Ongoing |
| | 2016 | Stratégie Provinciale pour des Solutions Durables en Faveur des Personnes Déplacées Internes au Nord-Kivu | Sub-national | Policy |
| Ethiopia | 2017 | Somali Region Durable Solutions Strategy | Sub-national | Policy |
| Kenya | 2011 | National Policy on the Prevention of Internal Displacement, Protection and Assistance to Internally Displaced Persons (IDPs) in Kenya (draft) | National | Ongoing |
| | 2012 | The Prevention, Protection and Assistance to IDPs and Affected Communities Act, 2012 (No.56) | National | Law |
| | 2012 | Bills No.44: Evictions and Resettlement Procedures Bill | National | Ongoing |
| Liberia | 2004 | National Community Resettlement and Reintegration Strategy | National | Policy |

*Source: IDMC 2019*

## 6.6 Protection from sexual exploitation and trafficking

The ACRWC provides for the protection of children from sexual exploitation, trafficking and abduction. Article 27 requires State parties to take measures to prevent the inducement of children to engage in sexual activity, the use of children in prostitution and other sexual activities, and the use of children in pornographic activities, performances and materials. Article 29 requires State parties to take appropriate measures to prevent any person, including parents or legal guardians, from selling, trafficking and abducting children.

**Table 6.6 Status of child sexual exploitation and child trafficking legislation**

| Issue | Status |
|---|---|
| **Sexual exploitation of children** | All countries except South Sudan have provisions in law criminalising different forms of sexual conduct involving children, including sexual exploitation and child pornography |
| **Child trafficking** | All countries have anti-trafficking laws that apply to all persons including children, through specific anti-trafficking statutes or provisions in children's statutes, penal codes, sexual offences statutes, tourism offences acts, employment acts, anti-terrorism laws or money laundering acts.<br>Benin,[73] Comoros,[74] Côte d'Ivoire,[75] Gabon[76] and Togo[77] have separate statutes focusing on child trafficking or child smuggling.<br>Child trafficking is a criminal offence in all countries except Chad, Tunisia and Zimbabwe, where it is not expressly criminalised. |

While African countries have taken appropriate legislative measures to prohibit people trafficking and the sexual exploitation of children, girls and other groups of children remain particularly vulnerable to such practices (ACPF 2018). African countries must also revise their laws to accommodate all developments in sexual exploitation of children, such as in travel and tourism, and more recently, online exploitation.

Some countries have already taken steps towards harmonising their laws on children with regional and international standards that address the exploitation in tourism:

- Lesotho's Anti-Trafficking in Persons Act of 2011 criminalises trafficking, broadly defined as the acts of "*recruiting, transporting, transferring, harbouring, providing or receiving a person 'by any means' for the purpose of prostitution, pornography, sexual exploitation, forced labour, drug trafficking, slavery, involuntary servitude or debt bondage as well as for other ends, such as marriage with a foreign person, tourism packages for the purposes of sexual exploitation, adoptions or organ removal*".
- Sections 14 and 15 of Kenya's Sexual Offences Act of 2006 criminalises the facilitation of child sex tourism and "child prostitution", and prescribes a penalty of no less than 10 years' imprisonment.
- Gambia's Tourism Offences Act of 2003 criminalises child sex trafficking, prescribing a penalty of 10 years' imprisonment. This unique provision has been recognised as an acknowledgment of the risks of child sex trafficking in the sector (ACPF and Plan International 2019).

[73] Act Relating to the Transportation of Minors and the Suppression of Child Trafficking (Act 2006-04), 2006.
[74] Law Countering Child Labour and Trafficking in Children, 2015.
[75] Law No. 2010-272 Pertaining to the Prohibition of Child Trafficking and the Worst Forms of Child Labour, 2010.
[76] Law 09/04 to Prevent and Combat Child Smuggling, 2004.
[77] 2005 Law Related to Child Smuggling.

The CRC Committee is working on a General Comment on children's rights in the digital environment which has the potential to address this challenge and help African countries harmonise their laws to ensure the protection of children from online sexual exploitation. The ACERWC is also finalising a General Comment on Sexual Exploitation which will see and offer guidance to member states on best practices and approaches for dealing with and addressing sexual exploitation.

**Box 6.2 Broadening the definition of rape in South Africa**
The 2007 Criminal Law Amendment Act of South Africa has broadened the definition of rape in its section on sexual offences and related matters to include a wide range of crimes that commonly occur against children, such as sexual grooming, sexual exploitation and use of and exposure to pornography.

## 6.7 Legal protection of children in the justice system

To protect children in the justice system, African countries have adopted laws that are in line with Article 17 of the ACRWC and other relevant standards. Table 6.7 shows details of these laws and policies in the criminal and civil justice systems as.

**Table 6.7 Laws on various aspects of access to justice for children**

| Element of laws | Countries |
|---|---|
| **Laws establishing children's courts or child-friendly benches where no specialised children's courts exist** | Congo Republic, DRC, Egypt, Gambia, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, Tunisia, Uganda |
| **Protection of children from pre-trial detention** | Congo Republic (only for 24 hrs)<br>Liberia (last resort)<br>Mali (last resort)<br>Mauritania (only if not released on bail)<br>Malawi (prohibited)<br>Namibia (only to be placed in a place of safety)<br>South Africa (prohibited)<br>Zimbabwe (only to be put in remand homes) |
| **Provision of legal aid for children** | Mandatory in 7 countries: Burkina Faso, Malawi, Morocco (under the age of 16), Rwanda, South Africa, Tanzania, Zambia<br>Ethiopia: if parents or guardian cannot afford it or the offence is punishable by 10 years' imprisonment or death<br>Gambia: if no one is willing to represent the child or legal representation is in his best interest |
| **Laws prescribing the diversion of children** | Congo Republic, Lesotho, Liberia, Malawi, Mali, Sierra Leone, Somalia, South Africa, South Sudan, Tanzania, Zimbabwe[78] |
| **Laws protecting child victims and witnesses** | Congo Republic, Malawi, Mauritania, Nigeria, South Africa, South Sudan, Sudan, Tanzania, Zimbabwe |

*Source: Compiled by ACPF from the laws/policies of African States (ACPF 2019)*

Most African countries have adopted consolidated children's statutes (see Table 2.6), and some also have statutes specifically focusing on children in conflict with the law (Table 6.8). Although there is no such statute in Gambia, the government adopted Children's Court Rules in 2010 to regulate the conduct of courts towards children.

[78] Included in the draft Zimbabwean Child Justice Bill.

**Table 6.8 African countries with separate child justice laws**

| Country | Child justice law |
|---|---|
| **Burkina Faso** | Law No. 19–61 on Child Delinquency |
| **Ghana** | Juvenile Justice Act No. 653 of 2003 |
| **Mauritania** | Ordinance No. 2005-015 on the Judicial Protection of the Child 2005 |
| **Mauritius** | Juvenile Offenders Act 1935 |
| **Mozambique** | Juvenile Justice Law |
| **Niger** | Order No. 99–11 of 14 May 1999 Concerning the Establishment, Composition, Organization and Jurisdiction of Juvenile Courts |
| **Somalia** | Juvenile Justice Law No. 36/2007 of 2007 |
| **South Africa** | Child Justice Act No. 75 of 2008 |
| **Tunisia** | Act to Establish Children's Court 2010 |
| **Zambia** | The Juvenile Act No. 03 of 2011 |

## CHAPTER 7. THE ROLE OF THE COURTS AND REGIONAL BODIES IN CHILD LAW REFORM

### 7.1 National courts

Domestic courts and human rights treaty bodies play an important role in promoting state compliance with their international and regional human rights treaty obligations. In this regard, courts often apply an interpretive presumption that statutes should be construed in conformity with the nation's international legal obligations, including those derived from treaties and customary international law. The significant role courts play in promoting child law reform is evidenced in South Africa, Zimbabwe, Tanzania and Malawi, where there have been challenges to legal provisions around sexual offences, prescription of offences, rape by common purpose, common law concepts in relation to sexual offences, child marriage, and common law defences against charges of assault for corporal punishment.

In *Teddy Bear Clinic and Another vs Minister of Justice,* South Africa's Constitutional Court dealt with the application of statutory rape laws to consensual sexual acts when both parties are below the age of consent. The court struck down the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 that criminalised children between the ages of 12 and 16 engaging in consensual sexual activity with other children in the same age range as unconstitutional on the grounds that this infringed the rights to dignity and privacy and the principle of the best interests of the child.[79]

Also in South Africa, in *YG v The State*,[80] the High Court declared that the common law defence of "reasonable or moderate chastisement" by parents was unconstitutional. The court underscored that South Africa was bound by its international obligations deriving from the CRC. It also explicitly referred to the recommendations of the CRC Committee and ACERWC to the South African government on the issue of corporal punishment.

In *S v Chokuramba,* Zimbabwe's Constitutional Court outlawed corporal punishment on convicted children under the age of 18. In 2016, two child marriage cases in Zimbabwe and Tanzania both resulted in court orders requiring the government to amend the laws to align them with international human rights standards. In *Mudzuru and Another v Minister of Justice*,[81] Zimbabwe's Constitutional Court declared the Marriage Act — which provided that a child under the age of 16 years could marry with parental consent — unconstitutional and ordered that the government amend the Act. In *Gyumi v Attorney General*,[82] the Tanzania High Court declared certain

[79] [2013] ZACC 35.
[80] Case No. A263/2016 (Gauteng Local Division). See also Mezmur 2018.
[81] Constitutional Application No. 79/14, CC 12-15 [2015] ZWCC 12 (20 January 2016).
[82] Miscellaneous Civil Cause No. 5 of 2016, Judgment: 8/7/2016.

provisions of the Laws of Marriage Act unconstitutional, ordering the government to amend them in line with its obligations under the CRC and ACRWC.

In *State v Second Grade Magistrate Court & Malawi Prison Service, ex p. Stanford Kashuga*, the Malawi court invalidated the statutory age for childhood for the purposes of child justice, declaring it inconsistent with the constitutional definition of 18 years, for the purposes of persons who come into conflict with the law as per section 42(2)(g) of the constitution. The accused, who was 16 at the time of the offence, sought invalidation of the Child, Care, Justice and Protection Act's definition of a child as a person who is under 16 years.

In all these cases, the national courts played a vital role as upper guardians of all minors, interpreting the law and, in some instances, invalidating laws that are inconsistent with the human rights of children.

## 7.2 Regional bodies

In Africa, treaty-based bodies such as the ACERWC and the ACHPR, which have a quasi-judicial mandate to receive complaints of human rights violations and give recommendations on how the victims should be redressed, are playing an increasingly important role. The goal in bringing complaints before these bodies is twofold: obtaining justice and reparations for victims of human rights and initiating law reform.

According to Article 44 of the ACRWC, the ACERWC is mandated to receive and consider individual communications alleging child rights violations as envisaged in the charter. To date, the ACERWC has dealt with 10 communications, dismissing three as inadmissible for not having exhausted local remedies and considering seven on merits. Of these, it dropped one on amicable settlement; in four, it recommended the respondent state undertake reform to harmonise their laws with international child rights instruments, particularly the ACRWC. Some of these communications — including the first against the government of Uganda — are summarised below.

**ACERWC Communication 1/2005:** In *Michelo Hansungule and others (on behalf of children in Northern Uganda) v the Government of Uganda*, the complainants alleged that several rights of children in Northern Uganda guaranteed in the ACRWC had been violated through government action or omission. These were children who, after escaping, being captured or rescued from the Lord's Resistance Army, were recruited into the Uganda People's Defence Force or forced to take part in military operations. The committee found the state in violation of Article 22 of the charter (protection of children from being involved in armed conflict). It directed the state to, among other things, add an explicit and comprehensive provision in its Penal Code criminalising the recruitment or use of persons below the age of 18 in situations of hostilities, tension or strife, and take all necessary legislative, administrative and other measures to ensure that children are registered immediately after birth (ACERWC 2013).

**ACERWC Communication 2/2009:** In the *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v the Government of Kenya*, the communication alleged that, although Nubians had lived in Kenya for over 100 years, they were always regarded as "aliens" and continued to have an uncertain citizenship status. Children in Kenya do not have their nationality recognised at birth. While most Kenyan children have a legitimate expectation that their Kenyan citizenship will be recognised, Nubian children have no such expectation. On reaching 18 years, all Kenyans apply for identity cards that are necessary to prove citizenship. For most Kenyan children, this is a simple process. However, Nubian children are forced to go through a long and complex vetting procedure with an uncertain result, and some never receive their cards. The complainants alleged violation of Article 6, in particular sub-Articles (2), (3) and (4) (the right to have a birth registration, and to acquire a nationality at birth), Article 3 (non-discrimination) and others. The ACERWC found that the state had violated, among others, Articles 3 and 6 (2), (3) and (4) of the ACRWC and recommended the government take all necessary legislative, administrative and other measures to ensure that children of Nubian decent in Kenya, who are otherwise stateless, can acquire Kenyan nationality and proof of this nationality at birth (ACERWC 2011a).

**ACERWC Communication 4/2014:** In the *Institute for Human Rights and Development in Africa v Malawi case*,[83] the communication was filed on behalf of all Malawian children aged 16 to 18 years. It contested the definition of a child under Section 23 (5) of the Malawian Constitution as anyone below the age of 16 years on the grounds that this excluded all Malawian children aged 16 to 18 from the Constitution's regime on children's rights. The case was due to be heard at the 28th Ordinary Session of the ACERWC, but the government requested for an amicable settlement. This was reached under the auspices of the ACERWC in session. Malawi committed *"to do everything within its power to amend its Constitution and all other relevant laws to be in compliance with article 2 of the African Charter on the Rights and Welfare of the Child by 31 December 2018"*,[84] and to report periodically to the ACERWC on *"the progress it has made to implement this Agreement"*. Malawi also committed to taking interim, administrative and other measures to protect children in Malawi during the time in which the law reform process would be completed. In 2017, the Malawian parliament amended the Constitution to provide for a child to be anyone below the age of 18 years and conducted an audit of all laws related to children to ensure they are harmonised with the ACRWC. Most provisions on the age of a child in Malawian law have since been harmonised accordingly.

**ACERWC Communication 5/2015:** In *the African Center of Justice and Peace Studies (ACJPS) and Peoples' Legal Aid Centre (PLACE) v the Republic Sudan case*, the communication was submitted on behalf of Iman Hassan. The complainants alleged that Iman's mother, Hawa Ibrahim, was a Sudanese national and confirmed that her father, Hassan Bejamin Daoud, had Sudanese

[83] ACERWC Communication No. 004/Com/001/2014.
[84] Malawi requested that this period be extended to 2021.

nationality, lived most of his life in Sudan and served in the Sudanese police force. According to the complaint, a person needs a national identity number to apply for university education. Iman was unable to apply for university as she only had a birth certificate. When she applied for a national identity card, the civil registration department directed her to the Aliens Persons Department, indicating that she had lost her Sudanese nationality since her father would have become a South Sudanese national upon separation by virtue of Section 10(2) and (3) of the 1994 Nationality Act as amended in 2011. The complainants further alleged that, by applying Section 10(2) and (3) of the 1994 Nationality Act as amended in 2011, Sudan had violated provisions of the ACRWC, including Article 3 (right to non-discrimination); Article 4 (the protection of the best interests of the child); Article 6(3) (right to acquire nationality); and Article 6(4) (the obligation to prevent statelessness) (ACERWC 2018c).

The ACERWC found Sudan in violation of Articles 3, 4 and 6(3) - (4) and 11 of the ACRWC and recommended that it revise its Nationality Act to ensure that:

- Children born to Sudanese mothers are automatically granted Sudanese nationality
- Children born to South Sudanese parents are not discriminated against in obtaining Sudanese nationality where they demonstrate their link to the respondent state
- Its Nationality Law does not lead to the statelessness of children born in the respondent state by assuming they have acquired South Sudanese nationality.

**ACERWC Communication 6/2015:** In *Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v the Government of the Republic of Cameroon*, the complainants alleged that TFA, aged 10, was repeatedly raped in April 2012, in Amanda, North West Region of Cameroon. The girl's aunt reported the rape, officially filing a case before the local police. Submitting that Articles 1 and 16(2) of the ACRWC oblige State parties to effectively investigate all suspected cases of child abuse, including sexual abuse, and provide support for children who have been abused, the communication alleged that the government of Cameroon and its agents did not carry out any credible investigations into the sexual abuse and rape committed against TFA. Nor did they provide any form of support for her in the aftermath of the rape. The ACERWC found the respondent state in violation of its obligations under Article 1 (obligation of State parties), Article 3 (non-discrimination) and Article 16 (protection from child abuse and torture) of the ACRWC. It also recommended for Cameroon to enact and implement a legislation eliminating all forms of violence, including sexual violence against children (ACERWC 2018d).

These cases demonstrate the potential of the ACERWC's communications procedure in advancing law reform and harmonisation of national child laws. This potential needs to be further explored in advocating for the harmonisation of children's laws with international child rights instruments, as it could be an effective tool for catalysing child law reform in Africa.

## CHAPTER 8. KEY CHALLENGES, CONCLUSION AND RECOMMENDATIONS

Generally, African countries have made progress in harmonising their laws with the ACRWC and other international and regional standards over the past decade. Today, only five countries have yet to ratify the ACRWC, and all African UN member states have ratified the CRC. However, despite the increased momentum towards ratifying international treaties, entrenching provisions on child rights in national constitutions and enactment of comprehensive children's statutes — largely as a consequence of recommendations to states by the treaty bodies — conformity, scope of implementation and pace of progress remains varied.

Several factors impede the effective realisation of children's rights: inadequate laws and policies, poor investment in social services such as education, poor implementation of laws, civil unrest, conflict and disease. It is 30 years since the adoption of the ACRWC and 31 years since the adoption of the CRC; but gaps still exist between the ratification of treaties and the domestication and implementation of treaty obligations. Across all regions of the continent, customary and religious laws and practices continue to pose a significant challenge to the advancement of child rights.

Aside from the common challenges — such as torture, corporal punishment, conscription into the army and widespread violence against girls — there are new and hidden threats to children's rights that must be addressed through targeted, specialised law reform. These include online child exploitation, internal displacement of children and hidden forms of violence. Certain prohibitions — such as child marriage and violence against children — are sustained by deeply rooted social constructions, making them difficult to enforce effectively.

Despite a trend to strengthen normative frameworks and establish mechanisms to monitor children's rights implementation across the continent, many countries lack the human and financial resources they need to assure their effectiveness. Some institutional mechanisms — such as national orphans and vulnerable children coordinating committees, district child protection teams and child law committees — lack proper legal status or are temporary.

As such, the practical realisation of regional and international standards for child rights is yet to fully materialise. The ACERWC has been, and remains, concerned about some countries' historical, cultural, social and economic contexts — particularly the prevalence of violence, corruption, poverty and inequality and the lack of adequate training for those working for and with children — which affects the full realisation of laws and policies for the benefit of children.[85]

[85] ACERWC, Concluding Recommendations to the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child para 6 and Concluding Recommendations to the Republic of Mozambique Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, para 6.

Effective implementation is a product of effective legal systems and institutions. And although some African states have initiatives to coordinate stakeholders' efforts in promoting and protecting child rights, many others are fragmented and duplicative. The non-existence or underperformance of institutional mechanisms contributes to the gap between law, policy and practice.

We therefore recommend that state parties to the ACRWC and all related child rights instruments should:

1. Adopt comprehensive national plans or policies on harmonising laws on children, with the following main elements:
   a) An analytical, in-depth review of existing legislation on children to identify provisions that do not conform with the ACRWC, CRC and related instruments.
   b) A multi-sectoral national review body comprising representatives from the government, civil society and independent experts to conduct periodic legal audits of child-related laws.
   c) An effective system to scrutinise all proposed legislation to ensure compliance with all applicable international children's rights instruments.
   d) An outline of the format and structure of the legislative measures required to bring national laws into conformity with international standards, whether a comprehensive piece of child rights-related legislation or sectoral legislation.
   e) For every proposal for change in existing law or introduction of a new law, a clear indication of the human, financial and other resources needed for effective implementation.
   f) Clear consideration of gender dimensions to avoid developing provisions that are discriminatory or have a discriminatory impact.

2. Ensure that the review of children's laws is an ongoing process, covering both proposed and existing legislation.

3. Conduct targeted law reform to address new and hidden threats to children's rights, such as online child abuse and exploitation, internal displacement of children and hidden forms of violence.

4. Ensure that the courts are adequately resourced with both human and financial resources and that judicial officers are adequately trained on child justice issues.

5. Ensure that they comply with reporting obligations to the ACERWC and other relevant treaty bodies and implement recommendations, including for law reform.

Overall, it is important to realise that harmonisation is not uniformity. To ensure their laws and policies on children are in line with the ACRWC, State parties must therefore engage in a systematic process of periodic comprehensive review while also taking advantage of opportunities for child law reform that emerge from other national development programmes.

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