

**The African Charter on the Rights and Welfare of the Child is a further means of securing Children's Rights in the international context. It supplements the United Nations Convention on the Rights of the Child in the African regional context. This book contains groundbreaking interpretations of the Charter's provisions in the context of the Convention and the African perspective. It contains insights into how the rights and responsibilities in the Charter can be harnessed to improve the situation and circumstances of children in Africa. More important, it points out the inadequacies of the Charter to ensure a comprehensive analysis of the provisions contained therein.**

**A publication of the Children's Rights Project**

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**The African Charter on the Rights and Welfare of the Child Michael Gose**

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African Charter on the Rights  
and Welfare of the Child**

**Community Law Centre**

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Child**

An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child

A publication of the Children's Rights Project:  
Community Law Centre

**To Mau with love!**

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You are all very special people.

Michael Gose  
July, 2002

## Foreword

South Africa's ratification of the African Charter on the Rights and Welfare of the Child also signalled the entry into force of this regional human rights instrument, almost a decade after its adoption. With significant regional consensus and support, the time for developing regional Children's Rights norms and standards has indeed dawned. The Committee which will serve as the monitoring body has now been elected, and this Committee held its first meeting in April 2002.

Michael Gose's textual analysis of the provisions of the African Charter represents an important contribution to the limited literature available on this treaty. He points to areas of strength and weakness, to where standards for the protection of children have been improved, and to certain ambiguities that might have been created in the wording and interpretation of the document. The result is a work which clearly delineates and highlights the specifics of the African instrument, by comparison to the more well-known UN Convention on the Rights of the Child.

The author can be commended for the thorough and detailed research which underpins his findings. Noting the textual differences between the Convention and Charter enables those that are irrelevant to be discarded, whilst those differences which may have an impact upon children - and African children in particular - can be clarified or probed. Such research can only be regarded as an important step along the way to identifying the precise nature of States Parties obligations towards children, and, conversely what rights children can demand of their parents, communities and governments. In this way, the

text reproduced here is itself a contribution towards the furtherance of Children's Rights in Africa, as dissemination of information about the existence and nature of rights is a crucial factor in furthering the Children's Rights movement.

The study presented here is intentionally limited in its focus - but, as the following pages will show, there is considerable value to be obtained from the comparison of these two seminal treaties, one regional and one international, where they cover the same ground. The author's work will undoubtedly be extremely helpful to the newly formed Committee which will oversee and respond to the reports submitted under the Charter, to government bodies involved in reporting on and monitoring Children's Rights in the African context, as well as to the non-governmental sector, often the most vociferous in demanding up-to-date information and analysis.

Michael Gose's work took shape in the context of lively, indeed at times intense, interaction in a challenging inter-African class of LLM students studying Children's Rights in African context. I have no doubt that he would like to acknowledge the influence of the stimulating discussions that occurred there upon this work. Thanks must also go to Jacqui Gallinetti of the Children's Rights project for her patient editing of the manuscript, and for agreeing to fund this publication.

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## A Introductory remarks

So far little is known about the first comprehensive regional children's rights charter, the 1990 OAU *African Charter on the Rights and Welfare of the Child*.<sup>1</sup> The Charter has been mentioned occasionally by documents and authors in different contexts. This happens mostly in the form of an addendum in the context of the 1989 UN *Convention on the Rights of the Child*, the universal children's rights instrument. This limited use of the Charter's provisions has created the impression that it is not, and cannot, be used as a document in its own. The confusion around the Charter is further complicated when it is quoted under a wrong name,<sup>2</sup> when dates and numbers get confused,<sup>3</sup> or when it seems to be nearly impossible to

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<sup>1</sup>OAU Doc. CAB/LEG/24.9/49 (1990), <http://www.dfa.gov.za/for/relations/multilateral/orgafr.htm> (last accessed on 15/05/2002).

<sup>2</sup>For example during the whole ratification process in the South African Parliament the Charter was referred to as "*African Charter on the Rights and Welfare of the African Child*", see Minutes and Proceedings of the National Assembly, Thursday, 18 November 1999.

<sup>3</sup> See for example the speech of the then South African Minister for Welfare and Population Development given on 18 November 1999, printed in the Minutes and Proceedings of the National Assembly, Thursday, 18 November 1999, who said: "[...] *The African Charter on the Rights and Welfare of the African Child was drafted in 1979. To date, 27 countries of the 53 OAU member states are signatories to the charter, while 16 countries have ratified it. The OAU will ratify the charter on 29 November 1999.*[...]" This statement is typical of the confusion that exists, not only is the Charter again referred to under a wrong name, but also the drafting date of the Charter is incorrect. It was probably confused with the UN Convention on the Rights of the Child which initiated in 1979, the International Year of the Child, and came to its conclusion in 1989, when the UN General Assembly adopted the

get a copy of the original draft of the Charter.<sup>4</sup> The situation gets worse if one tries to find reliable data on dates of ratification, numbers of States Parties and exact date of entry into force of the instrument.<sup>5</sup>

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Convention. The Charter, however, was drafted in a short period of time from 1988 to 1990 (see F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CISLS (1998), p.199, on p.207). Furthermore, according to a document on the status of the Charter that can be obtained from the webpage of the Centre for Human Rights at the University of Pretoria ([http://www.up.ac.za/chr/ahrdb/statorat\\_14.html](http://www.up.ac.za/chr/ahrdb/statorat_14.html), last accessed on 05/06/2002) at the time the Minister gave his speech, 32 countries had signed the Charter – if the information of the Centre of Human Rights is correct, the Minister was wrong again.

<sup>4</sup> The Charter was not published officially in South Africa, even though the Republic ratified it. The Library of Parliament in Cape Town does not have a copy of the Charter, despite the fact that Parliament had to deal with the Charter during the ratification process in 1999. The official OAU website (<http://www.oau-oua.org>, last accessed on 15/05/2002) does not contain any hint of the existence of the Charter. The South African Ministry of Foreign Affairs published the Charter on its website but forgot to include a web link to the document – it is therefore hidden and can be accessed only if one knows the correct address (<http://www.dfa.gov.za/for-relations/multilateral/orgafr.htm>, last accessed on 15/05/2002). Copies that are easily accessible can be found on the web pages of the Human Rights Institute of the University of Pretoria ([www.up.ac.za/chr/ahrdb/ahrdb.html](http://www.up.ac.za/chr/ahrdb/ahrdb.html), last accessed on 15/02/2002) and the Human Rights Library of the University of Minnesota (<http://www1.umn.edu/humanrts/instree/afrinst.htm>, last accessed on 15/05/2002). These versions, however, are not official copies.

<sup>5</sup> To get reliable data directly from the OAU seems impossible, even if one employs the services of the Library of the South African Parliament. The official webpage of the OAU (<http://www.oau-oua.org>, last accessed on 05/06/2002) contains no information in relation to the Charter at all. The website of the South African Department of Foreign

Only very scarce literature can be found on the subject. Very few authors<sup>6</sup> have written (brief) articles on the

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Affairs (<http://www.dfa.gov.za/for-relations/multilateral/oau.htm>, last accessed on 10/10/2001) denies the Charter's entry into force. However, information originating from the Department of Foreign Affairs in Pretoria received by the author through the kind offices of the Library of Parliament in Cape Town indicates the entry into force as the 29 November 1999. F. Viljoen (in: C.J. Davel, Introduction to Child Law in South Africa, Lansdown 2000, p. 229) lists 21 countries that are party to the Charter; the website the Human Rights Center at the University of Pretoria has two relevant webpages – the link contained in the ratification section

([http://www.up.ac.za/chr/ahrdb/statorat\\_2.htm](http://www.up.ac.za/chr/ahrdb/statorat_2.htm)) leads to an outdated list of 1999, a “hidden” page

([http://www.up.ac.za/chr/ahrdb/statorat\\_14.html](http://www.up.ac.za/chr/ahrdb/statorat_14.html)), which cannot be found linked at this webpage but at the webpage of the Human Rights Library webpage (<http://www1.umn.edu/humanrts/instree/afriinst.htm>) of the University of Minnesota, which links to the Human Rights Centre in Pretoria, indicates the date as 19 February 2001 and lists the same member states as Viljoen.

<sup>6</sup> A (nearly comprehensive) list of these authors and works includes

(1) K.C.J.M. Arts, *The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child*, 5 RADIC (1992) p.139

(2) L. Muthoga, *Analysis of the International Instruments for the protection of the Rights of the Child*, International Conference on the Rights of the Child, Papers and Reports of a Conference Convened by the Community Law Centre, University of the Western Cape, Cape Town 1992, p. 123

(7) W. Ncube et altri in: Welshman Ncube (ed.) *Law, culture, tradition and children's rights in Eastern and Southern Africa*, Aldershot and Brookfield 1992

(4) B. Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 ICLQ 1992

(5) G. van Bueren, *The African Charter on the Rights and Welfare of the Child: A New Children's Treaty*, 20 International Childrens Rights Monitor (1991) p.8; remarks at various places in: *The International Law on the Rights of the Child*, Dordrecht, Boston, London 1995

Charter in legal journals or contributions for books specializing in the field of children's rights. These authors, however, mainly concentrate on selected points of the Charter and its historical background. In fact most of them wrote on the topic before the Charter came into force on 29 November 1999.

It must therefore be noted that a thorough legal analysis of the Charter's provisions has not been undertaken by any author. The Charter appears to be a dormant human rights instrument the potential of which still needs to be explored in order to fill it with a life of its own. While the procedural and (future) enforcement mechanisms of the Charter have been described by most of the earlier contributions dealing with the Charter, an analysis of its substantive provisions has been neglected. The present paper therefore seeks to examine the Charter's substantive provisions more closely, to put them into the specific African context, and to evaluate the standard of protection the Charter is able to grant. This work shall examine to what extent the Charter can increase the standard of children's rights already attained under the *Convention on the Rights of the Child*. The wording of the Charter often appears to be very similar to the Convention's phrasing

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(6) P. E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Dordrecht, Boston, London 1992, pp.271 to 273

(3) F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CILSA (1998) p. 199; *The African Charter on the Rights and Welfare of the Child*, in: C.J. Davel, Introduction to Child Law in South Africa, Lansdown 2000, p. 214; *Why South Africa Should Ratify the African Charter on the Rights and Welfare of the Child*, 116 SALJ (1999) p. 660.

and its legal value can only be assessed by a direct comparison of the Charter's provisions to the related Convention's clauses.<sup>7</sup> For this purpose the provisions of the Charter, even though not categorised by the Charter itself, will be grouped in sections according to their content.<sup>8</sup> The first section will deal with the Preamble, the second with the overarching principle of the best interest of the child, the third with general principles, the fourth will focus on responsibilities of the child and parents, the fifth on protection rights, the sixth on security rights, and the seventh on participation rights.

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<sup>7</sup> The reader will very often find reference made to textual deviations between the Charter and the Convention. To facilitate the understanding of the interpretations and comments that will be made in these instances it is of importance to read the respective provisions. For this purpose the full text of the Charter and the Convention are contained in the annex to this book.

<sup>8</sup> Even though a categorization is sometimes not easy or unequivocally possible.

## B Substantive provisions

The Committee on the Rights of the Child (see Article 43 of the *Convention on the Rights of the Child*)<sup>9</sup> has identified four rights of special importance for the implementation of the Convention.<sup>10</sup> These four “pillars” of the Convention are the best interests principle (Article 3 of the Convention), the principle of non-discrimination (Article 2), the right to survival and development (Article 6), and the child's right to participate in matters concerning his or her well-being (Article 12). It can be assumed that these core principles can be transposed into the ambit of the *African Charter on the Rights and Welfare of the Child* which also contains these principles. These principles can be seen as the “soul”<sup>11</sup> of children's rights treaties and should be borne in mind when interpreting any provision of the Convention or the Charter.

The first general remark that can be made about the substantive provisions of the *African Charter on the Rights*

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<sup>9</sup> In the following, the word “Charter” shall refer to the *African Charter on the Rights and Welfare of the Child*, the word “Convention” shall stand for *Convention on the Rights of the Child*.

<sup>10</sup> See *General guidelines regarding the form and contents of initial reports to be submitted by States parties under article 44, paragraph 1 (a), of the Convention on the Rights of the Child*, adopted by the Committee on the Rights of the Child at its first session, in October 1991 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 41 (A/47/41)*, annex III), <http://www.unhcr.ch/html/menu6/2/fs10.htm> (last accessed on 22/05/2002).

<sup>11</sup> T. Hammarberg, *Children*, p.291, in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: a textbook*, Dordrecht 2001.

*and Welfare of the Child* refers to the wording. Where the Convention's wording refers primarily to States Parties and provides that "States Parties shall respect and ensure" a certain right, the Charter refers directly to the child as bearer of the right in proclaiming "Every child has" a certain right. The wording of the Convention seems to be more traditional in the sense that subjects of public international law are primarily States in classical doctrine. The Charter seems to follow a more 'human rights-centred' approach in conferring the rights directly upon the child, and therefore to an individual. This is a feature that adapts the more recent notion of the individual as a subject to public international law (even though partially).<sup>12</sup> It should be noted that the *International Covenant on Civil and Political Rights* (ICCPR) and the *Universal Declaration of Human Rights* apply a similar approach, while the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) adopts a wording similar to the Convention. The practice of human rights instruments in international law in this regard is therefore not uniform and seems to depend mainly on the conceptualization of the proclaimed rights as either civil and political, or economic, social and cultural – a distinction that the Charter tries to avoid.

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<sup>12</sup> K. Doehring, *Völkerrecht: ein Lehrbuch*, Heidelberg 1999, p. 107 et seq.

In the light of this general approach of the Charter, a categorisation of the rights and provisions contained therein into civil and political rights; economic, social and cultural rights; and community rights (the classical distinction of human rights into the "three generation" of rights) will be avoided. Although this is a distinction often made by scholars around the world<sup>13</sup>, this conceptualisation of human rights could nowadays appear old-fashioned in view of the often declared interdependency and unity of all human rights.<sup>14</sup> The idea that there is no sharp conceptual distinction between those categories of rights is seemingly in retreat.<sup>15</sup> Various authors have suggested different categories for international human rights.<sup>16</sup> In the present research an

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<sup>13</sup> In South Africa, see for example J. Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law*, SAJHR 1995, p.401, at page 413 et seq. (even though civil and political, and social, economic and cultural rights are used here as only two amongst other possible categories).

<sup>14</sup> See e.g. *Proclamation of Teheran*, art. 13, GA Resn. 32/130, (16 Dec. 1977), 33 UN GAOR, Resns., Supp. (No.45), at 150 (1977); GA Resn. 41/128, art. 6 (2), (4 Dec. 1986, 41 UN GAOR, Resns., Supp. (No.53), at 186 (1986).

<sup>15</sup> See for instance P. Hunt, *Reclaiming Social Rights: international and comparative perspectives*, Aldershot, Brookfield USA, Singapore, Sydney 1996, p.69.

<sup>16</sup> F. Viljoen, for example, distinguishes between survival rights, communal rights, self-asserting rights, protection rights, developmental rights and responsibilities, see F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CILSA (1998) p.199, p.220 et seq.; LeBlanc categorises children's rights into survival rights, membership rights, protection rights and empowerment rights, see L.J. LeBlanc, *The*

approach was used that distinguishes between the three different categories of rights, namely protection, security, and participation rights.<sup>17</sup> In this context protection rights aim at protecting the child from all forms of harmful treatment, security rights provide for basic needs for subsistence and rounded development, and participation rights create a framework for the child's participation in the making and implementation of decisions which affect the child. The other substantive provisions of the Charter will be grouped as general provisions, children's and parents' responsibilities, and overarching principles.

### ***I. Preamble***

Even though it could be argued that the preamble of a legal instrument does not form part of its substantive provisions, it must be noted that a preamble has an important role to fulfil in putting substantive provisions into context and in facilitating an appropriate interpretation of the norms. An evaluation of the substantive content of the Charter must therefore take into account, and give due regard to, its preamble.

First, the Charter's preamble is much shorter than the Convention's as it contains only eight subsections compared to the thirteen of the Convention. The wording of these is in some instances exactly the same. It can be

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Convention on the Rights of the Child – United Nations Lawmaking on Human Rights, Lincoln and London 1995.

<sup>17</sup> Such distinction is used by Welshman Ncube et al in: *Law, culture, tradition and children's rights in Eastern and Southern Africa*, Aldershot and Brookfield 1998.

assumed that the drafters of the Charter were mainly influenced by the blueprint of the Convention (which predates the Charter). In fact, there are such a lot of similarities that even some delegates at a preparatory meeting held in April 1990 wondered about the draft Charter's "lack of specificity" and "wanted guidance" as to how the Charter would differ from the Convention.<sup>18</sup> This is true for the preamble as well. The wording of the third observation of the preamble to the Convention ("...proclaimed and agreed...") is partially evident in the first observation of the preamble to the Charter. Interestingly, the Charter uses this phrase to refer to the *African Charter on Human and Peoples' Rights* while it is used in the context of the Convention with reference to the *Universal Declaration of Human Rights*, the ICCPR and the ICESCR.

Even though the Charter does not specifically refer to the UN Charter or the general human rights instruments referred to in the Convention's preamble, these are mentioned by implication in the very general concluding observation of the Charter's preamble ("Reaffirming adherence...") which seems to embrace every possible children's rights principle enshrined in every human rights instrument existing on the level of general international law and international law of regional application in Africa. In the concluding observation, direct reference is also made to the Convention, which becomes in this way

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<sup>18</sup> See P. E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Dordrecht, Boston, London 1992, p.272.

indirectly incorporated into the Charter. An interesting question is whether this general inclusion of all other international documents in the Charter's preamble refers only to documents already in existence at the time the Charter was drafted, or if this inclusion opens up the Charter for all future developments of international law. Furthermore it must be noted that the Charter speaks of "declarations, conventions and other instruments"; this seems to indicate that not only binding international law but even non-binding international instruments (soft law) are embraced. If one takes this fact into account, a reasonable interpretation of this provision would lead to the assumption that member States of the Charter are therefore indirectly bound by the Charter to all kinds of human rights instruments, even if they did not participate in the drafting process of these instruments, or did not sign or ratify them. Such interpretation could translate into an immense increase in the protection level of children's human rights standards. Non-binding international instruments, for instance the Beijing Rules,<sup>19</sup> could then indirectly attain binding status upon member States. On the other hand it must be noted that such an interpretation would greatly limit member States' sovereign rights to become party to international treaties or abstain from doing so by automatically transferring obligations contained in these instruments to them. The same can be

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<sup>19</sup> U.N. Standard Minimum Rules for the Administration of Juvenile Justice, New York 1986, U.N. Department of Public Information, A/RES/40/33. The General Assembly of the United Nations accepted these rules on 29/11/1985. These rules are not binding international law but merely "soft law".

said for an interpretation that includes future norms and standards. A more cautious interpretation would therefore exclude the application of the Charter's last observation to any future developments in customary law and international instruments in which member States of the Charter did not take part. An argument in this regard could be that a preamble could be seen in such a way as to only demonstrate the general framework of a treaty and not actually to provide for specific rights. It is therefore more convincing to understand the preamble's last observation in this narrower sense. Another interpretation, however, cannot be excluded.

The effort to shape the Charter's preamble in a specific regional way is obvious. It can be seen in the wording of the Charter's third observation, which refers to the specific situation of African children, the wording of the fourth observation, which outlines the special position of the child in African society, and the mention of the cultural heritage, historical background and values of African civilization in the sixth observation. The Charter differs from the Convention as well, in the manner in which it mentions duties imposed on everyone, as described in the fifth observation. Such duties refer to a concept that had been enshrined for the first time in the *African Charter on Human and Peoples' Rights*,<sup>20</sup> and therefore in a genuine African document.

Further, it should be noted that the third observation shapes a picture of the child as a physically and mentally

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<sup>20</sup> See ACHPR Part I Chapter II.

immature person who is therefore in need of special safeguards. The provision recalls the wording of the 1959 UN *Declaration of the Rights of the Child* and the ninth observation of the Convention's preamble. This concept of a child brings to mind a fairly traditional and apparently 'welfarist' approach that needs to be reconciled with the concept of the child as an independent being with rights to participate in matters affecting his or her life, the latter concept forming the basis of the participation rights contained in the Convention as well as in the Charter itself.

Furthermore, the position of the family seems to be strengthened in the fifth observation of the Convention's preamble – an observation that is interestingly not duplicated in the Charter. Even though the fourth observation of the Charter's preamble repeats the sixth observation of the Convention's preamble, namely that the child should grow up in a family environment, the notion of the family as the fundamental group of society which should be afforded protection and assistance in fulfilling its role is not mentioned in the Charter's preamble. The concept that a child should grow up in a family environment is, however, referred to in Article 18(1) of the Charter. The Convention does not include a similar provision in its corresponding Article 10. It could be stated, therefore, that the concept is emphasised in the Charter by attributing to it the binding power of an independent section in a special Article. This, however, is only true if one regards the preamble's provisions as less binding than the rest of the instrument.

In conclusion, it can be stated that even though the Charter's preamble contains observations that are of special importance to Africa, these observations are present in the Convention as well, though in a more generalised way. An example is the sixth observation of the Charter's preamble which deals with the cultural heritage and values in Africa, an observation that can also be found, but as a more general aspect, in the ninth observation of the Convention's preamble.

## ***II. Best interests of the child***

The best interests principle is a fundamental principle stemming from Western law, that governs disputes affecting children<sup>21</sup> and encompasses all the human rights of children. The human rights of children are underpinned by this principle,<sup>22</sup> and must be interpreted in conjunction with this principle. It is contained in Article 4 of the Charter and in Article 3 of the Convention.

One of the most celebrated<sup>23</sup> differences between Charter and Convention is a slight difference in the formulation of the best interests principle. Article 4(1) of the Charter

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<sup>21</sup> B. Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 ICLQ (1992) p.432, on p. 435.

<sup>22</sup> W. Ncube, *Prospects and Challenges in Eastern and Southern Africa – The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture*, p.8, in: W. Ncube (ed.) *Law, culture, tradition and children's rights in Eastern and Southern Africa*, Aldershot and Brookfield 1992, p.1.

<sup>23</sup> See for instance F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CISLS (1998), on p.224.

provides that the best interests of the child shall be “*the* primary consideration” while under Article 3(1) of the Convention it is only “*a* primary consideration”. Therefore it can be said that the Convention contains this principle but allows for other principles and considerations to be taken into account and, in a given case, to override the best interests principle. The Charter, however, seems to maximize the influence of the best interests principle in proclaiming its supremacy over other considerations. On the other hand, one could argue that the Charter embraces Western culture rather than genuine African spirit. However, on the other hand there can be nothing wrong in learning from other cultural experiences and adopting the best of them as may need be.

Further, another slight difference in wording must be noted: the Charter talks about actions “concerning the child” while the Convention relates to actions “concerning children”. The latter could be interpreted as a broader concept of action – the best interests principle does not only have to be taken into account in the specific matter regarding an individual child but in all matters concerning children in general. Such an interpretation would broaden the scope of the whole provision and ensure a maximum safeguard for the child. Understood in this way the wording of the Convention reaches a higher level of protection than the Charter.

However, it must be noted that Article 3 of the Convention not only contains the best interests principle but, in addition, general State obligations as well. These

obligations are not contained in Article 4 of the Charter, as will be dealt with more specifically elsewhere in this work. Suffice it to say that one could interpret the absence of further provisions, apart from the best interests principle, in Article 4 of the Charter as a way in which the drafters emphasise the principle by dedicating a whole Article to it alone.

### ***III. General provisions***

This section deals with general legal substantive provisions that do not necessarily fall under the category of children’s rights.

#### **1. Definition of a child**

The definition of the concept of childhood, and therefore the persons to whom the rights of the Charter apply, is contained in Article 2. It is one of the most advanced features of the Charter that this definition, which is crucial for the proper application of the Charter’s provisions, is very clear and does not allow for any limitations. Every person under the age of eighteen is regarded as a child falling within the scope of the Charter. The Charter’s protection is therefore more comprehensive and inclusive, because the Convention restricts its application by including the phrase “unless majority is attained earlier”. Unlike the Convention, the Charter therefore applies to *every* person below the age of 18.

However beneficial this approach might be for the bearers of the rights enshrined in the Charter, it seems to be in discordance with African culture and tradition. It has been

noted by Ncube that in the African cultural context, childhood is not perceived and conceptualised in terms of age but rather in terms of inter-generational obligations of support and reciprocity.<sup>24</sup> Traditionally, the termination of childhood has very little to do with the attainment of any predetermined age but with the physical capacity to perform acts which are normally reserved for adults (e.g. initiation ceremonies, or marriage).<sup>25</sup> In this way the Charter's notion of childhood clashes with the African traditional cultural understanding.

Even though the Charter's (and, in the same way, the Convention's) provision defining childhood seems therefore not attached to African traditional concepts, the wording of Article 2 of the Charter is clear. One might complain that the approach that the Charter and the Convention take implies that "someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age",<sup>26</sup> but this does not make it less necessary for these international instruments to do so in order to grant a comprehensive protection for all persons under the age of 18 years who are deemed to be in need of protection. Another approach that takes into account the more traditional concepts of childhood would possibly undermine this effective and comprehensive

protection. Therefore it must be said that even though the determination of the end of childhood in the Charter seems to be in a certain sense arbitrary, this is the only way to reach the Charter's aim of protecting the youngest and most vulnerable members of society. As was explained above, in so doing, the Charter is more advanced than the Convention in so far as its definition is absolute and does not allow for any exceptions.

## 2. General obligations of States Parties

The provisions of Charter and Convention that contain the general obligations of States Parties will now be examined.

Article 3 of the Convention, other than containing the best interests principle, sets out in its second and third subsection general obligations for States Parties. These obligations are not explicitly contained in Article 4 of the Charter, the Charter's Article enshrining the best interests principle, as was briefly mentioned above. Neither do these obligations appear in Article 1 of the Charter, which contains the general obligations States incur by ratifying the instrument, or in any other place in the Charter. The above-mentioned subsections of Article 3 of the Convention refer to the positive obligation of a State to ensure the protection and care required for the child's well-being and a minimum standard for institutions, services and facilities to care for children. Even though such obligations could, perhaps, be deduced from other provisions in the Charter (for instance Article 14 which deals with health and health related services) the Charter's silence on these State obligations is regrettable, at least in

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<sup>24</sup> W. Ncube, *The African Cultural Fingerprint*, p.18 in: Welshman Ncube (ed.) *Law, culture, tradition and children's rights in Eastern and Southern Africa*, Aldershot and Brookfield 1992, p.11.

<sup>25</sup> W. Ncube, *op. cit.*, pp.19 et seq.

<sup>26</sup> Armstrong et al., quoted in: W. Ncube, *loc. cit.*

terms of clarification. These obligations are of universal importance for the well-being of the child, and, even more in the specifically difficult African context that the third observation of the Charter's preamble refers to.

States Parties' general obligations are mostly contained in Article 1 of the Charter. This differs from the Convention which spells out general and specific States' obligations in different provisions. Further it must be noted that the Charter does not explicitly distinguish between civil and political, and economic, social and cultural rights as is the case in the Convention. Even the 'mother instrument' of the Charter, the *African Charter on Human and Peoples' Rights* does not categorise rights and reflects in this way the often-claimed interdependency and unity of all human rights.<sup>27</sup> Where the Convention states that socio-economic rights shall be given effect 'merely' to the maximum extent of the available resources, Article 1 of the Charter does not contain such a limitation. Nevertheless, in the more specific provisions of the Charter dealing with socio-economic rights, limitations related to the availability of resources seem to be permissible: see for example the right to education (Article 11(3)) or the rights of handicapped children (Article 13(3)). Both Articles contain rights that could be categorised as socio-economic and speak of progressive realisation. It can be assumed, therefore, that even though the distinction between categories of rights is less obvious in the Charter, such a distinction can

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<sup>27</sup> See footnote 13.

nonetheless be found underlying certain of the Charter's provisions.

Further, it must be noted that Article 1 of the Charter contains, in a very prominent position, the provision that the rights enshrined therein shall be regarded as the minimum standard rights and shall not hinder the effectiveness of those rights contained in other instruments which grant a higher level of protection than the Charter itself. A similar provision with nearly the same wording can be found in the Convention, but only in Article 41. The Charter seems therefore to emphasise that its level of protection is complimented by other rights and human rights instruments.

A unique feature of the Charter is contained in Article 1(3). This provision puts an obligation upon States Parties to discourage certain behaviour that is inconsistent with the Charter's provisions – a clause that could be of immense value in the specific African context, where potentially harmful religious and cultural practices seem to be deeply rooted.<sup>28</sup>

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<sup>28</sup> An example, in this instance, is the Trokosi practice in Ghana, see for example: A. Small Bilyeu, *Trokosi - The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 *Ind. Int'l & Comp. L. Rev.* (1999), pp.457 et seq. Further reference to Article 1(3) of the Charter will be made in the context of Article 21 of the Charter.

### 3. Publication of rights and guarantees

Article 42 of the Convention obliges States Parties to actively promote and publicise the rights of the Convention. A similar provision is missing in the Charter.

Nevertheless Article 1(1) of the Charter obliges States to “undertake the necessary steps [...] to adopt such [...] measures as may be necessary to give effect to the provisions of this Charter”. It has been suggested that one should read this Article in a sense that it includes a similar obligation as contained in Article 42 of the Convention.<sup>29</sup> Such interpretation, however, is in no way obvious or facilitated by the wording of the Charter. Moreover, it must be borne in mind that the drafters of the Charter were well aware of the concrete wording and the individual provisions of the Convention. If they chose to omit an explicit provision like Article 42 of the Convention it cannot be easily assumed that they intended to include this provision in the Charter by means of interpretation. It must be assumed, therefore, that the Charter does not oblige States Parties to publish and make the Charter widely known, but only to undertake all measures to give effect to the Charter’s provisions. If State Parties are of the opinion that they can allocate their resources more effectively in pursuing other objectives of the Charter than in spending

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<sup>29</sup> This was suggested by O. J. Olowu, Children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child, p.9, an unpublished paper that had been prepared for the course of Children’s Rights (LL.M.) taught by Prof. Julia Sloth-Nielsen in the 2<sup>nd</sup> semester 2001 at the University of the Western Cape, on file with the author.

money on information campaigns, such reasoning cannot be easily dismissed as an obvious breach of a Charter obligation.

However, it is questionable how effective a legal instrument can be when it is kept in hiding from the public. The fact that the Charter, for example, has not been published by the South African Government in any official publication, as was hinted at above, is regrettable. It is doubtful that this could promote the effectiveness of the Charter. The omission of an express obligation to make the Charter widely known to the public may turn out to be counterproductive. A human rights instrument, even if it contains provisions for a direct complaints procedure, as the Charter does, can only be brought to life if it is not only known to a small circle of specialized scholars, but also to the broad public. It must be fixed in the public consciousness in order to become effective. The Charter’s silence on this topic is therefore most unfortunate.

### *IV. Responsibilities*

Both Charter and Convention contain certain provisions dealing with direct responsibilities not only upon the State Party but upon private individuals such as parents, and in the case of the Charter, children as well.

#### 1. Parental responsibilities

With regard to parental responsibilities it must be generally noted that a general norm like Article 5 of the Convention cannot be found in the Charter. This provision of the Convention relates to the right and duty of parents to

direct and guide the child in the exercise of the rights enshrined in the Convention. However, a more specific norm, as opposed to the more general one, can be found in Article 9(2) of the Charter. This special provision employs nearly the same wording but is limited to the right of freedom of thought, conscience and religion. The absence of a general norm could be interpreted in a way that enables the Charter to provide for greater freedom for the child in the exercise of his or her rights and for less interference by the parents. On the other hand, children may not be able to properly exercise the recognised rights without adequate guidance by their parents. The absence of such a clause cannot therefore be easily judged as a positive or a negative omission.

Article 20 of the Charter, under the heading of “Parental Responsibilities”, spells out the duties of parents or legal guardians. The provisions on which this Article is based can be found in Article 18 of the Convention. The Charter does not explicitly provide for a ‘common’ responsibility of both parents as the Convention does. The Charter itself speaks of the “primary” responsibility of parents alone. Furthermore the Charter avoids the term “legal guardian” and uses the expression “other persons responsible for the child” instead. This could be understood in such a way that even people who are not legal guardians, but who care *de facto* for the child, fall under this clause, as well as legal guardians. This assumes a special meaning in the African context, where the care of children in remote areas lies with the extended family or with the tribal or rural community rather than with parents or legal guardians or

with the often non-present State. On the other hand, such an interpretation creates difficulties in the sense that it may not be possible to impose real legal duties on people who care only *de facto* for a child, without having the legal responsibility for doing so. Following this point of view, the afore-mentioned interpretation could be unlikely if one is not willing to accept that the ‘duties’ contained in the above mentioned Charter Article are of moral value only. If one is not willing to accept the interpretation that embraces *de facto* carers as well, one must assume that “persons responsible” in the sense of the Article are “legal guardians” as spelled out in the Convention. Then the textual deviation would not make any sense.

In addition, the expression “persons responsible for the child” who shall have the “primary responsibility for the upbringing and development of the child” seems tautological. With the provision that the “primary responsibility” lies with the parents, the Charter makes clear that it is principally not the task of the State to take care of the child. This is a concept that brings to mind the judgment by the South African Constitutional Court in the *Grootboom* case.<sup>30</sup> This is quite different to the Convention, because such a statement cannot be derived from the wording of Article 18 of the Convention. Read in

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<sup>30</sup> See The Government of the Republic of South Africa et al. v. Irene Grootboom et al., Case CCT 11/00, decided on: 4 October 2000, paragraph 77, p.50, <http://www.concourt.gov.za/judgements/2000/grootboom1.pdf> (last accessed on 20/05/2002).

this way, the Charter's provision could be understood as a safeguard for the State.

Article 20(1)(a) of the Charter adds the words "at all times" to the wording of the third sentence of the Convention's Article 18(1). This seems merely reinforcing the concept of the best interests of the child.

Duties that do not find any counterpart in the Convention are contained in Article 20(1)(b) and (c) of the Charter. The first one is the obligation to secure conditions of living necessary for the child's development. This duty is limited by the abilities and financial capacities of the parents or other responsible persons. The second duty concerns "domestic discipline" which shall "be administered with humanity and in a manner consistent with the inherent dignity of the child". This is a mere repetition of the provision of Article 11(5) of the Charter. The only difference is that this time the provision is formulated as a duty of the parents. A really absurd interpretation, even though it is consistent with the text, would be that the named persons are obliged to administer "domestic discipline", which could be seen as a euphemistic expression for corporal punishment! However, by contrast it can be stated that the Charter does not prohibit corporal punishment. Domestic discipline with regard to the inherent dignity of the child could mean for example that the parents are not allowed to treat their children in a manner that exposes them to the derision of other people, pillories and stocks, or degrades the child to

a mere object. Treatment that denies the human nature and value of the child is prohibited.

The provision of Article 20(2) of the Charter is based on Article 18(2) and (3) of the Convention. While the Convention's Articles are generally not assembled under headings, the Charter's Articles are. It should be noted, in this instance, that the heading "Parental Responsibilities" under which the provisions of the Charter's Article 20(2) fall, appears to be misleading. The provisions do not deal with parental responsibilities, but with State obligations related to parents, and other peoples responsibilities. In opposition to the Convention, the Charter contains an express limitation of the obligations set out by including the expression "in accordance with their means and national conditions". The Convention, on the other hand, has its own limitation clause for the fulfilment of rights in the second sentence of Article 4, that applies to socio-economic rights in general. A provision that cannot be found in the Convention, but is inherent in Article 18(2) thereof, can be found in Article 20(2)(a) of the Charter. States are obliged by this Article to assist parents and responsible persons. This assistance includes, *inter alia*, material assistance in the case of need. States are furthermore obliged to set up support programmes particularly with regard to nutrition, health, education, clothing and housing. This provision could assume great importance, for instance, in tackling the plight of children living in child-headed households, a problem that follows from the HIV/AIDS pandemic which a large part of the African continent faces at present. If the primary

responsibility for the upbringing and development of the child lies with the parents, this means that once the parents are not able or present anymore, the responsibility falls back to the State. Article 20(1) and (2) of the Charter would then translate into a concrete obligation on the State to provide material assistance to these children. Also relevant in this instance is Article 25 of the Charter which will be discussed elsewhere.

Article 20(2)(b) of the Charter mainly repeats the last part of the Convention's Article 18(2), and the Charter's Article 20(2)(c), the provision of Article 18(3) of the Convention. In contrast to Article 18(2) of the Convention, Article 20(2)(b) of the Charter uses the word "child-rearing" instead of "child-rearing responsibilities". The difference seems to be merely textual. The differences that can be found between Article 20(2)(c) of the Charter and Article 18(3) of the Convention are that the Charter states "are provided with" and the Convention uses the words "to benefit from" child-care services. The Charter's version seems to include a guarantee for the establishment of such services and facilities, while the Convention merely seems to guarantee the equal access to existing services and institutions. This could mean that, in the framework of the Charter, States are obliged to establish such services and facilities in areas where they are not already present, or have the capacity to provide services for every child of working parents. The Charter even omits the Convention's limitation clause, namely "for which they are eligible". The services and facilities under Article 20(2)(c) of the Charter, therefore, seem to be open to every

child of every working parent. Such services could consist, *inter alia*, of day-care-services or permanent kindergartens. Read and interpreted in this way the Charter's provisions provide for a higher level of service for the child and parents than the Convention does.

However, it must be cautioned, that even though such interpretations seem possible, one must keep well in mind that all the obligations under the Charter are limited by the above-mentioned clause "in accordance with their means and national conditions" which is contained in Article 20(1). Given the factual reality in most of the African countries, the most progressive interpretation of the Charter's provisions might be futile because of a real or alleged lack of resources.

## 2. Responsibilities of the child

A unique feature of the Charter is the express inclusion of the concept of children's responsibilities. These are contained in the last Article (Article 31) of the substantive part of the Charter (Part I). The concept of responsibilities of the individual, in other provisions conceived as the bearer of rights, is a peculiarity that can be found in the *African Charter on Human and People's Rights* as well. As in the case of parental responsibilities (Article 20 of the Charter), legal enforcement of the enunciated responsibilities is certainly difficult to conceptualise. One could say therefore that the normative value of these provisions is more of a morally persuasive than of a legal nature.

Concerns have been expressed with regard to the obligation of the child to “respect his parents, superiors and elders at all times” as it can be understood as constituting a duty of obedience.<sup>31</sup> Van Bueren objects that this responsibility is too unquestioning and general. She perceives a contradiction in the Charter insofar as children have to respect their parents even in cases where these parents abuse them. Furthermore, the duty to work for the cohesion of the family should not translate into a right of family members to exploit the child. The child is not in debt to the parents and doesn’t need to compensate them for whatever reason.<sup>32</sup> Viljoen responds to this criticism by stating that to adopt a confrontational approach to the interpretation is not very useful. Under an holistic approach the duty of the child to obedience could be balanced by the prohibition of harmful cultural practices, for example. The child’s duty must be viewed within the context of the whole Charter – duties would have to be given content in this way to be harmonized with the framework of already established rights.<sup>33</sup> In the last instance this (potential) problem seems to be of academic value only, given the fact that the stated duty of the child is of a merely persuasive nature and can hardly be enforced

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<sup>31</sup> G. Van Bueren, *The International Law on the Rights of the Child*, Dordrecht, Boston, London 1995, p. 76

<sup>32</sup> See G. Van Bueren, *op. cit.*, p. 76.

<sup>33</sup> F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CILSA (1998) p.198, on p. 211.

by legal means.<sup>34</sup> Both authors are nevertheless right in highlighting different interpretational possibilities of the Charter which need to be reconciled.

Even the provision that children shall assist the family, superiors and elders in case of need cannot be understood as a real legal obligation. Such a ‘duty’ is not legally enforceable. Following the holistic approach that Viljoen advocates, it is not possible to translate this duty into an obligation upon the child to take employment and to earn money in order to maintain the family. Such interpretation would be impossible in view of Article 15 of the Charter. Admissible examples of the assistance children should render to their parents could be to care for siblings, to help in the household without being economically exploited, to care for sick family members, and so on. Children would therefore not substitute adults in their actions but rather support adults in fulfilling their duties towards the family and in coping with their functions. An interpretation in this sense would be fully compatible with the other provisions that the Charter enshrines.

The following point that should be noted in relation to this Article of the Charter is the conceptual distinction that could be made between the different duties. The duties comprise three different levels. Article 31(a) contains duties towards the family, and therefore towards natural persons. Article 31(b), (c) and (e) relate to the national

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<sup>34</sup> On the other hand it must be borne in mind that, *de facto*, parents who know about this ‘duty’ of the child could very well force a child to obey their orders, and would not need legal enforcement at all.

community and the country of origin of the child. Article 31(d) and (f) regard duties related to the African continent and society. The duties imposed on children in relation to their country of origin and to Africa and the African society are very general and abstract. Here the programmatic character of the duties is clearly perceivable. It is not quite clear in which ways children could contribute specifically to “preserve and strengthen the independence and integrity of [their] country”. The possibility that children would be encouraged to take up arms, for instance, in the event of foreign occupation or civil war that threatens the national integrity, must be excluded given the express provisions of Article 22 of the Charter. Furthermore the duty to work for the promotion and achievement of African Unity needs explanation. No concrete steps come immediately to mind regarding possibilities for children to work for the achievement of these objectives. One could therefore critically conclude that those duties seem to be not only programmatic but, moreover, fairly void of substance.<sup>35</sup>

The introduction of duties into the Charter might therefore be a unique African feature, insofar as no other international instrument imposes duties on children. The actual usefulness of this feature, however, is disputable. At least it can be said that some of these duties could give rise to interpretations that would not be compatible with the aim of a comprehensive protection of the child. The

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<sup>35</sup> As it was put by W. Ncube in: *The African Cultural Fingerprint?*, op. cit., p.18: “Loaded ideological and conceptual notions and perspectives underlie this world view [...]”[that children have duties].

inherent ambiguity of the provisions, or at least their inclination to give rise to misunderstandings, is a characteristic that is not helpful in increasing the level of protection for children already reached by other international instruments, and specifically the Convention.

## ***V. Protection rights***

In the following section the different protection rights contained in the Charter will be scrutinised.

### **1. Survival and development**

What is usually known as the right to life can be found in Article 5 of the Charter under the heading “Survival and Development”. It has been highlighted that the respective Convention Article (Article 6) is one of the four “pillars” of this instrument and goes far beyond merely addressing the physical continuance of existence.<sup>36</sup>

The Charter, like the Convention, does not provide for clear guidance as to when the human life that is protected starts. It therefore takes no stance on the issue of abortion and leaves this topic open for individual and different approaches in culturally different States.

In contrast to nearly the same wording of the respective provision of the Convention (Article 6), Article 5(1) of the Charter includes a second sentence which states that this right to life shall be protected by law. This additional sentence could be interpreted as a special obligation for States to pass legislation that treats every act a person

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<sup>36</sup> See J. Sloth-Nielsen, op. cit., pp.408 et seq.

commits and which deprives a child of his or her life as a criminal offence, and also to introduce laws that will reduce the causes of stillbirth and high infant mortality rates. Furthermore, this Article could be interpreted as providing for an obligation on States to pass laws that aim to reduce the pollution of air, water, soil, or the environment in general, all of which cause the death of children. Under this perspective, the right to life as enshrined in the Charter not only has a negative but a positive dimension, too. This is a common interpretation of the right under other human rights treaties, but the Charter makes this positive dimension explicit.

Article 5(2) of the Charter, again, repeats nearly exactly the wording of Article 6(2) of the Convention. The only difference between these provisions exists in the inclusion of the word “protection” in the Charter which is missing in the Convention. Article 5(2) contains the clause that the survival, the protection and the development of the child shall be ensured “to the maximum extent possible”. This is reminiscent of a common limitation clause that provides that in order to realise socio-economic rights there have to be available resources. This could mean that the right is to be realised progressively, if ever – because States could easily claim that their low level of realisation is the maximum possible under the constraints of scarce resources. In this way the positive dimension that the right to life assumes under the Charter by the inclusion of the second sentence in Article 5(1) may well be limited again.

Furthermore, it must be noted that in Article 5(2) the word “protection” is included in addition to the words “survival and development”, while the respective clause of Article 6(2) of the Convention speaks only of the “survival and the development” of the child. This could lead to the absurd situation that Article 5(1), which contains no limitation clause at all, is contradicted by Article 5(2) that obliges States Parties to ensure the same protection only “to the maximum extent possible”. The inclusion of the word “protection” in Article 5(2) of the Charter is therefore unfortunate. From a more optimistic perspective, one could state that the inclusion of the word “protection” in Article 5(2) of the Charter does not have any specific meaning. States would merely be obliged to undertake all necessary efforts and to use all available resources to secure the survival, protection and development of the child – in this way subsection 2 would not be understood as a limitation clause. However, the wording of the Charter could be understood as providing for a lower level of protection than that already achieved under the Convention.

Article 5(3) contains a prohibition on the passing of the death sentence on children. A similar provision can be found in the Convention’s Article 37(a). In the framework of the Convention it has been put into the context of guarantees in the case of deprivation of freedom and punishment. Given the fact that capital punishment would deprive a child of his or her life, the Charter includes this provision in the Article guaranteeing the right to life.

Interestingly, the Charter does not contain specific provisions regarding the development of the child. Even though Article 5 appears under the heading “Survival and Development”, development is only briefly mentioned in Article 5(2) as was explained above. The Convention is much more explicit on this point and provides in Article 27 for specific clauses dealing with the child’s development. These provisions could be of extreme relevance in the African context and remind one again of the judgement of the South African Constitutional Court in the *Grootboom* case.<sup>37</sup> They provide that every child has a right to a standard of living adequate to his or her development, that the primary responsibility for this lies with the parents, and that the States Parties have the obligation to assist them in fulfilling this duty, even in the form of material assistance. A possible explanation for the silence of the Charter on this point could be found in the lack of financial resources that African nations (allegedly) suffer. African States could therefore be reluctant to engage in such an obligation that could imply massive financial burdens. Such fears, however, could have been overcome if one takes into account the built-in drawback clauses contained in Article 4 and Article 27 of the Convention. A Charter provision along the lines of Article 27 of the Convention would have been, at least, of great value as a declaration of principle and as a guideline for future legislation.

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<sup>37</sup> See footnote 30.

Another important provision missing in the Charter is contained in Article 27(4) of the Convention, which provides for the payment of maintenance by parents or other responsible persons and the enforceability of such monetary claims. Why the drafters of the Charter chose to omit this provision is unclear, as it is of no lesser relevance in the African context than in the rest of the world.

## 2. Protection against discrimination

### a) Non-discrimination

Article 3 of the Charter<sup>38</sup> deals with the protection of the child against discrimination and finds its respective counterpart in Article 2 of the Convention.

The wording of the respective Articles of the Charter and the Convention are almost exactly the same except for the prohibited ground of discrimination relating to “ethnic group” that was added in the Charter and the difference between “fortune” in the Charter and “property” in the Convention. “Ethnic group” seems to be a wider concept than the Convention’s listed notion of “race”. The term

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<sup>38</sup> It should be noted that the Charter’s wording as published by the Human Rights Centre in Pretoria seems to be flawed. Article 3 of the Charter in the list of forbidden grounds of discrimination obviously does not refer to “relation” but to “religion”, as is the wording of the Convention that contains nearly the same list. The text version that can be found at the *Human Rights Library* of the University of Minnesota reads in this way even though this institute refers to the *Human Rights Centre* in Pretoria as the source for their information. A copy of the Charter that the author obtained from the South African Department of Foreign Affairs in Pretoria speaks in Article 3 of “religion”.

“fortune” could also be interpreted in a wider sense than the more specific concept of “property”.

The mentioning of disability as a prohibited ground for discrimination, as contained in the Convention, is missing in the Charter even though its Article 13 directly deals with specific rights of children with disabilities. It is doubtful that discrimination against children with disabilities is allowed under the Charter, given the fact that the first part of the Article grants the rights to “every child”; however, the omission is unfortunate because in this way the Charter misses a chance to reaffirm the rights of children with disabilities and opens itself to questions regarding the reason for this omission.

The Convention’s Article 2(1) urges States to respect and ensure the rights of each child “within their jurisdiction”, a possible restriction that the Charter does not contain. The Charter seems to be more comprehensive on this point.

Another important difference between the Charter and the Convention, with regard to non-discrimination, concerns the prohibition of discrimination on the grounds of the status of or the activities of the child’s parents, family or legal guardians as contained in Article 2 of the Convention. The Charter is silent on this point even though the possibility of such discrimination does not seem to be totally excluded in the African context. A similar prohibition against discrimination could well be assumed under the prohibited ground “religion, political or other opinion, national and social origin” of parents and legal guardians (see Article 3 of the Charter), but for

reasons of clarity, it might have been advantageous to expressly include such a provision. Furthermore, family members of the child other than parents are, unlike the text of the Convention, not mentioned in Article 3 of the Charter. This is quite surprising given the special emphasis on the concept of family in the general African context, and in other provisions in the Charter.

#### **b) Protection against apartheid and discrimination**

A unique feature of the Charter is the inclusion of Article 26 which deals specifically with the historical African problem of apartheid and discrimination on various grounds. This Article could be merely regarded as a leftover of the past, a nowadays useless relic, but there are other interpretational possibilities as well.

Today there might be no African State that has an official doctrine of apartheid and discrimination. Nevertheless, this cannot be excluded in the future. The Charter deals with such a problem in relation to children and obliges States to care for the special needs of children living in such conditions. A State practicing a system of apartheid and discrimination necessarily violates other provisions of the Charter, for example Article 3. It is not very probable that such a State would comply with the special obligations set out under Article 26. It can therefore be assumed that this obligation is meaningful only for other States that do not practice a similar system. Those States are then obliged to act positively on behalf of children that live outside their own jurisdiction. This is a very interesting concept. From a

practical point of view, the provisions of Article 26(3) could be rather difficult to fulfil given the presumed unwillingness of a State practicing apartheid to allow for material assistance and help for people struggling against apartheid on its own territory. The concept is therefore quite unusual given the fact that, in this way, States would enter and penetrate the shell of the apartheid State's sovereignty and interfere in this way with its inner workings. This could be problematic in light of the principle of non-interference that can be derived from the concept of sovereign equality of States as contained in Article 2 of the United Nations Charter, and often invoked in interstate relationships. Furthermore the obligation to "direct" efforts concerning children living in an apartheid State towards elimination thereof could be in conflict with a State's obligation under Article 22 of the Charter (children in armed conflicts) if such efforts did not remain strictly anti-violent and peaceful. The relationship between these two norms therefore needs further elaboration. Possible measures that could be undertaken in the effort to comply with the obligations set forth in Article 26 could consist, *inter alia*, in the undertaking of diplomatic action and pressure on the international stage against the apartheid State.

Furthermore, Article 26 of the Charter gives rise to the interesting question whether its provisions are transferable to present day political situations, even outside of the continent of Africa. The wording of Article 26 does not seem to exclude such an interpretation. Read in this way, the Charter could oblige States Parties to care for children

all over the world living under discriminatory regimes. Applied to the present situation in the world this could have translated into a concrete obligation to protect and support children, for instance, living under Taliban rule in Afghanistan. Furthermore, an interpretation that forces member States to actively support children living in the Western Sahara or in the occupied territories of Palestine cannot be excluded. Article 26 could therefore imply very far-reaching consequences. But such an interpretation together with the vast and broad concept of "other forms of discrimination" as contained in Article 26(2) contains a huge potential for abuse by countries with opportunistic political agendas. This observation is aggravated by the fact that Article 26(1) calls for the undertaking of unilateral measures ("States [...] shall individually and collectively undertake..."). In this way, the safeguards of a collective and joint action, which could ensure objectivity and prevent possible abuse by single States, are not present. Therefore, the Article has undeniable potential to increase the level of protection of children's rights but, given its inherent danger of abuse in political and international conflict, it should be applied with a maximum of caution.

### **3. Protection against harmful social and cultural practices**

Article 21 of the Charter is a highly welcomed and unique provision<sup>39</sup> that aims to take into account the special African context with regard to the rights of the child.

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<sup>39</sup> See for instance K.C.J.M. Arts, *op. cit.*, p. 151.

Provisions of the Convention that could be relevant in this regard are Article 24(3), which will be fully dealt with under the right to health and health services, and Article 38 of the Convention, which will be discussed in relation to torture and child abuse.

Article 21 of the Charter reinforces the concept of an obligation on States Parties to discourage “any custom, tradition, cultural or religious practice that is inconsistent” with the Charter (Article 1(3) of the Charter). Article 21 goes beyond this obligation “to discourage” and forces States “to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development” of the child. These are, in particular, customs and practices affecting the health or life of the child, and those practices which are discriminatory on the ground of sex or other status. The concept of harmful practices is therefore very broad. The inclusion of this Article is an important step towards the effective protection of children’s rights. Its inclusion in the Charter is even more notable when one takes into account the recognition of the importance of the cultural heritage and the values of African civilisation as a guiding principle of the Charter, as expressed in the Charter’s preamble. Even though no particular practice is mentioned by name, it is generally assumed that the practice of female genital mutilation falls under this description<sup>40</sup> as a practice that directly affects the health of girls (sometimes even the life) and falls under Article 21(1)(a) of the Charter. Another

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<sup>40</sup> K.C.J.M. Arts, loc. cit.

practice falling under this Article is the custom of child virgin fetish slaves (‘Trokosi’) brought by their parents to shrines in order to serve the gods for ‘religious’ purposes and in the process being physically and psychologically abused. This practice, found in parts of Western Africa,<sup>41</sup> is another example of a custom falling under Article 21(1)(b) of the Charter. Another example of a practice falling under this provision is the killing of baby twins.<sup>42</sup> Furthermore, some initiation rites come to mind, such as where boys are circumcised under dangerously unhygienic conditions and have to survive for a certain period of time in a total wilderness without medical treatment and aftercare.<sup>43</sup>

Article 21(2) of the Charter explicitly prohibits child marriages and the betrothal of girls and boys. Given the fact that the Charter is very strict in defining the term ‘child’ (see Article 2 of the Charter, discussed above) and does not allow for any exceptions, this means that marriages of all children under the age of 18 are prohibited. The Charter obliges States to take effective action to specify the minimum age of marriage to be eighteen years. Article 21(2) is very clear on this point and no other interpretation is possible.<sup>44</sup> States are furthermore

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<sup>41</sup> See note 27.

<sup>42</sup> F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 *CISLS* (1998), p.220.

<sup>43</sup> As practiced, for example, in parts of South Africa.

<sup>44</sup> F. Viljoen speaks of an ambiguous provision that could be interpreted in such a way that states would be allowed to specify an age of marriage

under the obligation to register all marriages in an official registry. This provision could have an immense impact on the law governing traditional and customary marriages in Africa.

The specific obligations enshrined in Article 21(1) of the Charter could possibly be derived from other rights the Charter recognizes. Despite this, Article 21(1) is not only of mere clarification value seeing that the Charter's provisions must be interpreted in the special light of African culture and tradition (see the sixth observation of the Charter's preamble). Only by way of explicitly including such a provision does the Charter really assure that those customs and practices will be eliminated. The Convention, however, does not have to be interpreted from a specific African point of view. It nevertheless refers in the 12<sup>th</sup> observation of its preamble to the cultural and traditional values of the different people that must be taken into account in interpreting the rights contained therein. However, the Charter, by clarifying the situation, is able to increase the level of protection already reached by the Convention.

In addition, Article 21(2), mentioned above, adds a totally new obligation for States that cannot be found in other parts of the Charter, or in the Convention. It therefore also

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under 18 years. It is not clear how he arrives at this conclusion. See F. Viljoen, *Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 CILSA (1998) p.199, on p.209.

raises the level of protection already granted by the Convention.

#### 4. Protection against abuse and exploitation

##### a) Protection against child abuse and torture

Article 16(1) of the Charter<sup>45</sup> combines the provisions of the first sentence of Article 37(a) and Article 19(1) of the

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<sup>45</sup> It should be noted that there are different versions of the Charter's text in circulation. Given the fact that the author was unable to get a copy of the original draft, it can only be assumed that the version found on the web page of the Human Rights Institute of the University of Pretoria ([www.up.ac.za/chr/ahrdb/ahrdb.html](http://www.up.ac.za/chr/ahrdb/ahrdb.html), last accessed on 15/02/2002) is the correct one in relation to Article 16(1). Misleading versions are quite common on the Internet and elsewhere. For instance the version at the Human Rights Library at the University of Minnesota (<http://www1.umn.edu/humanrts/instree/afrinst.htm>, last accessed on 15/05/2002), or the one offered by the Institute for African Studies in Gambia.

([http://www.africaninstitute.org/html/african\\_charter\\_on\\_the\\_rights\\_html](http://www.africaninstitute.org/html/african_charter_on_the_rights_html), last accessed on 22/05/2002) seem to be flawed. It is interesting that even the version that the author obtained from the South African Department of Foreign Affairs in Pretoria seems to have an inaccurate text. These assumingly wrong versions read as follows (text highlighted by the author): „[...] *States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.* [...]“. The version that the author holds for the correct one, reads as follows: “[...] *States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.* [...]“.

Convention. Article 37 of the Convention, however, deals with the juvenile justice system. In the main, provisions relating to juvenile justice are incorporated in Article 17 of the Charter. While the close relationship between the Charter and the Convention is obvious, there are nevertheless minor differences and omissions in the Charter's text that should be noted.

In Article 37 the Convention changes its approach slightly in that, although the wording contains the usual "States Parties shall...", the Article proceeds to pledge a definitive obligation on States Parties to ensure that "No child shall...". In Article 16(1) and 17(2) the Charter on the other hand inverts its usually more child centred approach by starting "States Parties [...] shall...". This does not seem to be congruent with the other provisions contained in the Charter. No reasonable interpretation can be given in this instance.

In Article 37(a) the Convention protects against "torture or other cruel [...] treatment or punishment". In Article 16(1) the Charter on the other hand leaves out the words "or other cruel" and "or punishment". One wonders if this omission translates into a lower level of protection for the child. The Charter, however, repeats the provision in its Article 17(2)(a) that deals with juvenile justice issues – in this instance the words "or punishment" are mentioned. Again, the reference to "other cruel" treatment is missing.

Furthermore, the Charter in Article 16(1) leaves out the words "all forms of physical or mental violence" which can be found in Article 19(1) of the Convention, but

incorporates some of the wording of Article 19(1) word by word. However, the omission concerns the words "negligent treatment" and "or exploitation" contained in Article 19(1). Again the reason for this is unclear. The rest of Article 19(1) of the Convention is repeated by the Charter except for the plural forms of "parent(s)" and "guardian(s)" that the Charter reproduces in the singular form. Does this mean that the Charter does not protect the child against inhuman treatment if this is administered by both of the parents or a variety of legal guardians together? Such an interpretation does not make sense. Therefore it must be assumed that the drafters of the Charter did not pay too much attention to the peculiarities of the exact wording of the Convention when copying it. It can be concluded therefore that the wording of the Charter, read in conjunction with the relevant provisions of the Convention, leads to some curious questions – a more accurate and considered approach by the drafters of the Charter would have been preferable. After thorough interpretation, however, the substantive content of both instruments is the same.

Article 16(2) of the Charter is based on Article 19(2) of the Convention. The Charter provides for "special monitoring units" where the Convention establishes "social programmes" while the rest of the Charter's phrase repeats scrupulously the words of the Convention. It must be noted that such a method of drafting an international document is bound to lead to assumptions and interpretations unintended by the drafters. A more innovative approach from the drafters of the Charter would

have been preferable. The end of the Article again shows such a deviation in replacing the Convention's phrase "...of child maltreatment described heretofore" by the words "...of child abuse and neglect."

A provision of the Convention that has been omitted by the Charter relates to the last phrase of Article 19(2) of the Convention that provides for the possibility of judicial involvement. It is true that again such involvement could be included in the Charter's provision by way of interpretation – but the question as to why the drafters of the Charter omitted this provision while they were copying other provisions on a word for word basis remains.

#### **b) Sexual exploitation**

The Charter's Article 27 deals with the topic of sexual abuse and exploitation of children. The relevant Convention provisions are contained in Article 34 thereof.

Firstly, Article 27 of the Charter contains flaws in relation to its numbering. The Charter's provision is numbered as Article 27(1) while there is no other subsection in the Article. This, however, is only a formal inconsistency.

The first difference between Article 27(1) of the Charter and Article 34 of the Convention consists in the more general wording of the Charter that speaks of "measures" alone whereas the Convention is specific in using the expression "all appropriate national, bilateral and multilateral measures". The enunciated measures of the Convention can be, however, easily interpreted into the wording of the Charter.

The next difference can be found in Article 27(1)(a) and (b) of the Charter and consists of the omission of the word "unlawful" that can be found in Article 34(a) and (b) of the Convention. This word could be understood as a restriction of the general provision of Article 34, given the fact that States are in this way not obliged to take measures against lawful sexual activity. The Charter is stricter in using the expression "any sexual activity" instead. The difference is, however, slight given the possibility of interpretation of the expression "sexual activity". A "lawful sexual activity" (if possible at all) could be interpreted as not being a sexual activity in the sense of Article 27. One could think of the innocent play and exploration of children under the age of criminal prosecution as a concrete example for this theoretic possibility. This can surely not be regarded as "unlawful" in the sense of the Convention. Interpreted as a "sexual activity" such behaviour would be prohibited under the Charter if induced or encouraged by any person, even if this person does not take part in it and does not take any advantage of it. Such behaviour would fall outside the scope of the Convention's provision. The Charter is therefore slightly broader than the Convention. Whether this is an advantage or a disadvantage over the Convention cannot be judged in this instance.

The next difference between Charter and Convention concerns Article 27(1)(b) and (c) of the Charter. These provisions omit the word "exploitative", which the Convention uses in Article 34 (b) and (c) in connection with "use of children". Again the question arises whether there are possibilities in which the use of children in the

relevant activities is not exploitative. Such possibilities are rarely imaginable. The difference seems therefore nearly non-existent.

In the same way, the substitution of the word “performances”, that is used in Article 34 (c) of the Convention, by the word “activities” as employed by the Charter in Article 27(1) (c) seems meaningless.

### c) Child labour

Child labour is a sensitive topic in the specific African context. Traditionally African children were a resource for their family in that they performed direct labour in the fields, such as planting, cultivating, weeding and harvesting subsistence crops, or various domestic works including cooking, washing, tending the little children, and fetching water in order to secure the survival of the family members.<sup>46</sup> It must be noted, however, that children’s contribution to family survival is often subsumed in the ideology of childhood. As was pointed out by Ncube:

*Although the main objective underlying the engagement of children in various economic activities was to train them for future adult roles, there is no doubt that tangible economic benefits accrued to parents and the household members from the work of children. [...] although children play such a pivotal role their participation is played down as insignificant. What the adults stress is the fact that they care for the children, give them food and proper upbringing. All this leads to an accumulated debt to be*

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<sup>46</sup> W. Ncube, *The African Cultural Fingerprint?*, op. cit., p.22.

*repaid by the children in a lifetime of unquestioning obedience and loyalty.*<sup>47</sup>

African culture and tradition seems in this way to be prone to lead to economic exploitation of children through the use of child labour. It can happen, therefore, that child labour is not recognised by adults as such, but that it is seen as an educational measure, or as a duty of the child towards the family (see the above discussion on the topic of the child’s duties). The potential dangers of child labour could be forgotten if an adult thinks in the traditional way of “the harder the labour the child has to do the better prepared for life the future adult”. African traditional understandings of the role of children in the family and the child’s duties can in this way be counterproductive to the aim of international children’s rights treaties.

The topic of child labour is dealt with in Article 15 of the Charter and Article 32 of the Convention. Again the Charter’s provisions seem to be based on the wording of the Convention. The first difference to be found in Article 15(1) of the Charter concerns the words “all forms” of exploitation which is an addition to the Convention’s wording which generally speaks of “exploitation” alone. It might be that the Charter’s version is slightly broader than the Convention’s text. The words “all forms of” make it clear that there could be forms of exploitation that do not seem at the first glance to be exploitative. One could think of situations where the child is not forced to do physical work but behaves naturally (e.g. playing, interacting,

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<sup>47</sup> Ibid.

exploring), and this behaviour is used by other people for economic purposes – because of the Charter’s clear text, one could argue that this a prohibited exploitation if the child does not benefit from the profit derived from such an enterprise. Nevertheless such interpretation could derive from the wording of the Convention as well – the Charter, however, has the advantage of greater clarity.

The reference to work that is prone to “interfere with the child’s education” is missing in the Charter. One can wonder if the omission is deliberate or just negligent. It is not obvious why African children should not be protected against work that prevents them from going to school. The omission is therefore to be regretted.

Another omission, the motivation for which is unclear, concerns the missing words “or to be harmful to” which can be found in the Convention. Seeing that these words follow the word “education”, which is missing in the Charter as well, one could assume that this omission is, again, due to negligence in the drafting process of the Charter. No other explanation is otherwise obvious.

With regard to Article 15(2) of the Charter, one omission and one addition must be noted. The Charter does not repeat the Convention’s words “social and educational” as contained in Article 32(2). In this way the Charter obliges States only to take “legislative and administrative measures” for the purpose of implementation. This is most surprising if one considers the next Article in the Charter, namely Article 16, which concerns child abuse and torture. This Article uses the words “legislative, administrative,

social and educational measures” which can be found in the same order in Article 32(2) of the Convention. Again the question arises as to why there is such an omission in Article 15. Does it mean that the drafters did not want to oblige States to undertake social and educational measures to combat child exploitation? This is a highly improbable assumption. A more plausible explanation is that the drafters of the Charter did not include these words by accident.

An addition has been made by including in Article 15 of the Charter the words “covers both the formal and informal sectors of employment”. This is a mere clarification because the Convention, which does not contain a similar phrase, does not expressly state that its provisions apply only to formal employment. The same result can therefore be derived through interpretation of the Convention.

Article 15(2) of the Charter makes reference to the “relevant provisions of the International Labour Organisation’s instruments relating to children”. The Convention is much broader in referring the States’ obligation to “the relevant provisions of other international instruments”. This includes the International Labour Organisation conventions but is open for other instruments and new developments outside of the International Labour Organisation as well. The Charter, however, is more specific insofar as it is very clear which special international instruments the drafters had in mind.

The specific measures that States shall adopt to fulfil their obligations under these Articles are generally the same in both instruments. The Charter goes beyond the provisions of the Convention by providing for the adoption of minimum wages “through legislation” (Article 15(2)(a) of the Charter). This could translate into a greater level of protection because the Convention with its wording “appropriate regulation” would allow for administrative or other measures as well. Parliamentary legislation, as must be interpreted from the word “legislation”, has a higher rank in the hierarchy of norms. This could be an advantage over mere administrative or regulatory measures. The provision of minimum wages as provided for in the Charter is furthermore explicitly absolute, given the fact that minimum wages are prescribed for “every employment”. The Convention does not contain the word “every”. It could, however, be interpreted in the same way.

The additional obligation of Article 15(2)(d) is contained in the Charter alone. It provides for the widespread dissemination of information on the dangers of child labour. This could translate into an obligation of States to organize educational campaigns or other measures in order to inform a wide range of society. This could render the provisions of the Charter more effective and is a useful addition by the Charter’s drafters to the text of the Convention.

#### **d) Other exploitation**

The general provision of Article 36 of the Convention, however, is missing in the Charter. Even though the

Charter provides for the special provisions against sexual and all forms of economic exploitation (Article 15 of the Charter), and therefore for the most widespread examples of exploitation, there could be other forms of exploitation. The Convention provides in its Article 36 for a last and general safeguard. Even though no actual example for such “other exploitation” comes to mind the omission of a similar provision by the Charter has the potential to lower the level of protection for the child because such “other exploitation” might occur in future.

#### **e) Sale, trafficking and abduction**

Another form of commercial exploitation, the sale and trafficking in children, as well as the issue of child abduction are dealt with in Article 29 of the Charter. This Article finds its counterpart in Article 35 of the Convention. The concept of trafficking in children can already be found in Article 24(d) of the Charter. The concept of child abduction, as used by the Charter, is a comprehensive one and does not exclude abduction for non-commercial purposes, as for instance child abduction by a parent in the sense of the 1980 *Hague Convention on the Civil Aspects of Child Abduction*.

Again, as happened in Article 28 of the Charter, the term “appropriate measures” replaces the more specific term of “all appropriate national, bilateral and multilateral measures” used by the Convention. The measures specifically mentioned by the Convention can be, however, easily interpreted into the general expression used by the Charter.

Article 29(a) adds the phrase “by any person including parents or legal guardians of the child” to the original wording of the Convention. In this way the Charter explains and concretises the concept of abduction, sale and trafficking that could otherwise be deemed not to be applicable if the actions had been undertaken by parents or legal guardians. The Charter is therefore able to add a conceptual clarification that translates into a higher level of protection for the child.

Article 29(b) of the Charter introduces a prohibition on the use of children in begging that cannot be found in the Convention. This inclusion has to be welcomed because of the fact that such employment could prove harmful to the child’s development and expose him or her to all kinds of physical and moral dangers. Despite the fact that the use of children in begging could be concomitant with sale, trafficking and abduction, it could occur without it as well. It is therefore not quite clear why the norm was included in the specific context of Article 29 under the heading of “Sale, trafficking and abduction”. It might have been more appropriate to include this special provision in the Article dealing with exploitative labour practices (Article 15(1) of the Charter) considering that it could be understood as a special form of economic exploitation. It can therefore be said that, even though Article 29(b) of the Charter does not find a direct counterpart in the Convention, a similar provision could be derived from Article 32(1) or 36 of the Convention by way of interpretation. The provision of Article 29(b) is therefore of value as clarification but does

not substantially increase the level of protection already reached by the Convention.

A provision that is related to the topic of sale, trafficking and child abduction can be found in Article 11 of the Convention. This norm provides for a general obligation of States to combat the illicit transfer and non-return of children abroad. It could act as an important safeguard and help to render the provisions on child abduction, trafficking and sale more effective. The Charter’s silence in relation to Article 11 of the Convention is regrettable. Again it is true that even though the specific provisions contained in Article 29 of the Charter might be sufficient to cover all present forms of illicit transfer and non-return of children abroad, it cannot be said that in the future there might not be new developments that do not fall under these specific provisions, and render the use of a general clause like Article 11 of the Convention necessary. The Charter offers therefore, again, a potentially lower level of protection for children.

## **5. Administration of juvenile justice**

Perhaps the most striking feature of the Charter in the field of juvenile justice is the omission of a guarantee for the child’s liberty. The Convention proclaims in its Article 37(b) that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”. The Charter is absolutely silent on this point and does not repeat the provision or its substantive content in any of its Articles! This is most surprising and cannot be explained. Does this mean that there is no such guarantee and a child can simply be

deprived of his or her liberty? The omission is most disappointing and raises concerns about the credibility of the Charter as a comprehensive human rights instrument.

Moreover, the provision that the arrest, detention or imprisonment of a child shall be used only as a last resort and for the shortest appropriate period of time is missing as well. The provision that life imprisonment without the possibility of release is prohibited with regard to children (which can be found in Article 37(a) of the Convention) has also been omitted. A further very important omission concerns Article 37(d) of the Convention which guarantees legal remedies for children deprived of their liberty. These provisions are an essential and integral part of the principle of the rule of law. It cannot be assumed that children deprived of their liberty shall have no possibility of appealing against such detention before a competent legal authority. This would not be in compliance with all the other rights the Charter confers upon the child, and especially the child's inherent human dignity. This serious flaw of the Charter is all the more incongruous on account of the Charter's specific reference to the Convention in its preamble. However, in addition, the lamentable omission of the said guarantees is in conformity with the Charter's silence in relation to Article 25 of the Convention, which contains similar guarantees in relation to the placement of children for the purpose of care, protection and treatment.

As far as the specific provisions that the Charter contains in relation to juvenile justice are concerned (Article 17),

one notes again that the Charter's text is largely based on the blueprint of the Convention.

Article 17(1) refers to children "accused or found guilty of having infringed penal law" while the scope of Article 37(c) of the Convention is much broader relating to children "deprived of liberty". Under a strictly literal interpretation, one could argue that children who are detained in prison without trial do not fall under the provisions of Article 17 of the Charter. This would unduly restrict the circle of children eligible for the protection offered by the Charter – such an interpretation being highly unreasonable. The provision should therefore be interpreted as being applicable to all children deprived of their liberty so as to guarantee the highest level of protection for those children most in need of protection. The wording of the Charter in this regard can therefore, at least, be said to be most unfortunate.

The detained child shall be subjected to "special treatment"<sup>48</sup> in a manner consistent with the child's sense of dignity and worth" (Article 17(1) of the Charter). A similar provision can be found in Articles 37(c) and 40(1) of the Convention. The main difference between the Charter and the Convention is, however, that the Convention provides for "treatment with humanity and respect for the inherent dignity of the human person"

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<sup>48</sup> The term "special treatment" has been used as a euphemism for torture by different dictatorial regimes in the past, and recalls, for example, bad memories of German experiences in the time between 1933 and 1945 – therefore even though the Charter was drafted by African people, the words are ambiguous.

(Article 37(c) of the Convention). This appears to be a special safeguard as the child's own sense of dignity and worth could be underdeveloped. Does this mean that the child may be treated by State officials or other persons in a way that accords with the child's possibly underdeveloped notion of worth and dignity just because the Charter omits a broader provision? The way in which the Charter refers to subjective views and characteristics is again rather ambiguous and could be misinterpreted. The wording of the Convention in its neutral and objective form is therefore preferable. Even where the Convention uses the same language as the Charter (Article 40(1) of the Convention), the term "special treatment" is missing and it is submitted that Article 40(1) should read together with Article 37(c) of the Convention.

Similarly problematic is the term "treatment which reinforces the child's respect for human rights and fundamental freedoms of others". This provision, which is contained in both instruments, has the potential to be abused if not curtailed by a provision setting out the standard for the treatment to reinforce the child's respect for human rights and fundamental freedoms of others. It is submitted that Article 37(c) in the Convention fulfils the function of creating a minimum standard of treatment for every child deprived of his or her liberty. A like provision is, however, missing in the Charter. Would it therefore be possible to administer mild corporal punishment as a means to reinforce the child's respect for human rights and fundamental freedoms, given that the Charter does not explicitly prohibit corporal punishment? Could a possible

consequence for infringing the law be the administration of corporal punishment? The whole concept of this Article in the Charter tends to invoke uneasy feelings, and appears to be open to repressive interpretations. The potential for abuse that is created by the provisions of the Convention that use the same problematic language is, in addition to the minimum standards contained in Article 37(c), alleviated by the addition of the words "[...] and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" (end of Article 40(1) of the Charter). Again a similar provision is missing in the Charter.

Article 17(2)(a) of the Charter is based on the provisions of the first sentence of Article 37(a) of the Convention and merely repeats the Charter's own provision of Article 16(1), which has already been discussed above.

Article 17(2)(b) provides for the separation of imprisoned or detained children from imprisoned or detained adults. Unlike Article 37(c) of the Convention, it does not allow for exceptions where it would be in the best interest of the child to remain with adults. This could be interpreted in a way that, even in cases where a child has been imprisoned and has family members serving a sentence in the same prison, it would not be allowed to house them together. A all embracing approach to the Charter, however, could try to reconcile Article 17(2)(b) of the Charter with the child's right to parental care, guidance and protection (Article 19 of the Charter) by way of interpretation. Article 19 entails

the provision that a child shall, wherever possible, reside with his or her parents. Such interpretation, however, might cover only an extremely small number of possible cases where it could be in the best interest of the child to be detained together with adults. The Convention seems to be more flexible in this regard, and this could be an advantage over the provision of the Charter.

Article 17(2)(c) of the Charter compared to Article 40(2)(b) of the Convention does not make sure that the guarantees enshrined in the Charter are minimum guarantees as the words “at least”, contained in the Convention, are missing.

The Charter’s definition of a court of justice (Article 17(2)(c)(iv)) is much more general than the Convention’s (Article 40(2)(b)(iii)). The Charter only speaks of an impartial tribunal, while the Convention spells out in more detail how such a tribunal should be constituted. The guarantees offered by the Convention in this regard are more elaborate and easier to access than the Charter’s. This is true for the right to appeal as well. The Convention provides in Article 40(2)(b)(v) for a review by a “higher competent, independent and impartial authority or judicial body according to law”. The Charter speaks in Article 17(2)(c)(iv) of “an appeal by a higher tribunal” only. No further guarantees as to the status of this tribunal are made.

In the provisions that deal with the establishment of evidence, namely Article 17(2)(c)(v)<sup>49</sup> of the Charter and Article 40(2)(b)(iv) of the Convention, the Charter’s provision omits any reference to the fair examination of witnesses.

Article 17(2)(d) of the Charter prohibits the press and the public from attending the trial of a child accused of having infringed the law. This is very different to the Convention which, in Article 40(2)(b)(vii), provides only that the child’s privacy shall be respected. It must be noted in this instance that, while possibly endangering the child’s privacy, the access of the press and the public to a trial could be argued to act as a special safeguard for the accused, in that it puts the exercise of power by the State under public scrutiny. This argument is motivated by incidents that have occurred in different countries in the world where oppressive regimes have prosecuted persons without due regard to the law and in instances where public scrutiny would have been welcome. However, from a children’s rights approach that aims to prevent victimisation and brutalisation of children, such public scrutiny would not be warranted. In any event the Charter provides safeguards such as the appeals process in order to ensure due process and a fair trial, although these provisions are somewhat less substantive than those

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<sup>49</sup> The author found that some webpages which reproduce the Charter omit Article 17(2)(c)(v), see for example the Human Rights Library of the University of Minnesota (<http://www1.umn.edu/humanrts/instree/afriinst.htm>, last accessed on 15/05/2002).

contained in the Convention. In relation to the accused child's privacy the Charter is therefore more specific than the Convention.

Article 17(3) of the Charter relates to the underlying purposes of dealing with a child in trouble with the law. The corresponding provision of the Convention can be found at the end of Article 40(1). The Charter provides for "reformation, re-integration into [the] family and social rehabilitation". The Convention merely speaks of "reintegration and the child's assuming a constructive role in society". Reintegration in the sense of the Convention does not necessarily have to be into the family but could be into society as well. The notion of "reformation" could be understood as an out-dated concept of treatment which follows a fairly 'welfarist' approach to child interventions. The term is, however, open to interpretation. Such interpretation must be made with a view to other provisions of the Charter, as for instance the concept of child participation in matters regarding his or her wellbeing. The seemingly narrower approach of the Charter can be in this way mitigated.

Finally, it must be established that there are a number of provisions that the Convention contains which do not find parallels in the Charter. One of the most fundamental omissions relates to Article 40(2)(a) of the Convention which contains the fundamental principles of *nulla poena sine lege* and *lex praevia*. This is surprising given the fact that these guarantees are the basis for every fair trial and

can be found in many national constitutions and international instruments.

Other provisions that are missing in the Charter are Article 40(3)(b) of the Convention which relates to the possibility of dealing with a child without resorting to judicial proceedings, and Article 40(4) that provides for a range of possible actions to be taken to ensure that children are being dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

In conclusion, it should be noted that the Charter's provisions on juvenile justice, deprivation of liberty, and legal remedies when accused of offending seem to be very fragmented and lacking in substance. The lack of fundamental guarantees for the safeguard of the child's freedom and the above-mentioned lack of legal remedies is of great concern. Even though special safeguards are included in a variety of other national and international human rights instruments, especially the Convention, it would have been a matter of sound principle to restate these provisions in a (supposedly) comprehensive human rights instrument, such as the Charter. Most of the provisions that have found their way into the Charter are based on the exact wording of the Convention. It is then even more concerning that fundamental safeguards are missing, as the question then arises as to whether these omissions constitute a deliberate intention to exclude the Convention's guarantees.

## Placement for the purpose of care, protection or treatment of health

Article 25 of the Convention contains a special provision that closely relates to the right to health, the protection of family, and the provisions in relation to guarantees in the context of juvenile justice. This provision contains the right of an institutionalised child “to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”. A similar provision is missing in the Charter. Does this mean that a State could, under the Charter, simply forget about a child once he or she has been placed in an institution, or keep him or her there until he or she reaches majority? It is doubtful that this was the intention of the drafters of the Charter in omitting such a provision. Such an interpretation would be, moreover, incompatible with the other provisions of the Charter, as for example the best interests principle as contained in Article 4. The omission is therefore regrettable and not easily understood.

### 6. Armed conflicts

The Charter’s provisions regarding children in armed conflicts (Article 22) attempt to advance the provisions contained in Article 38 of the Convention. Even though the wording is, again, very similar, there are important differences.

The differences between Article 22(1) of the Charter and Article 38(1) of the Convention consist in the Charter’s omission of the words “to them” as well as the use of the words “which affect” instead of “are relevant”, as

contained in the Convention. The aforementioned omission could mean that States Parties should take into account not only children in armed conflicts in which the respective State is directly involved, but other armed conflicts as well. This could spell out an obligation of the State Party to use all diplomatic or other internationally lawful means to ensure respect of this law wherever armed conflicts occur. Such measures could consist in the use of economic pressure, humanitarian help or the participation in actions undertaken by the United Nation. In this respect, the obligation set out by the Charter exceeds the one contained in the Convention in protecting children worldwide. The difference between “which affect” and “which are relevant” to the child seems to be merely textual.

Article 22(2) of the Charter replaces the expression “persons who have not attained the age of fifteen years” that is used by the Convention in Article 38(2) by the words “no child”. Given the strict definition in Article 3 of the Charter this means that the age of protection under the Charter is 18 years without exception. Furthermore the Charter prohibits the recruitment of any child, and therefore of any person under the age of 18 years. A similar provision can be found in Article 38(3) of the Convention. However, the Convention fixes the age of persons who are not allowed to be recruited at 15 years. The Charter, therefore, increases the level of protection by including persons between the ages of 15 and 18 years. A possible implication hereof is that even military schools that prepare children for service in the armed forces are

not allowed under the Charter, if the enrolment in such schools is already understood as recruitment.

The last difference between the Charter and the Convention in relation to Article 22(2) of the Charter consists in the use of the words “all necessary” measures in the Charter and “all feasible” measures in the Convention. This, again, could be a meaningless difference. However, it should be noted that the Charter, in repeating the provisions of Article 38(4) of the Convention in its Article 22(3), uses exactly the same words as the Convention in speaking of “all feasible measures”. The question therefore arises as to why the drafters of the Charter used exactly the same wording in Article 22(3) and did not do so for Article 22(2). A possible interpretation is that the word “necessary” obliges States to undertake something more than “feasible” measures, as feasibility is limited by whether the actual possibility of undertaking a certain measure exists, while “necessary” does not look to the possibility of the realisation of a measure, but to whether there is an actual need. In other words, if a necessary measure means that a State has to spend the amount of, for example, one billion Rand to make sure that no child takes a direct part in hostilities, this would not be feasible if the State did not have one billion Rand. The level of State obligation provided for by the Charter could therefore be slightly higher than the one provided for by the Convention.

An addition has been made by the Charter in Article 22(3) that finds its counterpart in Article 38(4) of the

Convention. The Charter makes it clear in the last sentence of this subsection that the rules set out in Article 22 are applicable in situations of internal conflict as well. The armed conflict need therefore not be an international or a cross border incursion. Given the fact that the notion of “armed conflict” could be disputed in international law, and given the silence of the Convention on the topic, this explicit statement of the Charter is of great use and provides for a comprehensive protection of the child.

In conclusion it can therefore be said that the Charter Article dealing with children in armed conflicts and military organisations is a progressive development on the Convention’s provisions. The Charter is therefore able to add substantially to the level of protection for children in armed conflicts, or military services or facilities. This is of special relevance in the African context where, even at the present time, children can be found fighting in wars they might not even be able to understand.<sup>50</sup>

## 7. Protection of privacy

The Charter grants the child a right to privacy in Article 10, whereas the respective Convention provisions can be found in Article 16 of the Convention.

Again, the wording of the Charter is very similar to that of the Convention. Despite the fact that the wording of the Charter does not use the male and female form of

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<sup>50</sup> For an overview of current problems in relation to children in armed conflicts see S. Hick, *The Political Economy of War-Affected Children*, 575 *Annals* (2001), p.106.

pronouns in a gender-neutral way (i.e. the Convention speaks of his or her privacy, the Charter only of his privacy) there are two more substantial differences to be noted. While the Convention speaks of unlawful attacks on honour and reputation the Charter leaves out the word “unlawful”. This could be an editing error, or could be deliberate. In the latter case this would mean that the child is protected against “lawful” attacks as well – a highly improbable interpretation. It can be assumed, therefore, that the omission was just an oversight, or the drafters of the Charter thought it not necessary to include the word (which again seems strange given the overwhelming similarity of the wording of the Charter and the Convention).

The second difference relates to the possibility of limiting the child’s right to privacy by parental power. While the Convention does not contain a similar reservation, the Charter subjects the privacy of the child to the right of the parents to exercise supervision. This is a major difference between the Charter and the Convention – the Convention protects the child’s privacy in a comprehensive way against interferences by the State as well as by private individuals. The Charter, on the other hand, protects the privacy of the child against interference by the State and non-parental, private individuals. In relation to his or her parents, it would appear that the child’s right to privacy is negated as it would be practically impossible to establish whether the parental supervision was reasonably exercised or not. The Charter, in this way, seems to grant a lesser protection for the child’s privacy than the Convention, and

rather emphasises the rights and role of the child’s parents. It is difficult to say whether this has a positive or negative effect. At the very least it can be said that the possibility for parental abuse of the child’s right to privacy is opened up.

## **VI. Security rights**

These rights have as their objective the attainment of the child’s basic needs for subsistence and rounded growth and development. Under the classical conception of human rights, it could be said that many of these rights fall under the category of socio-economic (or second generation) rights. The category of security rights is, however, not restricted to these rights.

### **1. Health related rights**

#### **a) Health and health services**

The right to health and health services is contained in Article 23(1) of the Convention and Article 14(1) of the Charter. It should be noted that one of the largest problems encountered by African societies today, the HIV/AIDS pandemic, has not been addressed directly by the Charter. This, however, is of no surprise as the Charter’s drafting process was finished in 1990 when the real dimensions of the problem might not have yet been obvious. Taking into account the seriousness of the problem in the African context,<sup>51</sup> however, the possibilities of interpreting health

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<sup>51</sup> See for example Children in 2001. A Report on the State of the Nation’s Children. Pretoria: National Programme of Action for Children in South Africa; 2001, p.88.

related provisions in such a way as to address this crisis becomes of crucial importance for the survival of large parts of the African population, and especially children.

The Charter speaks of the “best” attainable standard of health while the Convention recognises the right to the “highest” attainable standard. There seems to be no major difference between these expressions. The Charter distinguishes between physical, mental and spiritual health while the Convention does not categorise the notion of health in such a way. The Charter’s clarification can be useful in avoiding discussion about the actual meaning of the word as in this way it protects the broadest concept of health possible. The concept of spiritual health could be understood in a quasi-religious sense; however, it may be difficult to include this notion in the traditional concept of health. The Charter seems therefore to be inclined to open up the concept of health to African traditions. In such a way, it can be said that the Charter does not only embrace classical “western-orthodox” health notions and services but includes traditional and holistic ways of dealing with health issues, as for example propagated by the African fraternity of traditional healers. As such Article 14(1) of the Charter seems able to correlate specific African concepts with human rights.

The second sentence of Article 23(1) of the Convention contains a right to health care services which no child should be deprived of. The Charter, however, does not expressly provide for such a right, but seems to assume that a similar right is contained in the general right to the

best state of health. The Charter lists certain measures that States shall undertake to attain full implementation of the right. For example, in Article 14(2)(b) the Charter imposes an obligation on the State Party to ensure necessary medical assistance and health care to all children. Even though the wording of the Charter deviates slightly from the text of the Convention this does not result in substantive changes in content. The Charter states, for instance, that “States shall undertake to pursue” instead of “States shall pursue” as stated in the Convention; another example is the omission of the word “appropriate” in connection with “measures” – a phrase that the Convention uses; finally, the Charter uses the word “reduce” the infant and child mortality rate instead of “diminish” as is used in the Convention.

Article 14(2)(b) of the Charter, however, is exactly the same as Article 24(2)(b) of the Convention.

Article 14(2)(c) and (d) of the Charter obliges States to ensure the provision of adequate nutrition and safe drinking water, and to combat diseases and malnutrition. These provisions become of great relevance in dealing with the growing African problem of mass orphanhood following the HIV/AIDS pandemic, and the related problem of child headed households. This aspect will be dealt with at a later stage in the context of the States Parties’ obligations in the case of a child’s separation from his or her parents. Another area in which these specific obligations can be of major importance is issues relating to street children.

The Convention combines the various aspects of preventative health care in Article 24(2)(c). Through the insertion of the word “including” in Article 24(2)(c) the Convention broadens the scope of the provision insofar as it implies that there could be other measures than those mentioned that could contribute to the fulfilment of the child’s right to health. Other such measures could include, for example, educational measures for parents or the general population. The Charter is silent on this point.

The Convention also differs from the Charter in relation to the “dangers and risks of environmental pollution” which, the Convention provides, shall be considered by the States in the fulfilment of their obligations. Again the omission of a similar provision in the Charter is confusing given the fact that the environmental dangers are very high, especially in the African context, due to the fact that many countries could be tempted, because of financial interests, to apply low standards of environmental protection in their legislation in order to attract foreign investors. Furthermore a “right to a healthy environment” (however problematic such a concept might be<sup>52</sup>) is not unfamiliar to the African human rights tradition as evident by the express inclusion of such a provision in Article 24 of the 1980 *African Charter on Human and Peoples’ Rights*. The deviation of the wording of the Charter from the Convention can therefore not easily be understood.

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<sup>52</sup> See for example G. Handl, Human Rights and Protection of the Environment, p. 303, passim, in: A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: a textbook*, Dordrecht 2001.

The next aspect of the right to the best attainable state of health regards expectant and nursing mothers (Article 14(2)(e) of the Charter), who shall be cared for in order to protect the unborn or the very young child. The wording of the Charter differs from the Convention’s Article 24(2)(d) in as far as it substitutes the word “pre-natal” by the word “expectant” and the word “post-natal” for the word “nursing”. There seems to be no difference between these concepts and they are essentially the same. This provision could assume special importance in the African context especially with regard to the HIV/AIDS pandemic. Translated into a very concrete obligation, it could mean that States Parties are obliged to provide pregnant women who are HIV infected with anti-retroviral drugs in order to prevent the mother to child transmission of the virus. In addition, it could include educational programmes for young mothers with HIV/AIDS to treat their children in a way that minimises their risk of getting infected.

The wording of Article 14(2)(f) of the Charter differs from the corresponding Article 24(2)(f) of the Convention in that it replaces the words “guidance for parents and family planning education and services” by “family life education and provision of services”. “Family life education” might be a broader term than “guidance for parents and family planning education” but the concept of the Convention seems to be clearer and more obvious. The actual reason for the alteration is not clear – especially if one takes into account that the concept of family planning could be of special importance in the African context. Accordingly, the omission of this term is puzzling. However, this

provision can be interpreted as including a State's obligation to provide its citizens with the means of family planning and safeguards against sexually transmitted diseases, as for instance by providing free access to contraceptives and education on their usage. Even though the Charter does not take a clear stance on the issue of abortion, in States where a termination of pregnancy is legally possible, the term "provision of service" in the sense of Article 14(2)(e) of the Charter could be understood as obliging the State to provide for appropriate medical facilities in order to prevent back-street abortions from occurring.

The provisions of Article 14(2)(g) of the Charter are an addition to the provisions contained in the Convention. It aims at the full realisation of the right to health through the special means of national development plans.

Article 14(2)(h) of the Charter corresponds with Article 24(2)(e) of the Convention and differs from the latter only insofar as the Charter mentions, in addition to parents and children, "community leaders" and "community workers". This broadens the circle of people who have to be informed and supported in the use of basic knowledge in the pursuit of the right health and health services. It should be noted in this regard that the words "have access to education" have been omitted in the Charter. The concept of having access to education could mean that people should be able to equip themselves with the necessary knowledge on health issues instead of being cared for in a more passive way by the State. The omission of these

words might not be of great importance as their meaning could be derived from the context but, again, it is not quite clear why the Charter alters the wording of the Convention that it usually follows. The question remains whether the drafters of the Charter were aiming at something specific by doing so, or whether the alteration of the original wording is unintentional or meaningless?

Article 14(2)(h) of the Charter also differs from Article 24(2)(e) of the Convention in that the Charter adds the words "domestic and other" to the word "accident". The question arises as to whether there are accidents other than "domestic and other accidents", or whether the mere concept of "accidents" excludes certain possibilities that the Charter wishes to include? The addition could have been made for clarity's sake but seems unnecessary, and such textual deviations are prone to confuse the reader and lead to interpretations that may have been unintended by the drafters. Furthermore it should be noted that the State's obligation "to inform and support in the use of [...] the advantages of breastfeeding" could be quite problematic in the specific African context when one takes into account that the HIV virus can be transmitted from a mother to her child through breastfeeding. In the light of the widespread HIV/AIDS pandemic this obligation must therefore be interpreted in a restrictive sense and accompanied by educational programmes and bottle-feeding policies that warn infected mothers of the risks that they run by breastfeeding their children.

Article 14(2)(i) of the Charter contains a right to participate in the planning and management of service facilities. This will be examined in more detail in the section on participation rights.

Article 24(3) of the Convention aims for the abolition of traditional practices that are harmful to the health of the child. A similar provision can be found in Article 1(3) of the Charter that obliges States to discourage customs or practices “that are inconsistent with the rights” of the Charter. This Article does, however, not only refer to the right to the best attainable state of health but more generally to all rights, duties and obligations enshrined in the Charter and is a directing principle of the Charter as was already discussed above. This issue is also dealt with by Article 13 of the Charter, relating to harmful social and cultural practices, which has already been dealt with.

Article 24(4) of the Convention echoes the general principle contained in Article 4 of the Convention, namely that socio-economic rights should be realised to the maximum extent of the available resources and within the framework of international cooperation. As such, Article 24(4) subjects the right to health to progressive realization. For this purpose, international co-operation should be promoted and encouraged. The Charter, however, does not contain a similar clause that could be understood as a limitation of the right. However, the wording of the Charter makes it clear that the realisation of the right is a process that aims at progressive realisation, which can be derived from the clauses “shall undertake to pursue the full

implementation”, “shall take measures” and “to develop”. Nevertheless the absence of an express limitation or reservation clause could translate into a higher level of protection, and result into constant pressure on the State by activists and society to further the full achievement of the right. In this way the Charter could increase the pace of realisation of the right.

In relation to the HIV/AIDS problem it has been shown that, even if the Charter provisions in relation to health have various weaknesses and do not expressly address the urgent needs of the population suffering from AIDS or HIV infections, the Charter can be interpreted in a sense as to address the problem and be useful in fighting the pandemic.

#### **b) Children with disabilities**

Special provisions for disabled children are made in Article 13 of the Charter and Article 23 of the Convention.

Again the wording of the Charter is very similar to that of the Convention. This, in turn, makes the differences between the Charter’s Article 13(1) and Article 23 (1) of the Convention more obvious. While the Convention provides that a “disabled child should enjoy a full and decent life” the Charter employs a different wording. Article 13(1) states that the disabled child “shall have the right to special measures of protection”. Thus the wording of the Convention seems to be very broad and unspecific while the Charter contains a specific right that is very clear in its application. If a State is only obliged to recognise that a disabled child should enjoy a full and decent life,

this does not necessarily mean that the State has to undertake special measures to provide for such. The right enshrined in the Convention must, however, be looked at in the context of the other subsections of the Article. Article 23(2) of the Convention goes into much more detail and spells out the specific rights of a disabled child, and the measures States must undertake to fulfil their obligation under Article 23(1). Article 13(2) of the Charter also contains special measures States have to undertake but is shorter and less detailed. The most striking difference lies in the fact that the Convention provides for special care, which shall be generally free of charge, while the Charter is silent on this point. Both instruments subject the rights of the disabled child to the availability of resources. Assistance under the Charter is not dependent on the “circumstances of the parent or others caring for the child”. This could be an advantage for the child in need because in this way States are allowed to only take into account the circumstances of the child’s special situation and not that of his or her parents. A disabled child is, therefore, entitled under the Charter to receive the special assistance of the State even if his or her parents live in circumstances that would permit them to care for the needs of this child and without help by the State. This could translate into a higher level of protection for the child because the circle of persons eligible for State help is wider than that provided for by the Convention.

With regard to the listed facilities and services to which the disabled child should have access, it should be noted that the list contained in the Charter leaves out

“education”, “health care services” and “rehabilitation services” as provided for in the Convention. Even though education is catered for in Article 11 of the Charter, which applies to all children, including disabled children, it must be borne in mind that the educational needs of children with disabilities are different from those of non-handicapped children. The omission of the word “education” in Article 13(2) of the Charter is therefore regrettable. Likewise, of special importance for disabled children is access to health care services and rehabilitation services. Again, it is assumed that the necessary costs of these special treatments have deterred States from incurring such obligations. However, such an assumption is of limited value given the fact that all member States of the Charter are also members of the Convention, which does contain such provisions - the omission is therefore not easily understood.

Equally difficult to explain is the swapping of the words “spiritual development”, which can be found at the end of Article 23(2) of the Convention, for the words “moral development” in Article 13(2) of the Charter. As was explained above, the Charter, in Article 14, contains the notion of “spiritual health” while the Convention is silent on the issue. In relation to disabled children it is therefore surprising that the Charter avoids the repetition while the Convention introduces it. No reasonable explanation for this phenomenon can be given in this instance.

Article 13(3) of the Charter is a new addition to the right contained in the Convention. It aims to guarantee mobility

of the disabled child and his or her access to public institutions or facilities. The provision is subject to the availability of resources and progressive realisation. This is a provision that should not only be of great importance for disabled children in Africa, but everywhere in the world. Therefore one cannot regard this as a unique feature of a specific region, but it should be regarded as being of utmost importance to the realisation of the rights of children with disabilities everywhere. The State's obligation that is created by this Article could include different measures, such as the construction of public buildings with easy access for disabled persons (in other words, stairs must be supplemented by ramps, doors must be wide enough to allow passage, toilets must be designed so that disabled people can use them etc.), or the availability of public transport for disabled people (e.g. by the employment of shuttle busses). The inclusion of this right is welcomed as it increases the level of protection for children with disabilities. However, such a right is not only important for children but for every disabled person, as once the necessary installations are put in place they will not only benefit children with disabilities but adult people as well. An interesting question in the context of this special right arises in view of the interpretation of the term "legitimately". What does it mean to "legitimately want to have access"? Does it mean that there are places to which disabled people have no right to go to, or can it be established by legislation what places those people should have access to, or does it simply restrict the enjoyment of this right to the basic needs of the disabled child and does

not include 'unnecessary' movements, i.e. for recreational purposes? A possible interpretation could be that the wish to access should be reasonable and not abusive of the right – in this way even access for recreational purposes would be included, and a maximum of benefit for the handicapped child guaranteed. This interpretation is supported by the child's right to leisure, recreation and cultural activities as contained in Article 12 of the Charter.

Another State obligation is contained in Article 23(4) of the Convention and relates to international cooperation in the research and the treatment of disabled children. This provision is not included in the Charter and leads to the question as to whether African States believe they are unable to add anything of value to the research and treatment of these children. This is, however, a highly improbable assumption and the reason for the omission of this specific provision unclear.

### c) **Drug abuse**

Article 28 of the Charter and Article 33 of the Convention deal with the topic of substance abuse. The only difference between these Articles lies in the Charter's omission of the phrase "including legislative, administrative, social and educational measures". The Charter's expression "all appropriate measures" can be interpreted, however, in such a way as to include these specific measures as well. In the African context, a concrete example of the application of this Article could be the problem of street children sniffing glue. It could translate, in this instance, into an obligation to restrict the trade of glue containing psychotropic

substances or setting up norms and standards for the production of these commercial goods.

#### **d) Rehabilitation**

A provision that would have been of great relevance especially in the African context is the obligation of States to promote the physical and psychological recovery and social reintegration of children as set forth in Article 39 of the Convention. The problem of African child soldiers who are not able to adapt to the circumstances of normal life after the end of armed conflicts comes almost immediately to mind. It is not clear why the Charter is silent on this important topic. The usual explanation that African States do not have the necessary resources to fulfil such costly obligations is not convincing given the chance that a limitation clause could have been added. By including a similar, though limited, Article in the Charter the moral statement and obligation would have been present. Although such an Article might appear to provide a lesser form of protection, its inclusion in the Charter would still have been worthwhile.

## **2. Name and nationality**

The issue of a child's right to a name and nationality is dealt with by Article 6 of the Charter and Article 7 of the Convention.

The wording of these Articles is again nearly the same despite the fact that the Charter splits Article 7(1) of the Convention into three different subsections. This setup highlights the fact that Article 6 of the Charter enshrines

three different rights of the child. A possible fourth and fifth right that could be deduced from the wording of Article 7(1) of the Convention are missing in the Charter, namely the right to know and be cared for by the child's parents. Why these rights are missing in the Charter is not clear and again raises concerns about the comprehensiveness of the Charter. Nevertheless, these rights could be derived at by a broad interpretation of Article 18 of the Charter, which provides for the rights of the family.

Article 6(4) of the Charter is the counterpart to Article 7(2) of the Convention. In this regard, it is submitted that the Charter makes real progress over the provisions of the Convention. The right to acquire a nationality is "an empty shell" if there is no particular State to turn to in order to apply for nationality – and the relevant provision of the Convention does not impose a specific duty on States to grant nationality.<sup>53</sup> The Charter enshrines the *ius soli* principle according to which a child shall acquire the nationality of the country in which it is born. It must apply in those instances where no other State has granted nationality to the child. In this instance, the Charter imposes a concrete obligation on to the State to grant nationality.<sup>54</sup>

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<sup>53</sup> C.J.M. Arts, *The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child*, 5 RADIC (1992) p. 138, at p. 146.

<sup>54</sup> C.J.M. Arts, *loc. cit.*

Another provision that relates to this group of rights can be found in Article 8 of the Convention. It is the right of the child to preserve his or her identity. This specific right is absent in the Charter even though its relevance in the African context is arguably no less than in other regions of the world. In the same way the Charter omits to include an Article such as Article 30 of the Convention, which similarly aims at the protection of (cultural and traditional) identity. The reason for these omissions is not obvious. Especially in the African context, with its many different cultures, this is most unfortunate.

### **3. Family rights**

#### **a) Protection of the family**

Article 18 of the Charter is a provision that is original and does not have a counterpart in the Convention. It establishes that the family shall enjoy the special protection of the State by recognising the important role the family plays in society. The role of the parents, as well as the family, in the upbringing of the children, however, is nevertheless recognised and protected under the provisions of Articles 5, 9, 10 and 14(2) of the Convention, and is also mentioned in the fifth observation of the Convention's preamble. Furthermore, as was already explained above, the Convention contains the specific right of the child to know and be cared for by his or her parents (Article 7(1)). The Charter's Article 18, on the other hand, does not contain an express 'right of the child to a family' but rather a 'right of the family'.

The concept of family has been described as subject to "the nebulous and indeterminate framework of cultural contexts"<sup>55</sup> and criticised by others as "the last bastion of feudalism within capitalist liberal societies"<sup>56</sup>. The emphasis the Charter lays on the notion of family is, however, an expression of a specific African understanding and must be interpreted from an African point of view. Such an interpretation leads to the assumption that the term "family" cannot be understood in the traditional, narrow, Western concept of "mother, father and child" but as a much wider band of people related to each other.<sup>57</sup> With such a broad perspective, even distant relatives could be family members that fall under Article 18 of the Charter.

Despite these general considerations it should be noted that the special provisions of the Charter following the general statement of Article 18(1) mainly concentrate on the parents and the child. In this sense, the Charter reverts to a more Western concept of the family. Interestingly enough, the Charter seems to link the concept of marriage to the notion of family. This can be deduced from Article 18(2) that only speaks of the rights and responsibilities of

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<sup>55</sup> W. Neube, *The African Cultural Fingerprint?*, op. cit., p.14.

<sup>56</sup> D. Nelken, *Afterword: Choosing Rights for Children*, p.330 in: G. Douglas, L. Sebba, *Children's rights and traditional values*, Aldershot and Brookfield 1998.

<sup>57</sup> See for an example of such a wide understanding in the African context - J. Fenrich, T. E. Higgins, *Special Report: Contemporary African Legal Issues: Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 *Fordham Int'l L.J.* (2001), p.259, at pp.269 et seq.

spouses. The Charter does not seem to take into account the possibility of parents living together without being married or of families composed of same sex couples with child. One could argue that these are possibilities that seem to be quite unlikely in the African context. Such possibilities, however, should not be excluded, and the context of Article 18 seems to neglect them. This could lead to criticism on account of discrimination on the grounds of the marital status and sexual preferences of the parents. Even worse, in the context of a children's rights instrument, is the fact that in this way children could be excluded from benefiting from the special protection granted by the instrument. It is lamentable that the drafters of the Charter did not use the opportunity to provide for a comprehensive construction of the family with a view to the special protection of the child.

Article 18(2) does not seem to be a right that only accrues to the child but a right that accrues to married parents as well. It provides for equality of rights and responsibilities with regard to children and aims at safeguarding the child's wellbeing even in the case of the dissolution of the marriage. The Charter is silent on the rights and responsibilities of unmarried parents. This is, as was mentioned above, a regrettable lacuna.

Article 18(3) of the Charter picks out one aspect of the specific needs of children born out of wedlock in that it provides for a special maintenance clause that protects against discrimination on the ground of marital status.

The Convention, on the other hand, contains a provision on a very narrow, yet special, aspect of the right to the enjoyment of family life. It provides, in Article 10, for a right to family reunification in international cross-border situations. A similar provision is absent in the Charter. It might be that the special circumstances that led to the adoption of this provision in the framework of the Convention did not affect the African continent.<sup>58</sup>

#### **b) Parental care and protection**

Related to the family right of Article 18 of the Charter, is the right to parental care and protection as contained in Article 19. This special provision finds its counterpart in Article 9 of the Convention even though the content of it has been mainly reformulated.

A novel addition the Charter makes to the rights enshrined in the Convention is the right of every child to enjoy parental care and protection.

While the Convention states that a child shall not be separated from his or her parents against their will, the Charter reformulates this provision into the right of the child to reside with his or her parents. It should be noted that the Convention emphasizes the will of the parents while the Charter seems to be more child-centred. This is especially true if one takes into account the second sentence of Article 19(1) of the Charter. Here the Charter

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<sup>58</sup> A similar provision would have been of immense use in the German context where many families had been separated by the special political circumstances before 1989.

expressly states that no child shall be separated from the parents against “his” will. This is a totally different approach compared to that of the Convention. The Charter grants the child a decisive role in determining his or her residence. This could, for example, translate into a right of the child to decide by him- or herself with which parent to stay with in the case of a divorce or a separation. Another difference between the Charter and the Convention is that a separation may be ordered by a “competent” authority in accordance with “applicable law and procedures” under the Convention, and by a “judicial” authority in accordance with “the appropriate law” under the Charter. Yet another safeguard for the child is created by the Charter through this provision. A competent authority under the Convention does not have to necessarily be a judicial one – a situation that is not possible under the Charter. The Convention, however, provides for a judicial review of such a decision. The difference in practice would, therefore, not be very great. Even the omission of the words “and procedures” in the Charter does not seem to alter the level of protection, given the fact that procedures can be prescribed by law and can be included in the term “appropriate law”, which the Charter uses. The difference between the Charter’s wording “[...] that such separation is in the best interest of the child” and the Convention’s “[...] that such separation is necessary for the best interest of the child” seems to be merely textual and not substantive. The Convention sets out factors to determine when such separation might be necessary. The Charter, on the other hand, remains silent on this point and

leaves it to the interpretation of the judicial authority to establish the cases in which a separation lies in the best interest of the child.

Another safeguard the Convention provides for in Article 9(2) is the right for all interested parties to participate in the proceedings. This could include the parents, the child, relatives or other interested persons. The Charter, however, is yet again silent on this point. The only interested party, whose participation is guaranteed under the Charter, is the child (pursuant to Article 4(2) of the Charter) provided that he or she is able to communicate his or her views.

The provisions contained in Article 19(2) of the Charter are the same as those contained in Article 9(3) of the Convention with the exception of the fact that the Charter omits the clause “except if it is contrary to the child’s best interests”. This could mean that even in cases where the maintenance of personal relations is not in the best interests of the child, i.e. because of sexual abuse of the child by a parent, the contact between the child and the abusing parent can not be prevented, except by way of a decision by a judicial authority in terms of Article 9(1) of the Charter, if the child wants to maintain this contact.

Article 19(3) of the Charter provides for the right of the child, the parents, or another member of the family to information in the case of a separation caused by an action of the State. As opposed to Article 9(4) of the Convention, no request by the right bearer is necessary and the State must act on its own initiative. Article 9(4) of the

Convention contains specific examples of such actions by the State, which are not replicated by in the Charter. These examples, however, are merely illustrative and can be easily interpreted as being included in the wording of the Charter. Furthermore, the Charter's right is absolute and does not provide for an exception clause, as the Convention does. In the framework of the Convention, the information does not need to be given if it would be detrimental to the wellbeing of the child. In this way the Charter ensures the highest level of certainty for the family members.

Another, more specific right to information for the parents or guardians of a child apprehended by a State Party is contained in Article 19(4) of the Charter. This provision is a unique feature of the Charter. It provides that "[w]here a child is apprehended by a State Party, his [or her] parents or guardians shall, as soon as possible, be notified [...]". The reason for the inclusion of this provision is not quite clear given the fact that a similar right could be easily derived by way of plain application of Article 19(3) of the Charter.

### c) **Separation from parents**

Article 25 of the Charter, which deals with safeguards for a child separated from his or her parents, finds its basis in Article 20 of the Convention.

Article 25(1) of the Charter uses the expression "any child" instead of "a child", adds the expression "for any reason", and leaves out the phrase "or in whose own best interests cannot be allowed to remain in that environment",

which the Convention uses in addition to the words "provided by the State". The former alterations seem to be negligible and enforce the underlying concept. The omission of the phrase "or in whose best interests cannot be allowed to remain in that environment" does seem to be significant given the fact that the same expression is employed by the Charter in Article 25(2)(a). The omission of the words "provided by the State", however, could lead to a different interpretation of the Charter's provision. As it stands, it is not quite clear who is obliged under Article 25(1) to provide for special protection and assistance. It could be assumed that the obligation is not incumbent upon the State alone but upon the whole of society. The Charter, however, makes it clear in Article 25(2) and (3), that the State has special obligations.

Article 25(2) lists different possibilities for alternative family care that are, however, only for clarification purposes and not comprehensive. It should be noted that the measures or the possibilities mentioned do not include the concept of "kafalah of Islamic law" and adoption. Furthermore, the Charter does not refer to concepts that have been developed in the debates around child-headed households, such as community care, cluster care or kinship care. Reliance seems to be placed on the rather non-African concepts of alternative care.<sup>59</sup> This should,

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<sup>59</sup> As was pointed out by J. Sloth-Nielsen in an unpublished paper on the topic of child-headed households, J. Sloth-Nielsen, Too little? Too late? Too lame? The implications of the Grootboom case for State responses to child-headed households, 2002, p.8, on file with the author; for a discussion of these concepts see the South African Law

however, not be regarded as a disadvantage considering the non-comprehensive nature of the list. The provisions of this subsection could be of relevance in dealing with the specific African problem of child-headed households.

From a formal point of view it should be noted that Article 25(2) of the Charter uses the gender-neutral expression of “his or her” instead of the usually employed “his”. In this regard the Charter’s wording is not consistent and uniform with other provisions contained therein.

An additional obligation that the Charter introduces for States is contained in Article 25(2)(b) and concerns the reunification of children with parents or relatives in the case of internal or external displacement caused by armed conflicts or natural disasters. This provision is a mere repetition given the fact that it can be found in Article 23(4) in relation with Article 23(2). The only slight difference between these provisions and the obligation set forth in Article 25(2)(b) is that while the former obliges the State merely to gather information necessary for family reunification, the latter explicitly obliges States re-unite the family. Such concrete obligation could also be derived from Article 23(2) and Article 23(4) by way of interpretation. The Charter, therefore, merely reinforces the level of protection that it had already established in Article 23, which in any event is higher than that granted by the Convention.

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Commission Discussion Paper on the Review of the Child Care Act, 2002, p.550.

Article 25(3) of the Charter relates to the second sentence of Article 20(3) of the Convention. The Charter has, however, substituted the word “solutions” with the expression “alternative family care of the child and the best interests of the child”. The word “solutions” seems to be broader than the pure concept of “alternative family care”. The narrowing of this conception is, nonetheless, accompanied by a reference the best interests principle. This difference should be therefore merely textual.

#### **d) Children of imprisoned mothers**

Article 30 of the Charter introduces a special provision that aims to protect the infants and young children of imprisoned mothers, and the unborn children of expectant imprisoned mothers. In this way, the Charter recognises the importance of a mother’s care for (very) young children. This is a unique feature of the Charter that does have a counterpart in the Convention.

The Article provides for certain safeguards for such mothers and takes into account the special situation of their children. In doing so it increases the level of protection under the Convention as it seems to be difficult to deduce similar provisions from the Articles contained in the Convention.

The word “young children” needs to be interpreted. Given the fact that the word infant already applies to very young children like babies or toddlers the expression “young children”, to assume its meaning, must relate to children that are not babies anymore but still of an age low enough to be regarded as young. The notion is therefore unclear. A

reasonable interpretation would assume that a child who has reached school going age is still young, but not in terms of Article 30 because he or she does not need the all-round care of a mother any longer and is able to remain alone in the care of other people such as teachers. If one is willing to assume such an interpretation the maximum age of a child regarded as young, in the sense of Article 30, is six years. Other interpretations are, however, possible.

It can also be pointed out, though, that the provision entrenches the old-fashioned perception of the primary caregiver being the mother, and does not provide for a comprehensive solution for imprisoned parents. There are cases of young children who live with and are cared for by the father alone because the child's mother is not present for whatever reason, including death and divorce. Similarly, a child might feel similar hardship if the father was sentenced to imprisonment. It is therefore somewhat incongruous that the Charter does not provide for such possibility even though the situation might be similar to the one regulated by Article 30. The non-gender neutral approach of the Charter would therefore be debatable.

Nevertheless, it should be noted that this Article provides relief for at least some of the affected children. This, in itself, is an advantage over the Convention's silence in relation to the specific issue.

#### e) **Adoption**

Article 24 of the Charter deals with adoptions and finds its counterpart in Article 21 of the Convention.

The first difference between the two Articles relates to the States Parties that are the subject of the obligations set forth by the Articles. The Charter speaks of States that "recognise" and the Convention of States that "recognise and/or permit" the system of adoption. The Charter's provision must be interpreted to include the expression "permit" the system of adoption, in order to guarantee the highest level of protection of adopted children. It is, however, not very likely that a State permits the system of adoption but does not recognise it. The textual deviation seems therefore meaningless.

Article 24(a) of the Charter provides for a special obligation on a State to "establish competent authorities" while the Convention seems to take the existence of such authorities for granted. This should be understood to constitute a special safeguard in States where no suitable administrative infrastructure exists for handling adoption cases. Furthermore, the Charter establishes that the adoption "is carried out in conformity with applicable laws and procedures" while the Convention requires that it "is authorized only by competent authorities [...] in accordance with applicable law and procedures". The difference seems negligible given the provision of the Charter that matters of adoption must be determined by competent authorities.

The Charter substitutes the word all "pertinent" information that is used by the Convention by the expression all "relevant" information. As these words are synonyms, the meaning does not change.

The following variation between the Charter and the Convention lies in the Charter's omission of the word "legal" in reference to a guardian. Again the question arises as to whether there could be any situation where a guardian is not the "legal" guardian and whether the provision should be applicable in this context. Under a pure textual reading of the norm this would be quite possible. It could mean that even in cases where a child does not live with a parent, relatives or legal guardians, the fact must be taken into account that the child is *de facto* guarded by another person. This could then translate into a higher level of protection for the child if one recognises that it could be in the best interests of the child to remain in his or her usual environment, where he or she is actually cared for in a proper way by a person without a legal relationship towards him or her. On the other hand, the omission could be just meaningless and caused by negligence in the drafting process of the Charter. In the same way the substitution of the word "required", as employed by the Convention, with "necessary" could be understood in a similar fashion. Both words are obviously synonyms.

More puzzling is the addition the Charter makes to the words "persons concerned", as used in the context of the Convention, by including "appropriate persons concerned". Is it possible that there are persons concerned who are not appropriate? The expression might be understood in the sense that there could exist a variety of persons that are concerned, but out of those persons only the ones that are nearest to the child should have the right

to deny their consent to the adoption. Again the difference could be meaningless.

At the end of Article 24(a) of the Charter, instead of the original wording "such counselling as may be necessary" the expression "appropriate counselling" is used. Appropriate counselling could be understood as being possibly less intensive than counselling that may be necessary. It might be that there are cases where appropriate counselling, in the sense of the Charter, has taken place but more and further counselling would be necessary. The Charter's textual deviation could therefore translate into a slightly lower level of protection for the child and the people who have to give their consent.

Article 24(b) adds the clause "in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter" to the original text of the Convention that does not contain a similar restriction. This clause could be understood as a special safeguard for the rights of the child, which would have been threatened if the child had been removed from the ambit of applicability of the Convention or the Charter by way of inter-country adoption. Having regard to the fact that all States of the world, with the exception of the United States of America, have ratified the Convention, this special safeguard and restriction clause has lost its potential benefit. Therefore, under the Charter, States that recognise the system of adoption are obliged to take into account inter-country adoptions between all other States of the world except the USA.

Another safeguard included in the Charter, in addition to the Convention's original text, is that inter-country adoptions have to be considered as a last resort only. The Charter emphasises in this way a concept that underlies the Convention's provision as well. If there are no other suitable means of caring for a child in his or her own country, the Charter provides that an inter-country adoption be possible.

Article 24(d) of the Charter changes the wording of the Convention by adding the expression "in trafficking" and replacing the words "for those involved in it", as employed by the Convention, with "for those who try to adopt a child". The introduction of the notion of "trafficking" can be welcomed as a further clarification of the Convention's approach. The second change made by the Charter, however, raises concerns. The original wording of the Convention can be understood as a comprehensive provision that aims at the greatest possible protection for the child. In altering the original wording the Charter now opens up the possibility for interpretation in a narrower sense. It is very seldom that an adoption will result in financial gain for those people who adopt a child. The real danger comes from persons who arrange the adoption, namely the agents. These people could be tempted to neglect the interests of the child and to act out of purely financial interests. The agent is, however, not the person who is going to adopt the child. The agent is, therefore, not included in the narrow wording of the Charter if one employs a plain textual interpretation. The Charter's provision must, accordingly, be interpreted in a sense

contrary to its wording to reach the same level of protection as the Convention. This awkward approach and the uncertainty derived from it is a major disadvantage.

In Article 23(f), the Charter introduces a new obligation for States to provide for the appropriate monitoring of the well-being of the child. Such machinery could enhance the protection of the child but it is unclear as to how effective such a procedure could be. The adopted child will necessarily be removed from his or her country of origin and be located in a new country with his or her new parents. How can a State then provide for an effective monitoring procedure in these circumstances, and more importantly, what is the remedy if it transpires that the child is not being treated in an appropriate manner by his or her new parents? In this regard, international cooperation between States and the conclusion of international cooperation agreements or treaties relating to monitoring and enforcement of provisions would be necessary and of great assistance. None of these measures is mentioned in the Charter. The Charter's provisions, however, could be useful in cases where a child has been adopted by nationals of another State that has ratified the Charter. In these specific circumstances the monitoring process established by the adoptive State could be an important safeguard for the child. Nevertheless, the question remains as to how realistic such a situation of inter-African adoption might be. Most inter-country adoptions presumably take place between African States as 'suppliers' of children and Western countries as 'customers'. The Charter's provisions might therefore be

well-intended but do not match the realities unless interpreted in a way that includes the above mentioned international cooperation and enforcement agreements.

Another Article that could be of relevance in the context of adoptions, including inter-country adoptions, is Article 30 of the Convention that aims at preserving the cultural identity of a child. The Charter, however, does not contain a similar provision. This could then, together with the abovementioned weaknesses, amount to a lower level of protection than provided for under the Convention.

#### **4. Education rights**

Article 11 of the Charter and Article 28 and 29 of the Convention deal with the child's right to education and education related issues.

Even though the Charter's provisions on education are structured in a different way from those contained in the Convention, both treaties deal with, generally speaking, the same rights. The Charter recognizes, in Article 11(1), the right of every child to education generally. Article 11(2) contains the aims and directive principles for education, Article 11(3) enshrines the special aspects of this right, Article 11(4) relates to the rights of parents to choose schools for their children other than State schools, Article 11(5) provides guarantees for the administration of school or parental discipline, Article 11(6) includes special safeguards for pregnant school girls, and Article 11(7) provides for a guarantee of the freedom to establish private schools. Despite the many similarities there are slight differences between the two children's rights instruments.

Article 11(2)(a) of the Charter finds its counterpart in Article 29(1)(a) of the Convention. The wording is the same except for the addition of the word "promotion" contained in the Charter. Promotion could mean that the State shall not only "develop" the child but try to stimulate the child's own abilities to develop without the help of other people - in other words to teach the child to educate him or herself, and to acquire life skills necessary to sustain him or herself.

Article 11(2)(b) of the Charter mirrors Article 29(1)(b) of the Convention and refers to international and regional human rights instruments in general. In doing so, it is broader than the Convention, which only makes reference to "the Charter of the United Nations".

Article 11(2)(c) of the Charter is less concrete than Article 29(1)(c) of the Convention and mainly focuses on the African context. Thus, the respect for parents and the respect for different civilizations is not mentioned as is in the case of the Convention.

Article 11(2)(d) differs from Article 29(1)(d) insofar as the spirit of peace and the sense for equity between the sexes is absent in the Charter provision. The notions of mutual respect and dialogue have been added. Nevertheless, the omission of the two former terms seems strange. In addition, the Charter substitutes the word "national" with "tribal"; however, the reference to indigenous people has been omitted. This is surprising given the special African context that would lean one to expect a similar provision.

Articles 11(2)(e), (f) and (h) of the Charter contain original African provisions, which do not find corresponding provisions in the Convention. These provisions relate to the preservation of national independence, territorial integrity, and African unity and solidarity. The first concept could be interpreted as a reminder of the colonial heritage of African nations. This specific educational aim could be at odds with the aim of African unity and solidarity. Despite these possible tensions, both are genuine and equally ranking African goals that need to be reconciled with one another.

Article 11(2)(g) adds the words “and natural resources” to the wording of Article 29(1)(e). This seems to place the environment in a subordinate position to the satisfaction of human needs – a very anthropocentric focus which is not clearly stated in the wording of the Convention.

The last aim, contained in Article 11(2)(h), is once again a new one and is not echoed in the Convention. The promotion of the understanding of primary health care assumes a different meaning in the African context than it would in other parts of the world on account of the threats that HIV/AIDS and other diseases hold for the African population.

In the same way as the Convention, the Charter obliges States Parties in Article 11(3) to strive for the progressive realisation of the right. This is surprising if one takes into account the respective provisions of the *African Charter on Human and Peoples' Rights*, which in Article 17 does not contain such a limitation. Once again, it should be

noted that even though there is no express categorisation of rights into first or second generation rights, such a distinction apparently underlies the Charter. In this sense the Charter differs from the African “mother-charter”.

Article 11(3)(a) differs from Article 28(1)(a) in as far as it does not contain the words “to all”. Despite this omission, the purpose of the provision is quite clear and can easily be deduced by way of interpretation. The word “primary”, which is used by the Convention, has been substituted for the word “basic”, which seems to be a clearer concept than primary education. The notion of basic education could give rise to interpretational difficulties given the varieties of cultures on the African continent.

The Charter’s provision concentrating on secondary education, namely Article 11(3)(b), seems to be less specific than the respective provision of Article 28(1)(b) of the Convention. It does not include the specification of general and vocational education, does not speak about the obligation of States to make secondary education “available” or to offer financial assistance schemes for children in need. The term “available” could be regarded as being included in the notion of ‘accessibility’. The absence of an obligation to offer financial aid is perhaps understandable in view of the financial problems of most African States. The introduction of free secondary education, however, as provided for in the provision is nevertheless very resource intensive and this does not seem to have bothered the drafters of the Charter. The textual deviations are consequently somewhat confusing.

Article 11(3)(c) of the Charter, providing for higher education, adds the words “and ability” to the original wording of Article 28(1)(c) of the Convention. This seems to be a further limitation subject to the personal characteristics of each child – a reservation that seems to be quite reasonable given the heavy financial burdens that a system of higher education establishes.

Article 11(3)(d) of the Charter is exactly the same as Article 28(1)(e) of the Convention, thereby emphasising the importance of regular school attendance.

Article 11(3)(e) introduces a new provision that cannot be found in the Convention. It provides for the obligation of States to undertake affirmative action measures in regard to female, disadvantaged and gifted children. This is a provision that can be understood in the African context where huge social imbalances exist that need to be corrected by way of State action.

Article 11(4) of the Charter contains the special right of parents or guardians to choose private schools for their children. The private institutions must comply with certain minimum standards that may be laid down by the State. The purpose of such private schools shall be to secure the religious and moral education of the child. Confusion is created by the phrase contained at the end of the subsection “to ensure [...] the education [...] in a manner consistent with the evolving capacities of the child”. It is not clear whether this refers to the parents who are not allowed to choose such a private school if this is not consistent with the capacities of the child, or if this refers

to the minimum standards, which the State may set. Understood in the latter way, the minimum standards must conform to the evolving capacities of the child. A third possible interpretation could be that the religious and moral education of the child would not be ensured if enrolled at a non-private school, the idea being that this education can only be guaranteed in a manner consistent with the evolving capacities of the child by way of a private institution. It is evident that the wording of this Article is not very clear.

Article 11(5) of the Charter concerns school and parental discipline. This differs from Article 28(2) of the Convention which only refers to school discipline. Underlying both the Convention’s and the Charter’s Article is the apparent assumption that corporal chastisement is not generally prohibited. The Charter provides not only for the “dignity” of the child while being punished but, moreover, for “humanity” – a term that the Convention does not use. This might, on the one hand, provide a greater level of protection for the punished child but, on the other, the notion of “humanity” underlies the concept of the “inherent dignity” of the child. It is doubtful whether a parent or schoolteacher administering corporal punishment hits softer if he or she administers the punishment not only with regard to the “inherent dignity” of the victim but also to his or her “humanity”. It is furthermore doubtful that corporal punishment is compatible with the child’s dignity at all. It is therefore not quite clear whether the inclusion of the concept of “humanity” in the Charter’s provision is really able to

substantially increase the level of protection already granted by the Convention.

An extremely relevant provision, especially in the African context, is contained in Article 11(6) of the Charter and does not appear in the Convention. It aims at safeguarding the rights of pregnant girls. These children (interestingly, this time the Charter uses the gender neutral expression “children” – as if this special provision could ever apply to a male child) shall be given the opportunity to finish an interrupted education. This is a very important provision considering the widespread praxis of expelling pregnant girls from schools. A further interpretation leads to the conclusion that pregnancy shall not be a ground for any kind of discrimination (if pregnant girls are expelled from school, as often happens, then why should the boy who took part in creating this condition be allowed to continue his education).

Article 11(7) mirrors Article 29(2) of the Convention. It contains a guarantee for the institution of private schools – a guarantee that is already implicit in the provision of Article 11(4) of the Charter. The special provision contained in Article 11(7) is, therefore, merely repetitive and possibly even superfluous. The wording of both the Convention’s and the Charter’s Article with regard to this topic is nearly the same. The drafters of the Charter have apparently copied the Convention’s text without properly adapting it to the different structure of the Charter. Only in this way can the words “...subject to the observance of the principles set out in Paragraph 1 of this Article...” be

explained. This paragraph merely states that “every child shall have the right to education.” Applied to a private school this could be understood in the sense that the private school must accept every person that applies for education. It is submitted that this would be a reasonable interpretation, as a private school has to provide for equal access for all children to its educational facilities. This could entail a secondary obligation for these schools or for the State to provide funds for children who cannot afford to pay the fees of these institutions, but who possess the mental and physical capacity to be admitted to them. This interpretation would bring heavy financial burdens with it, burdens that African States would usually prefer not to be saddled with. Compared to the provisions of the Convention, however, the picture changes. Article 29(2) of the Convention uses the same words and the same reference to “...paragraph 1 of the present article...”. The major difference, though, is that “paragraph 1” of the Convention’s Article 29 contains the aims of education and not the provision that “every child shall have the right to education”. This provision accordingly relates the aims of education to private schools as well as State schools. This is, without a doubt, a clear and logical clause. Given the nearly exact congruency of the Charter’s and the Convention’s provisions, it can be hypothesised therefore that the drafters of the Charter copied the Convention’s provisions without taking into account that the aims of education are contained in “paragraph 2” of Article 11. This is not clear if one reads the text of the Charter in isolation, without taking into account the Convention.

In conclusion, it is clear that some important provisions have been included in the right to education contained in the Charter. These provisions are of extreme relevance in the African context. On the other hand, certain provisions have been altered so that important words are missing for no obvious reason.

### **5. Social security**

The right to social security and social insurance that is contained in Article 26 of the Convention has found no place in the Charter's provisions. This could be due to the socio-economic circumstances prevailing in most African States. Nevertheless, this right would have been of the utmost importance particularly in the context of Africa and its exclusion is extremely disturbing.

### **6. Refugee children**

Article 23 of the Charter and Article 22 of the Convention deal with special safeguards for refugee children.

The wording of Article 23(1) of the Charter is nearly identical to the Convention's Article 22(1). The first difference relates to the Charter's omission of the words "and procedures", which can be found in the Convention. This does not seem to lead to substantive differences. In addition, the Charter substitutes the words "by any other person", used by the Convention, with the expression "legal guardians or close relatives". Given the context of the Article, this does not seem to make a substantive difference either. The rights set forth in the Charter are applicable "whether [the child is] unaccompanied or

accompanied" by whomsoever. The substitution is therefore not noteworthy.

Furthermore the Charter provides for the enjoyment of "rights" whereas the Convention speaks of "applicable rights". In this way, the Charter seems to indicate that there are no restrictions for the application of rights to the refugee child. The protection of refugee children is therefore comprehensive.

The differences between Article 23(2) of the Charter and Article 22 of the Convention are more obvious. Firstly, cooperation under the Charter is not dependent on the fact that the State considers such cooperation appropriate, whereas the Convention does. The Charter, in fact, makes such cooperation obligatory.

Where the Convention speaks of the "United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations", the Charter employs the notion of "existing international organizations". In this instance, the Charter is less specific than the Convention. International organizations, in the context of international law, refers usually to governmental international organizations. The Convention makes it therefore expressly clear that non-governmental organisations (NGO's) are meant as well. This is not clear in the context of the Charter and can only be derived by way of interpretation. Unfortunately, the Charter can be interpreted in both ways. To render the provision of Article 23 of the Charter more efficient, therefore, it must be understood to include NGO's as well.

Furthermore, the Charter does not expressly mention the United Nations. Where as it seems that the Convention targets only organisations that are in some way affiliated with the UN, the scope of the Charter is much broader and allows for other organisations. Nevertheless, the Charter restricts the obligation of States to cooperate with international organisations to “existing” organisations. The reason for this restriction is not very clear. It could be understood in a way that only organisations that were already in existence when the Charter came into effect fall under Article 23. Such a restriction is, however, not very useful because it could unduly limit the reach of the Article. Once again, the wording of the Charter is somewhat unfortunate.

In addition, the Charter substitutes the Convention’s expression of “other members of the family” with the term “or other close relatives”. In this sense, the Charter seems to be narrower, as it is possible that a member of the family, as considered in the Convention, is not a “close” relative. Consequently, problems could arise in establishing what a close relative is. Is an uncle a close relative? What about the daughter of an uncle? Or the husband of this daughter? These problems in interpretation could have been avoided by using the Convention’s phraseology.

Furthermore, the Charter sets out the obligation to trace the family of a child only in circumstances where this child is unaccompanied. The Convention is broader in providing for a similar service for “any” child. Problems

arise within the framework of the Charter if the refugee child is accompanied by a person that is neither a parent nor a legal guardian nor a close relative – a possibility that could be quite common. Is this child then “unaccompanied” in the sense of Article 23(2) of the Charter? Such interpretation could be deduced from the wording of Article 23(1) where the notion of “accompanied” is used in connection with parents, legal guardians or close relatives only. The logical consequence would be an obligation on States under Article 23(2) of the Charter to trace the parents or close relatives of the child. On the other hand, it runs contrary to the meaning of the word if one assumes that a child, who is in the company of other people who take care for him or her without having a legal or family relation, is unaccompanied. To assume that the child is accompanied, would then mean to deny him or her the protection offered by a State’s obligation to trace his or her relatives. Even though both interpretations are possible, the first one seems to be preferable in order to grant maximum protection to the child. The wording of the Convention, however, is much clearer and therefore easier to access without difficult interpretations.

An explicit obligation of States to re-unite a child with his or her family is contained in Article 25(2)(b) of the Charter as well. Some brief observations with regard to the relationship between Articles 23 and 25 of the Charter have already been alluded to above.

Article 23(3) of the Charter repeats exactly the second sentence of Article 22(2) of the Convention. The only

difference is that the Convention provides for “the same protection [...] as set forth in the present Convention” while the Charter provides for “the same protection”. The Charter appears to be in this way broader and seems to protect the child in a more comprehensive way. This is because a right of the child to protection could derive from other national and international instruments as well. The Charter provides for generally equal treatment, while the Convention seems to limit its guarantee to its own protection clauses alone. In this manner the Charter increases the level of protection already reached by the Convention.

The last provision of Article 23 is an addition to the Convention and provides for the application of the Article to internally displaced children, whatever the reason for their displacement may be. This is a very progressive provision that echoes the concept of a comprehensive application of the Charter’s rights. This same concept can be found in the second sentence of Article 22(2) of the Charter with regard to internal armed conflicts. Again, the Charter is able to increase the level of children’s protection.

### ***VII. Children’s participation rights***

Children’s participation rights stem from a growing recognition of the autonomy of children, and, therefore, their right to have a say in matters affecting their well-being. The introduction of these rights for children was depicted as heralding a total break from previous

international approaches to children’s rights.<sup>60</sup> In the same way as children’s participation rights are crucial to the interpretation of all the rights enshrined in the Convention on the Right the Child,<sup>61</sup> it can be said that these rights influence and inspire the Charter’s rights as well. Children’s participation is one of the above-mentioned four ‘pillars’ of the Convention, and, by analogy, of the Charter.

#### **1. The views of the child in proceedings affecting him or her**

The right of a child to be heard in matters affecting his or her life is enshrined in Article 4(2) of the Charter and Article 12 of the Convention. These provisions lie at the very heart of children’s participation rights.

The first difference between these provisions concerns the notion of the child’s ability to express an opinion. While the Convention refers to a child who is “capable of forming [...] views” the Charter relates to children “capable of communicating [...] views”. The wording of the Charter is in this sense more restrictive than that of the Convention because a child who is not able to communicate could, nevertheless, be able to express his or her views by means other than verbal or written, as for instance by body language or other means. The views of

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<sup>60</sup> J. Sloth-Nielsen, *Ratification of the United Nation’s Convention on the Rights of the Child: Some implications for South African Law*, op. cit., p.403.

<sup>61</sup> See J. Sloth-Nielsen, op. cit., p.410.

children who are unable to communicate in the traditional sense are therefore neglected in the Charter.

Furthermore, the Charter refers only to “judicial or administrative proceedings” while the Convention talks about “all matters” affecting the child. Even though an international convention addresses mainly States Parties, they alone, generally speaking, are legally bound by the obligations of international law, and such a treaty can, of course, contain declarations of principle. The Charter contains, in other provisions, the duties of parents (see for example Article 20). It is therefore quite surprising that the views of the child should only be taken into consideration by States Parties in official proceedings and not by other non-State actors (as, for instance, in matters regarding the family life that are to be decided by the parents) as well. The Convention with its broad wording seems in this way to grant greater protection for the expression of the child’s own opinion.

The Charter states that the views of the child shall “be heard”, while in the Convention the child is merely allowed “to express” views. “To express” does not necessarily mean that another person has to listen to the expressed view. This statement is nevertheless somewhat mitigated by the fact that the Convention provides that “due weight” has to be given to those views. This means that they must be known to the decision maker. However, the wording of the Charter is clearer on this point than the Convention.

One could now pose the question as to whether “due weight” counts for more than the clause “take into consideration” that the Charter provides. It could mean that the authority towards which this provision is directed can decide freely, as long as it has taken notice of the child’s views. If somebody is obliged to give due weight to something, then this person is not totally free to make his or her own decisions anymore. The wording of the Convention is, for this reason, possibly inclined to guarantee a greater freedom for the child.

The last consideration regarding this clause concerns the limitations provided for in the text of the Charter and the Convention. The Charter does not contain the phrase “...in accordance with the age and maturity of the child”, which limits the Convention’s provision. Nevertheless this limitation could be interpreted as implicit in the notion of “capable of communicating his or her views”. The limitation clause of the Charter states that those views shall be taken into consideration “in accordance with the provisions of appropriate law”. This is an important drawback clause which gives wide discretion to the States Parties in limiting the right conferred upon the child. The Convention does not contain a similar reservation to the general rule of the child’s participation. Article 12(2) of the Convention provides, however, for the specific right of the child to be heard in judicial and administrative proceedings (which is the only right the Charter provides for). This participation must be exercised “in a manner consistent with the procedural rules of national law”. In this way there is the possibility of a further limitation on

the right in the Convention, as well. This may, however, not be a general reservation but rather a procedural question.

Even the forms of participation differ slightly between Charter and Convention. While the Charter provides for the indirect participation of the child in the form of an “impartial representative as a party to the proceedings” the Convention offers the additional possibility of participating through “an appropriate body”. The establishment of such an “appropriate body” could, however, limit the participation rights of the individual child in favour of the more general interests of all children.

To conclude, it can be said that the level of protection for, freedom of choice and free will of the child granted by the Convention is in many ways higher than that which the Charter provides for. The Charter does not add much to the level of protection already achieved by the Convention.

## **2. Freedom of expression**

Even though the guarantee of freedom of expression, one of the classic ‘first generation’ rights, could easily be understood as belonging in the category of protection rights, it is obvious that a child’s participation as guaranteed in Articles 4(2) of the Charter and 12 of the Convention would not be worth anything without this underlying right. Because of this, the guarantee of freedom of expression is included in the dimension of participation rights.

The right to freedom of expression is contained in Article 7 of the Charter and Article 13 of the Convention. Both Articles differ in their wording and in the normative content of the relevant provisions. Again, the Charter refers to the ability of the child to communicate his or her views while the Convention does not link the right to certain characteristics of the child but rather grants it to every child. The Charter’s provision is very general as it states that the right to express an opinion freely in all matters, and to disseminate this opinion, shall be assured. The Convention, however, is more specific and lists various aspects of the right to freedom of expression – the freedom to seek, receive and impart information and ideas of all kind – and it specifies different possibilities or ways that the expression could be exercised. Oral, written and printed communications of facts and opinions are protected, as well as information and ideas expressed in the form of art or any other media. In this way, the Convention includes the right to freedom of information as well as the freedom of the arts. All these aspects of the right can be derived from the Charter’s provisions by way of interpretation only. The Convention has therefore the advantage of greater clarity over the Charter.

An important aspect of the freedom of expression is neglected by the Charter – there can be no freedom of expression if the individual cannot receive the information necessary to form his or her opinion. Without this the whole guarantee of freedom of expression is an empty

promise. The Charter is silent on this point, which is a major disadvantage that could hamper the effectiveness of the guaranteed right.

Furthermore the Convention's version is preferable as it protects the way in which ideas can be expressed while the Charter merely safeguards the expression of opinions and does not prevent certain means of expression from being restricted.

On the other hand there could be a difference between "opinions", as protected by the Charter, and "information and ideas", as provided for by the Convention. The question remains as to whether the term "opinion", in the framework of the Charter, contains the notion of plain information as well as the mere utterance of personal beliefs? In other words, is it possible to prohibit the expression of facts that do not contain opinion, or would such behaviour be protected by Article 7 of the Charter, as well? For reasons of clarity, once again, the version of the Convention is preferable.

A further, very important, deviation concerns the possible limitations of the right. While the Convention provides, in a special subsection, specific rules for restricting the right, the Charter is very general in stating that the right is subject to such restrictions "as prescribed by law". This wording is certainly too open and general, given the fact that in a purely textual interpretation the right could be limited by any kind of legislation passed in a constitutional way – even if such legislation has aims that rank lower in the hierarchy of values than the right itself, or are of no protected value at all. This is why the limitation clause in

Article 13(2) of the Convention is so specific and strict – the normative content of the right must be protected against easy and unreasonable intervention by the State.

It can, therefore, be said that Article 7 of the Charter is too general and too restrictive to add anything of real value to the existing legal framework of children's rights.

### 3. Freedom of association

The guarantee of freedom of association, again, can be understood as underlying every participation right of children.

The Charter's Article on freedom of association, namely Article 8, is very short and, except for the limitation clause, mainly repeats Article 15 of the Convention. Again, it can be said that the limitation clause "...in conformity with the law" is very broad and unspecific. This opens up the possibility of abuse, as was explained above in the context of freedom of expression. The problems that the drafting committee of the Convention had with this right, especially concerning the lack of restriction concerning the evolving intellectual capabilities of the child,<sup>62</sup> have found no counterpart in the wording of the Charter. This is surprising given the normally different approach to the concept of children's participation rights that African countries follow, to be deduced from participation rights as for instance the freedom of expression. The proposal for the inclusion of an Article on the freedom of association into the *Convention on the*

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<sup>62</sup> See L.J. LeBlanc, *op. cit.*, p.173 et seq.

*Rights of the Child* originated with the delegates of the USA and was harshly opposed by other countries. So one can state that, once again, a “Western approach” to human rights was adopted by the African drafters of the Charter – but this does not necessarily mean that the right would not be of relevance in the African context. Nevertheless, the Charter’s Article on this issue is merely repetitive of Article 10 of the *African Charter on Human and Peoples’ Rights* as well as Article 15 of the Convention, and is too restrictive to add anything new to the framework of human rights in Africa.

#### 4. Freedom of thought, conscience and religion

The basic guarantee of freedom of thought, conscience and religion as contained in Article 9(1) of the Charter and Article 14(1) of the Convention is the same.

Article 9(2) of the Charter, however, differs in important points from the Convention’s version, even if the wording appears to be fairly similar. First, it should be noted that the Charter does not confer rights *and* duties on parents or guardians, but only duties. Secondly, in exercising these duties, due regard has to be given not only to the evolving capacities of the child but also to the best interests of the child. The question remains as to what the purpose of this textual deviation was, given the fact that in Article 4(1) of the Charter the best interests principle is already proclaimed as an overriding principle. The wording of Article 9(2) is, therefore, merely repetitive. Because of the fact that Article 4(2) of the Charter does not necessarily provide for the child to be able to express his or her

opinion in decisions of the parents it is quite possible that the best interests in these instances, as provided for in Article 9(2) of the Charter, can be achieved without the participation of the child. Such an interpretation would reflect an old-fashioned ‘welfarist’ approach and abandon the child-centred core of the Convention.

The Charter’s notion of duties of parents, found in Article 9(2), is narrower than Article 15(2) of the Convention, which speaks of “rights and duties” of the parents. Parents, in the wording of the Charter, do not have a free choice to exercise a right but are obliged to fulfil a duty. This seems to be a fairly repressive concept that does not leave much room for the free development of the child’s own personality without parental indoctrination. The wording of the Convention could, for this reason, be preferred over the Charter.

Interestingly Article 9(3) of the Charter repeats the first part of Article 14(2) of the Convention. The important difference lies in the limitation clause, “subject to the national laws and policies”. Again, this is a very broad and unspecified limitation clause. This time it is not even necessary to pass proper legislation in accordance with constitutional provisions – a national policy is enough. The most important question, however, refers to the applicability of this reservation. It is contained in the last part of Article 9(3). This section deals with the obligation of States to respect the abovementioned duty to provide guidance and direction, in other words, it contains an obligation of non-interference in family matters. It could

be argued that the restriction clause refers only to Article 9(3), and therefore only to the obligation of non-interference. Compared to Article 14(3) of the Convention this seems to be a highly plausible interpretation, given the fact that the reservation in the Convention, unlike that in the Charter, is a very specific provision that, without any doubt, refers to the whole Article. Read in this way, the very wide reaching reservation contained in Article 9(3) of the Charter would not be applicable to the child's right of freedom of thought, conscience and religion. This would mean that the Charter grants this right without any reservation. Curiously, in accordance with this point of view, the State would be allowed to restrict the right of the parents to guide their children in the enjoyment of the right, but not to restrict the rights granted to their children. Understood in this way, the provision seems to be very progressive and goes beyond the level of protection granted by the Convention. Nevertheless it could transpire that the very precise and specific reservation clause of the Convention is more suitable for the protection of the right. This is because, in the end, no right can be granted without limitations and even rights that do not contain reservations can be restricted by way of balancing them with the rights of other people that are of the same value and at the same level in the hierarchy of norms.<sup>63</sup> An express and very clearly worded restriction clause would be preferable in eliminating the danger of abuse by the executive power of the State or misinterpretation by judicial organs. Despite

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<sup>63</sup> A possible restriction called "Praktische Konkordanz" (practical concordance) in German constitutional justice and doctrine.

the abovementioned problems, the fact remains that this Article, read and interpreted in the proposed way, is a very progressive one that has the potential to guarantee a maximum of protection for the child.

Finally the interrelation between Article 1(3) of the Charter and the rights contained in Article 9 falls to be examined. Even though one can establish that the rights contained therein are not subject to a written reservation in the Article itself, such limitation could derive from the general clause of Article 1(3) that obliges States to discourage harmful cultural or religious practices. This provision, however, does not expressly allow for the prohibition of religious or other practices but restricts itself to oblige States to "discourage" such practices. What State measures could be included in such 'discouraging' action, is open for interpretation. A reasonable interpretation could, however, be that direct prohibitions on the right to freedom of thought, conscience and religion are not permitted on account of the fact that there is no specific limitation clause in the Article. Restrictions can, therefore, only be imposed for the safeguarding of other rights of the same value and importance as the restricted one, as was explained above.

## **5. Protection and function of the mass media**

Article 17 is a specific Article of the Convention that closely relates to the freedom of expression and information, as well as to the freedom of thought and conscience. It describes important aspects of the process of forming one's own thoughts and conscience. This Article

protects different information sources, for example, the Internet, television, libraries, radio etc., which are important for the development and education of the child. The special provision of Article 17(d) would be of great importance to the children of Africa with their broad variety of languages and cultures. None of the provisions contained in Article 17 of the Convention can be found in the Charter. A possible reason could be that the obligations enshrined therein are very costly and would require a special allocation of resources. Such argument, however, is weak if one takes into account that the various media functions could be fulfilled by private companies without a major financial contribution from the State. The usefulness of these specific provisions for the development of the child cannot be doubted. The omission of a similar provision in the Charter is therefore unfortunate.

#### **6. Leisure, recreation and cultural activities**

The right to leisure, recreation and cultural activities is contained in Article 12 of the Charter and Article 31 of the Convention. The wording of Article 12 of the Charter is an exact copy of the respective provision of the Convention. It could be interpreted not only to guarantee “leisure, recreation and cultural activities”, as can be derived from the heading of the Charter’s Article, but also to enshrine the freedom of arts, as well, which is an aspect of the freedom of expression.

#### **7. Cultural identity**

A provision that the Convention contains and that is not recalled by the Charter is contained in Article 30 of the

Convention. This right is closely related to the right of freedom of religion and protects the cultural identity of children. The reason for the omission of this right in the Charter is not obvious, as it would be of great relevance in Africa as well. This is especially true with regard to the language right that Article 30 of the Convention enshrines. To reach a similar provision through interpretation in the Charter could be quite difficult as there is no provision in the Charter that deals explicitly with ethnic, religious or linguistic minorities or indigenous people. Very few Articles of the Charter mention the right to use a specific language (except for e.g. Article 17(2)(c)(ii) with regard to juvenile justice). A general right as contained in Article 30 of the Convention cannot accordingly be derived therefrom. The omission is therefore regrettable.

#### **8. Participation in the planning and management of service programmes**

A unique feature of the Charter can be found in Article 14(2)(i) and (j), in the ambit of health and health services. These clauses provide for the participation of the whole of society and especially non-governmental organizations in the planning and management of basic services and primary health care programmes for children. The Article, therefore, does not contain a specific right of the child as such, but rather a guarantee for society’s participation. This participation can be understood as an expression of the belief that the full realisation of a right can only be achieved if the society benefiting therefrom participates in the process of realising the right in order to fully

appreciate the achievement and to introduce the necessary local expertise in reaching it. Interestingly, the wording of Article 14(2)(i), even though the Article's heading reads "Health and health services", speaks of "basic service programmes for children". It does not specify that it deals with health service programmes alone. Therefore, it could be argued that not only health service programmes should be subjected to this provision but other programmes as well, for instance, educational programmes as provided for in Article 14(2)(h) or (f). Such an interpretation would lead to a broad public participation programme in pursuing the full realisation of the right to enjoy the best attainable state of health as contained in Article 14.

### C Concluding remarks

The *African Charter on the Rights and Welfare of the Child* is a highly praised, but regrettably often neglected regional human rights instrument. Under a closer scrutiny, it turns out that many of the advantages claimed in the substantive provisions are not as extensive as may be thought. The provisions that are really original are very few in number. A huge advantage, though, is the possibility of enforcing the Charter's provisions by way of a direct complaints procedure. This means that, even though the Charter might not be particularly well drafted, with little originality, clarity of interpretation and order in the Articles, the possibility exists that the enshrined rights could be made effective by an authoritative interpretation by a committee established under the Charter.<sup>64</sup> However, some questions hang over the future of the implementation mechanisms of the Charter, occasioned by the creation of the African Union. The effect the transition from the OAU to the AU might have on the Charter is, at least, unclear<sup>65</sup> and cannot be assessed in this point of time.

The question remains as to what the Charter has done and is able to do to improve the situation of children in Africa. On the one hand its provisions, as has been shown, add

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<sup>64</sup> See for an overview on the process of establishment of the Committee and a possible outlook on its future: F. Viljoen, *The African Charter on the Rights and Welfare of the Child*, p. 227, in: C.J. Davel, *Introduction to Child Law in South Africa*, Lansdown 2000, p. 214.

<sup>65</sup> For a very short overview see E. Baimu, *The African Union: Hope for a better protection of human rights in Africa?*, 2 *African Human Rights Law Journal* (2001), p.299.

little to the legal framework already created by the Convention. Even though the Charter gives the impression of being a comprehensive children's rights document, important safeguards and guarantees are absent, for instance in relation to juvenile justice, imprisonment, and detention. The Charter is often unclear or misleading in its concepts, as was highlighted in various instances. The inclusion of specific duties of the child, even though hailed as a genuine African feature, could appear repressive, ideologically loaded or even senseless, and these provisions have the potential to make the child more vulnerable to exploitation or abuse.

On the other hand, important improvements over the *Convention on the Rights of the Child* have been highlighted, for example, more comprehensive protection for children in armed conflicts, refugee children and children with disabilities. In addition, the fact that the Charter's protection extends to all children under eighteen years is to be welcomed. This is in contrast to the Convention, which, while applying to persons under eighteen years in general, does limit its application in certain instances. Indeed, some very far-reaching and innovative provisions, for example the Article on children living under apartheid and serious discrimination, have been incorporated in the Charter. Unfortunately, the Charter is not able to maintain these innovations throughout the whole document. Thus even though some parts of the Charter can be said to bear the "African cultural fingerprint" this is mostly not the case, as this study shows.

However, given the fact that the Charter does not intend to lower the level of protection, or to substitute the Convention, but rather to complement it, an additional legal human rights instrument cannot do any real harm to the legal situation of children. If the Charter contained only one single provision that exceeded the level of protection already granted by other instruments, its existence would not be in vain – and it has been shown that the Charter does contain provisions that are able to do so. This fact, and its potentially better possibilities for enforcement, constitute the real value of the Charter. Even though the approach of this paper towards the Charter might be seen as fairly critical, and the conclusions offering little encouragement, for these improvements alone the Charter must be lauded. Furthermore the interpretations contained in this study could be understood as a guide to develop the Charter to its full potential. Once authoritatively interpreted by an appropriate body established under the Charter that clarifies the points in doubt and excludes possibilities of regressive interpretation, the Charter has the potential to step out of the Convention's shadow. Particularly because of its enforcement provisions, the Charter has the potential to be a living instrument that is able to adapt to changing circumstances and to be developed to the greatest possible benefit of children. This inherent potential is the real value of the Charter.

## Annex

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African Charter on the Rights and Welfare of the Child,  
OAU Doc. CAB/LEG/24.9/49 (1990)<sup>1</sup>

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### PREAMBLE

The African Member States of the Organisation of African Unity, Parties to the present Charter entitled "African Charter on the Rights and Welfare of the Child",

**Considering** that the Charter of the Organisation of African Unity recognised the paramouncy of human rights and the African Charter on Human and Peoples' Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognised and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other

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<sup>1</sup> The text of the Charter used here is the unaltered version that can be found at the Human Rights Institute of the University of Pretoria ([www.up.ac.za/chr/ahrdb/ahrdb.html](http://www.up.ac.za/chr/ahrdb/ahrdb.html), last accessed on 15/02/2002). The author tried hard to find a certified copy but was not successful. Even though he received a paper copy of the Charter that bears the emblem of the OAU through the kind offices of Ms. Crystal Theron at the Office on the Rights of the Child at the Presidency: Republic of South Africa, he doubts that this is the official and accurate version given the many grammar and spelling errors that are contained in this document. It must be born in mind therefore that the version here reproduced is for information purposes only. It is in no way warranted that this is the official version.

opinion, national and social origin, fortune, birth or other status,

**Recalling** [that] the Declaration on the Rights and Welfare of the African Child (AHG/ST 4 Rev 1) adopted by the Assembly of Heads of State and Government of the Organisation of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979, recognised the need to take all appropriate measures to promote and protect the rights and welfare of the African Child,

**Noting with concern** that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

**Recognising** that the child occupies a unique and privileged position in the African society and that for the full harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,

**Recognising** that the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

**Taking into consideration** the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

**Considering** that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

**Reaffirming adherence** to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments of the Organisation of African Unity and of the United Nations and in particular the United Nations Convention on the Rights of the Child, and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child,

have agreed as follows:

## **PART I: RIGHTS AND DUTIES**

### **CHAPTER ONE**

#### **RIGHTS AND WELFARE OF THE CHILD**

##### **ARTICLE I: OBLIGATION OF STATES PARTIES**

1. The Member States of the Organisation of African Unity Parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to take 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.

##### **ARTICLE II: DEFINITION OF A CHILD**

For the purposes of this Charter, a child means every human being below the age of 18 years.

##### **ARTICLE III: NON-DISCRIMINATION**

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status.

**ARTICLE IV: BEST INTERESTS OF THE CHILD**

1. In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, [an] opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

**ARTICLE V: SURVIVAL AND DEVELOPMENT**

1. Every child has an inherent right to life. This right shall be protected by law.

2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.

3. Death sentence shall not be pronounced for crimes committed by children.

**ARTICLE VI: NAME AND NATIONALITY**

1. Every child shall have the right from his birth to a name.

2. Every child shall be registered immediately after birth.

3. Every child has the right to acquire a nationality.

4. States Parties to the present Charter shall undertake to ensure that their constitutional legislations recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

**ARTICLE VII: FREEDOM OF EXPRESSION**

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 VIII: FREEDOM OF ASSOCIATION**

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

**ARTICLE IX: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION**

1. Every child shall have the right to freedom of thought, conscience and [religion].

2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

#### **ARTICLE X: PROTECTION OF PRIVACY**

No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

#### **ARTICLE XI: EDUCATION**

1. Every child shall have the right to education.

2. The education of the child shall be directed to:

(a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;

(c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples[,] ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievement of African unity and solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;

(c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of drop-out rate;

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standards [as] may be approved by the state, to ensure the religious and moral education of the child in a manner [consistent] with the evolving capacities of the child.

5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States Parties to the present Charter shall 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.

7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in Paragraph 1 of this Article and the requirement that the education given in such institutions

shall conform to such minimum standards as may be laid down by the States.

## **ARTICLE XII: LEISURE, RECREATION AND CULTURAL ACTIVITIES**

1. States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

## **ARTICLE XIII: HANDICAPPED CHILDREN**

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, ... assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the

child achieving the fullest possible social integration, individual development and his cultural and moral development.

3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highways, buildings and other places to which the disabled may legitimately want to have access to.

#### **ARTICLE XIV: HEALTH AND HEALTH SERVICES**

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

- (a) to reduce the infant and child mortality rate;
- (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) to ensure the provision of adequate nutrition and safe drinking water;
- (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers;

(f) to develop preventive health care and family life education and provision of service;

(g) to integrate basic health service programmes in national development plans;

(h) to ensure that all sectors of the society, in particular parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;

(i) to ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of basic service programmes for children;

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

#### **ARTICLE XV: CHILD LABOUR**

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development;

2. States Parties to the present Charter shall take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organisation's instruments relating to children, States Parties shall in particular:

- (a) provide through legislation, minimum ages for admission to every employment;
- (b) provide for appropriate regulation of hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
- (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

#### **ARTICLE XVI: PROTECTION AGAINST CHILD ABUSE AND TORTURE**

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

#### **ARTICLE XVII: ADMINISTRATION OF JUVENILE JUSTICE**

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

- (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
- (b) ensure that children are separated from adults in their place of detention or imprisonment;
- (c) ensure that every child accused of infringing the penal law:
  - (i) shall be presumed innocent until duly recognised guilty;
  - (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and

shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(v) shall not be compelled to give testimony or confess guilt;

(d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

#### **ARTICLE XVIII: PROTECTION OF THE FAMILY**

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.

2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during

marriage and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of the child.

3. No child shall be deprived of maintenance by reference to the parents' marital status.

#### **ARTICLE XIX: PARENTAL CARE AND PROTECTION**

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.

2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.

3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

#### **ARTICLE XX: PARENTAL RESPONSIBILITIES**

1. Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:

(a) to ensure that the best interests of the child are their basic concern at all times;

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures:

(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;

(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the

development of institutions responsible for providing care of children; and

(c) to ensure that the children of working parents are provided with care services and facilities.

#### **ARTICLE XXI: PROTECTION AGAINST HARMFUL SOCIAL AND CULTURAL PRACTICES**

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

#### **ARTICLE XXII: ARMED CONFLICTS**

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a

direct part in hostilities and refrain, in particular, from recruiting any child.

3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

### **ARTICLE XXIII: REFUGEE CHILDREN**

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are parties.

2. States Parties shall undertake to co-operate with existing international organisations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason. 4. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

### **ARTICLE XXIV: ADOPTION**

States Parties which recognise the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognise that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of child's care, if the child cannot be placed in a

foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

#### **ARTICLE XXV: SEPARATION FROM PARENTS**

1. Any child who is permanently or temporarily deprived of his family environment for any reasons shall be entitled to special protection and assistance;

2. States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be

brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

#### **ARTICLE XXVI: PROTECTION AGAINST APARTHEID AND DISCRIMINATION**

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.

3. States Parties shall undertake to provide, whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

#### **ARTICLE XXVII: SEXUAL EXPLOITATION**

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.

#### **ARTICLE XXVIII: DRUG ABUSE**

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

#### **ARTICLE XXIX: SALE, TRAFFICKING AND ABDUCTION**

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

#### **ARTICLE XXX: CHILDREN OF IMPRISONED MOTHERS**

States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;

(e) ensure that a death sentence shall not be imposed on such mothers;

(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

### **ARTICLE XXXI: RESPONSIBILITIES OF THE CHILD**

Every child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

(c) to preserve and strengthen social and national solidarity;

(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

## **PART II: [COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD]**

### **CHAPTER TWO**

#### **ESTABLISHMENT AND ORGANISATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD**

##### **ARTICLE XXXII: THE COMMITTEE**

An African Committee of Experts on the Rights and Welfare of the Child, hereinafter called "the Committee", shall be established within the Organisation of African Unity to promote and protect the rights and welfare of the child.

##### **ARTICLE XXXIII: COMPOSITION**

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child;
2. The members of the Committee shall serve in their personal capacity;
3. The Committee shall not include more than one national of the same State.

**ARTICLE XXXIV: ELECTION**

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

**ARTICLE XXXV: CANDIDATES**

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the State Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

**ARTICLE XXXVI: [NOMINATION PROCEDURE]**

1. The Secretary-General of the Organisation of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organisation of African Unity shall draw up, in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

**ARTICLE XXXVII: TERM OF OFFICE**

1. The members of the Committee shall be elected for a term of five years and may not be re-elected. However, the term of four of the members elected at the first election

shall expire after two years and the term of six others, after four years.

2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organisation of African Unity shall draw lots to determine the names of those members referred to in sub-paragraph 1 of this Article.
3. The Secretary-General of the Organisation of African Unity shall convene the first meeting of the Committee at the Headquarters of the Organisation within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman, whenever necessary, at least once a year.

**ARTICLE XXXVIII: BUREAU**

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

**ARTICLE XXXIX: VACANCY**

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term - subject to the approval of the Assembly.

**ARTICLE XL: SECRETARIAT**

The Secretary-General of the Organisation of African Unity shall appoint a Secretary for the Committee.

**ARTICLE XLI: PRIVILEGES AND IMMUNITIES**

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation of African Unity.

**CHAPTER THREE****MANDATE AND PROCEDURE OF THE COMMITTEE****ARTICLE XLII: MANDATE**

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems

in the fields of the rights and welfare of the child, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Government;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) co-operate with other African, International and Regional Institutions and Organisations concerned with the promotion and protection of the rights and welfare of the child;

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organisation of African Unity or any other person or Institution recognised by the Organisation of African Unity, or any State Party.

(d) Perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU, or the United Nations.

**ARTICLE XLIII: REPORTING PROCEDURE**

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organisation of African Unity, reports on the

measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

(a) within two years of the entry into force of the Charter for the State Party concerned; and

(b) thereafter, every three years.

2. Every report made under this Article shall:

(a) contain sufficient information on the implementation of the present Charter to provide the Committee with a comprehensive understanding of the implementation of the Charter in the relevant country; and

(b) shall indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1(a) of this Article, repeat the basic information previously provided.

#### **ARTICLE XLIV: COMMUNICATIONS**

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

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

#### **ARTICLE XLV: INVESTIGATIONS BY THE COMMITTEES**

1. The Committee may resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures a State Party has adopted to implement the Charter.

2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article 46 of this Charter.

3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.

4. States Parties shall make the Committee's report widely available to the public in their own countries.

**CHAPTER FOUR****MISCELLANEOUS PROVISIONS****ARTICLE XLVI: SOURCES OF INSPIRATION**

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

**ARTICLE XLVII: SIGNATURE, RATIFICATION OR ADHERENCE**

1. The present Charter shall be open to signature by all the Member States of the Organisation of African Unity.
2. The present Charter shall be subject to ratification or adherence by Member States of the Organisation of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organisation of African Unity.
3. The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organisation of African Unity of the instruments of ratification or adherence of 15 Member States of the Organisation of African Unity.

**ARTICLE XLVIII: AMENDMENT AND REVISION OF THE CHARTER**

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organisation of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)

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### *PREAMBLE*

The States Parties to the present Convention,

*Considering that*, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Bearing in mind* that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

*Recognizing* that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling that*, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

*Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

*Recognizing* that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

*Considering* that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

*Bearing in mind* that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical

and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

*Recalling* the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

*Recognizing* that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

*Taking due account* of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

*Recognizing* the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

*Have agreed* as follows:

## PART I

### *Article 1*

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

### *Article 2*

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### *Article 3*

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety,

health, in the number and suitability of their staff, as well as competent supervision.

#### *Article 4*

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.

#### *Article 5*

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

#### *Article 6*

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

#### *Article 7*

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

#### *Article 8*

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

#### *Article 9*

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse

or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### *Article 10*

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of

family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### *Article 11*

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### *Article 12*

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those

views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

#### *Article 13*

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

#### *Article 14*

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide

direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

#### *Article 15*

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

#### *Article 16*

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

*Article 17*

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

*Article 18*

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have

common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

*Article 19*

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting,

referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

#### *Article 20*

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

#### *Article 21*

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required,

the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

#### *Article 22*

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of

applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

#### *Article 23*

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

#### *Article 24*

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is

deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

#### *Article 25*

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

#### *Article 26*

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

*Article 27*

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

*Article 28*

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

*Article 29*

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions

shall conform to such minimum standards as may be laid down by the State.

*Article 30*

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

*Article 31*

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

*Article 32*

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

#### *Article 33*

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

#### *Article 34*

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

#### *Article 35*

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

#### *Article 36*

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

#### *Article 37*

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

#### *Article 38*

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

#### *Article 39*

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

#### *Article 40*

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### *Article 41*

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

## *PART II*

### *Article 42*

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

### *Article 43*

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second

year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

#### *Article 44*

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

#### *Article 45*

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be

transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### *PART III*

#### *Article 46*

The present Convention shall be open for signature by all States.

#### *Article 47*

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### *Article 48*

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### *Article 49*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

*Article 50*

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

*Article 51*

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

*Article 52*

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

*Article 53*

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

*Article 54*

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

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