

Legal protection of refugee children in Africa: positive aspects and shortcomings

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ABSTRACT: Despite the legal measures that have been put in place for their protection, refugee children in Africa remain at risk. Africa is the first continent in the world where every persecuted individual has the right 'to seek and obtain asylum in other countries' (article 12(3) of the African Charter on Human and Peoples' Rights). In Africa, refugee children are at risk mostly because the continent lacks a clear definition of 'sovereignty'. African countries interpret the adjective 'sovereign' to their own advantage, in terms of the rights and responsibilities imposed on foreigners – including refugees – entering their territory. Although the overall treatment of refugee children has over the last decades improved in Africa, they nonetheless remain a vulnerable category of persons. If refugee children are targeted because they are 'foreigners', such discrimination could be curbed and even eradicated through the education of the youth. The various international treaties that African nations have adopted (in particular, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child) provide an important legal umbrella for the protection of refugee children. However, in many instances, the bulk of the protection is still carried out by NGOs. Consequently, there is still a long way to go before African refugee children will be treated with the dignity that is due to all the children in the world, irrespective of their origin.

TITRE ET RÉSUMÉ EN FRANCAIS:

Protection juridique des enfants réfugiés en Afrique: développements positifs et faiblesses

RÉSUMÉ: Les enfants réfugiés en Afrique demeurent en danger en dépit des mesures juridiques adoptées par les Etats pour les protéger. L'Afrique est le premier continent au monde où toute personne persécutée a le droit de « demander et obtenir l'asile dans d'autres pays » (article 12(3) de la Charte africaine des droits de l'homme et des peuples). En Afrique, la principale menace des enfants réfugiés émane du fait que le continent n'a pas de définition claire de la notion de « souveraineté ». Les pays africains interprètent l'adjectif « souverain » à leur profit, en mettant l'accent sur les droits et les responsabilités imposés aux étrangers qui franchissent leur frontière – dont les réfugiés. Bien que le traitement global des enfants réfugiés se soit amélioré au cours des dernières décennies en Afrique, ils demeurent néanmoins une catégorie de

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personnes vulnérables. Si les enfants réfugiés sont ciblés parce qu'ils sont des « étrangers », cette discrimination future pourrait être enrayerée voire éliminée grâce à l'éducation des jeunes. Les différents traités internationaux que les pays africains ont adoptés (en particulier la Convention relative aux droits de l'enfant et la Charte africaine des droits et du bien-être de l'enfant) constituent un important cadre juridique pour la protection des enfants réfugiés. Cependant, dans de nombreux cas, l'essentiel de la protection est toujours assuré par les ONG. Par conséquent, un chemin important reste encore à parcourir pour que les enfants réfugiés africains soient traités avec la dignité qui est due à tout enfant, quelle que soit son origine.

KEY WORDS: Refugee children, best interests, African Charter on the Rights and Welfare of the Child, sovereignty, national security

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1 INTRODUCTION

This article investigates the positive aspects and the shortcomings of the protection of refugee children in Africa. The shortcomings are often due to the element of 'sovereignty', whereby African countries decide who may enter their territory and under what conditions, given that the right of free movement of people does not imply the right of entry or stay.¹ The article starts by analysing the concept of the 'best interests' of children and its interpretation and application in Africa. Thereafter, the discussion focuses on other relevant principles that should be guaranteed for the protection of refugee children in Africa. This is followed by a detailed examination of the possible shortcomings of that protection, and particularly, if and why the international and regional legal instruments for the protection of children's rights are still not adequately implemented on the continent. Finally, the concept of sovereignty is scrutinised as well as ways in which this concept is used to limit the protection of refugee children in Africa. The study concludes with observations on the current situation and recommendations to address the key stumbling blocks in the protection of refugee children on the African continent.

1 AU 'The Migration Policy Framework for Africa' EX.CL/276 (IX) (25-29 June 2006) 18.

2 'BEST INTERESTS': THE PRINCIPLE AT THE CORE OF (REFUGEE) CHILDREN'S PROTECTION

All solutions to improve the conditions of African refugee children should be viewed from the core principle of the 'best interests' of the child. This principle is derived from article 3 of the 1989 UN Convention on the Rights of the Child (CRC) and taken up by article 4 of the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter).²

Article 3(1) of the CRC stipulates:

- 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.

Article 4(1) of the African Children's Charter more briefly contends that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.' Kaime considers this last expression ill-defined as it fails to clearly describe the range of factors that must be taken into consideration when determining what specifically constitutes the best interests of a child – both in general and for refugee children in particular.³ Moreover, as JM Pobjoy affirms:⁴

Although the role of the 'best interests' principle is well established as a matter of international obligation, there has, at a domestic level, traditionally been a general lack of enthusiasm with the idea that the 'best interests' principle may provide an independent basis for international protection.

The 'best interests' principle must apply in all actions regarding refugee children, irrespective of whether public or private entities are undertaking those actions.⁵ This principle is well-suited to finding a durable solution for refugee children. A durable solution should normalise the child's situation by ensuring their mental and physical health, intellectual development and adequate material security.

2 UNGA, Convention on the Rights of the Child (20 November 1989) UNTS, vol 1577, 3; OAU, African Charter on the Rights and Welfare of the Child (11 July 1990) CAB/LEG/24.9/49.

3 T Kaime *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective* (2009) 110. However, at 111, the author contends: 'Yet, the seemingly expansive formulation of the principle in the Charter is also its most important characteristic. It allows a contextual application of the principle on a case-by-case basis, allowing for a result that is specific to each child.' In this regard, according to UNHCR: 'The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child.' See: UNHCR, *Guidelines on international protection no 8: Child asylum claims under articles 1(A) (2) and 1 (F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (22 December 2009) HCR/GIP/09/08, para 10.

4 JM Pobjoy *The child in international refugee law* (2017) 201.

5 Kaime (n 3) 113.

Arriving at such a solution would require the participation of the children involved.⁶ The validity of this notion is manifest in, for example, the protracted refugee settlement of Kyaka II, South West Uganda, where refugee children have clearly demonstrated their capacity to speak about their needs and protection with adults in different environments such as schools and churches.⁷

Through the 'best interests' approach, the African Children's Charter has adopted uniform standards for the treatment of refugee children, indicating that parties to the African Children's Charter must comply with these standards.⁸ In Africa, however, the concrete interpretation given to the notion of 'best interests', particularly in the case of refugee children, has at times been interpreted in an ambiguous way, on the basis of what I define as the 'best interests of the sovereignty of the host country'. For example, if the reunification of children with their family is generally regarded as being in their best interests,⁹ in the case of refugee children, reunification with their biological family should not always be dogmatically pursued as the best solution for them. Individual situations should be carefully assessed and reunification should not be advised when the parents or relatives have been responsible for the children's flight. For instance, this can be seen where children flee from cultural practices such as genital mutilation or forced marriage,¹⁰ as was the case in Rwanda during the 1994 genocide. The child's background is therefore fundamental in deciding upon the right solution for them.¹¹

Amnesty International (AI) has pointed out that reunification is not only represented by the return of the unaccompanied minor refugee to their country of origin. For it to be in the best interests of the child, it should also involve the organisation of such reunification. A prime example is what happened in Somalia when, in December 2006, the Kenyan authorities forcibly repatriated a number of children back to Somalia where civil strife was still raging, despite hundreds of these children already having acquired refugee status. This repatriation was ostensibly to reunify the children with their families, however, in effect, it served to alleviate the burden on Kenyan authorities. In this particular case, it was certainly not in the best interests of the Somali children to be reunified with their families in their country of origin.¹²

6 T Kaime 'From lofty jargon to durable solutions: unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child' (2004) 16 *International Journal of Refugee Law* 340.

7 A Skeels 'Refugee children's participation in protection: a case study from Uganda' in UNHCR, *New Issues in Refugee Research*, research paper No 241 (2012) especially at 10-14.

8 T Kaime 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 186.

9 UNHCR *Guidelines on Determining the Best Interests of the Child* (May 2008) 31.

10 Kaime (n 6) 343-344.

11 Kaime (n 8) 160.

12 AI *Kenya Denied refuge: the effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees* (2 May 2007) 3-4.

In a 2014 request for advisory opinion, the African Court on Human and Peoples' Rights (African Court) emphasises the nature of the best interests of the child, which should take priority over technical points that could obstruct justice for children.¹³ This opinion highlights that the principle of 'best interests' should first and foremost be considered when determining 'any person's or authority's actions towards or on behalf of children' (article 4(1) of the African Children's Charter).

3 OTHER CORE PRINCIPLES OF THE WELLBEING OF REFUGEE CHILDREN IN AFRICA: IS EFFECTIVE PROTECTION TAKING PLACE?

Certain general principles underline the obligation of African states to protect the rights of all children, and are of relevance to children in the context of refugee protection. Apart from the 'best interests', another key principle is that of 'non-discrimination' (as set out in article 3 of the African Children's Charter) and that of right to life, survival and development of the child (article 5 of the African Children's Charter).¹⁴

In the communication entitled *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Senegal*, the African Committee of Experts on the Rights and Welfare of Children in Africa (African Children's Rights Committee)¹⁵ stresses the significance of these principles in reinforcing the other rights guaranteed under the African

- 13 ACHPR *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Standing of the African Committee of Experts on the Rights and Welfare of the Child on Human and Peoples' Rights* (Request No 002/2013, 5 December 2014). In detail, para 95 of the advisory opinion affirms: 'The Court is persuaded that the arguments that the best interests of the child should be of paramount and well founded. It is also persuaded [...] that the best interests of the child should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children.'
- 14 In full, article 3 stipulates: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this language, religion, political or other opinion, national and social origin, fortune, birth or other status.' Article 5 stipulates: '(1) Every child has an inherent right to life. This right shall be protected by law. (2) State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child. (3) Death sentence shall not be pronounced for crimes committed by children.'
- 15 The African Children's Rights Committee is established by article 32 of the African Children's Charter ('The Committee shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child'). As A Lloyd affirms: 'The African Committee is mandated to collect and document information, to commission interdisciplinary assessments of situations on African problems in the children's rights sphere, to organise meetings, to encourage national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary.' (A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: raising the gauntlet' (2002) 10 *The International Journal of Children Rights* 186).

Children's Charter.¹⁶ Ensuring non-discriminatory access of refugee children to economic, social and cultural rights and promoting the concept of leisure and play, which encourage the fullest possible development of a child's personality, will allow for such development (article 12 of the African Children's Charter).¹⁷

Equally important is protecting children in the context of forced migration from exploitation, detention and separation from their families, which clearly contradicts their best interests (arts 15(1), 17, 19, 25, 27 of the African Children's Charter). This concept was reinforced by the African Union (AU) in 2018, when it demanded an end to the detention of children due to their migration status, asking for relevant authorities to establish alternatives to detention which would be in the best interests of the child.¹⁸ In this regard, in the case *Modise v Botswana*, the African Commission on Human and Peoples' Rights (African Commission) affirms:¹⁹

The complainant was deported to South Africa and was forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'No-Man's Land', a border strip between the former South African Homeland of Bophuthatswana and Botswana. Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being.

In addition, holding a child without permitting them to have any contact with their family, and refusing to inform the family whether and where the child is being held is considered by the African Commission as inhuman treatment of both the prisoner and their family.²⁰

It is blatantly obvious that the development of refugee children in countries of transit and destination can be severely affected by constraints on their rights or the rights of their parents. Public international law prohibits *refoulement*. This term refers to the repatriation of anyone to a country where they would be at risk of torture, cruel, inhuman or degrading treatment or the repatriation of a refugee to any country where, in any manner whatsoever, their life or freedoms would be threatened (in this regard see, for example, article

16 African Children's Rights Committee *Decision on the Communication submitted by the Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) against the Government of Senegal* Communication No 001/2012 (15 April 2014) paras 40-45.

17 Article 12 stipulates: 'State Parties shall 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) State 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.'

18 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (May 2018) 72.

19 African Commission *Modise v Botswana*, Communication 97/93, 10th ACHPR AAR Annex X (1996-1997) para 32.

20 African Commission *Amnesty International et al v Sudan*, Communication Nos 48/90, 50/91, 52/91, 89/93 13th Activity (Report 1999-2000) para 54. In this regard, see also ACHPR *The Law Office of Ghazi Suleiman v Sudan*, Communication Nos 222/98 and 229/99, 16th Activity Report (2002-2003) para 44.

33 of the UN Refugee Convention,²¹ article 2(3) of the OAU Refugees Convention²² or article 3 of the United Nations (UN) Convention Against Torture).²³

Prohibition of '*refoulement*' would also include access to asylum procedures and procedures to establish whether children have been subjected to trafficking and/or other serious human rights violations.²⁴ Child trafficking presents particular challenges in Africa, and special requirements should be made to ensure the protection of, and assistance to child victims of trafficking, many of who according to the United Nations Children's Fund (UNICEF) are refugees.²⁵

The 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, provides AU member states with comprehensive guidance in addressing human trafficking and developing comprehensive counter-trafficking strategies that are based on the '4Ps' – prevention, protection, prosecution and partnership.²⁶ Furthermore, the AU Commission Initiative against Trafficking (AU.COMMIT) raises awareness of the Ouagadougou Action Plan and drives its implementation.²⁷ The AU Horn of Africa Initiative, launched in 2014, builds on these efforts and promotes dialogue and concrete initiatives that address human trafficking and smuggling within and from the Horn of Africa region.²⁸ In addition, Agenda 2063's First 10 Year Implementation Plan calls for the empowerment of youth and children, ending child labour exploitation, marriages, trafficking and soldiering by 2023.²⁹

As briefly mentioned above, international law also provides that the detention of children, including refugee children, should generally be avoided. Where strictly necessary, children should only be detained as a last resort. The detention must always be justified by law and should

- 21 UNGA Convention relating to the Status of Refugees (28 July 1951) UNTS, vol 189, No 2545, 150. In detail, article 33(1) stipulates: 'No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'
- 22 OAU Convention governing the specific aspects of refugee problems in Africa (10 September 1969) UNTS, vol 1001, No 14691, 45.
- 23 UNGA Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS, vol 1465, No 24841, 85.
- 24 Article 29 of the African Children's Charter stipulates: 'State Parties to the present Charter shall take appropriate measures to prevent: a) the abduction, 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.'
- 25 UNICEF *Children make up almost one-third of all human trafficking victims worldwide* (27 July 2018).
- 26 AU-EU *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children As adopted by the Ministerial Conference on Migration and Development* (22-23 November 2006).
- 27 AU *AU Commission Initiative against Trafficking (AU.COMMIT) Campaign* (3 December 2012).
- 28 *The Khartoum Process* (13-16 October 2014).
- 29 AU Commission *Agenda 2063 The Africa We Want: A Shared Strategic Framework for Inclusive Growth and Sustainable Development First Ten-Year Implementation Plan 2014-2023* (September 2015) 24.

be for the shortest possible period of time.³⁰ Unfortunately, there is no similar provision in the African Children's Rights Charter.

Although detention of refugee children is often practised by African countries,³¹ in 2009 the UN Special Rapporteur on the human rights of migrants affirmed in 2009 that detention is never in the best interests of children.³² Furthermore, children should not be detained based on their migratory status or irregular entry into the country.³³ In this regard, to challenge the power of the relevant South African authorities, in the case *Centre for Child Law and Another v Minister of Home Affairs and Others* Judge De Vos affirmed as follows:³⁴

I am of the view that the detention of these children at Lindela [repatriation centre] is unlawful and invalid and should cease immediately. Furthermore, the way in which these children are being deported is not only unlawful, it is shameful.

Article 19 of the African Children's Rights Charter obliges states to ensure that children are not separated from their parents against their will.

The principle of family unity plays an important protective role for children in the context of forced migration, particularly in the situation of unaccompanied or separated children.³⁵ Family reunification also constitutes a key element of integration policies. The family is recognised as a natural and fundamental unit of society in relevant legal instruments such as article 23 of the International Covenant on Civil

30 Article 37(b) of the CRC stipulates: 'States Parties shall ensure that: [...] 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 [...].'

31 International Detention Coalition *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015 – 2016* (2017) 19-20.

32 UNGA *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante A/HRC/11/7* (14 May 2009) para 62: 'Migration-related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As UNICEF and other experts have stressed, detention of children will never be in their best interests.'

33 UN Committee on the Rights of the Child General Comment No 6 (2005) *Treatment of unaccompanied and separated children outside their country of origin* (17 May-3 June 2005) para 61: 'Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.'

34 Transvaal Provincial Division Court *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) Case No 22866/04 (18 September 2004) para 23.

35 For a definition of 'unaccompanied' and 'separated' children see: International Committee of the Red Cross (ICRC) *Inter-agency Guiding Principles on Unaccompanied and Separated Children* (January 2004) 13: 'Unaccompanied children (also called unaccompanied minors) are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.' 'Separated children are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.'

and Political Rights (ICCPR),³⁶ article 18(1) of the African Children's Rights Charter, and article 18(1) of the African Charter on Human and Peoples' Rights (African Charter).³⁷

Considering article 18 of the African Charter,³⁸ in the 2010 Communication *Good v Botswana*, the African Commission contends:³⁹

[T]he State has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties. In exercising the positive obligations, the State exercises a negative obligation, which is to refrain from violating the rights and interests of the family. In the present Communication, the sudden deportation of the victim with no justification, knowing fully that he will be separated from his minor daughter who was living with him runs counter to the protection States are required to give to the family under article 18.

However, when dealing with the separation of families, Starr and Brilmayer claim that international law places excessive weight on state sovereignty and imposes insufficient responsibility on states to protect human rights within the family.⁴⁰ Nevertheless, even if refugee children are separated from their families, in many African countries these children are legally protected in order to care for them. For example, in South Africa the Children's Act and Regulations provide the framework for the placement of unaccompanied refugee children in alternative care.⁴¹ A Children's Court places a refugee child in alternative care if it is found that the child is in need of care and protection.⁴² Section 150 of the Children's Act lists a number of indicators according to which the child's circumstances must be assessed to determine whether they are considered to be in need of care and protection.⁴³

36 UNGA International Covenant on Civil and Political Rights (19 December 1966) UNTS, vol 999, No 14668, 171.

37 UNGA African Charter on Human and Peoples' Rights (27 June 1981) UNTS, vol 1520, No 26363, 217.

38 Article 18 stipulates: '1) The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and moral. 2) The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community. 3) The State shall ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. 4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

39 ACHPR *Good v Botswana* (Communication 313/05) [2010] (26 May 2010) paras 212-213.

40 S Starr & L Brilmayer 'Family separation as a violation of international law' (2003) 21 *Berkeley Journal of International Law* 231.

41 Republic of South Africa Children's Act (38 2005) vol 492 19 June 2006 No 28944 amended by Children's Amendment Act 41 of 2007 and Child Justice Act 75 of 2008. See section 167 (Alternative Care).

42 South Africa Children's Act section 156.

43 Scalabrini Centre *Foreign Children in Care: South Africa. A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa* (July 2019) 11.

4 EFFORTS TO IMPLEMENT NORMS PROTECTING REFUGEE CHILDREN IN AFRICA DESPITE RESISTANCE OF (SOME) STATES

In Africa, there is a historical lack of consensus as to the definition of ‘children’s rights’ within the context of different African cultures. This could pose problems when it comes to defending the rights of refugee children on the continent. Perceptions of what constitutes a child in Africa differ to those of the rest of the world (a child is defined as a person below the age of 18 years according to article 2 of the African Children’s Charter). This is highlighted by the fact that in Africa, a child is also considered an individual who has ‘responsibilities towards his family and society, the State and other legally recognized communities and the international community’ (article 31 of the African Children’s Rights Committee. There is no similar provision in the CRC). However, the African Children’s Rights Committee emphasises that children’s rights are ‘not contingent upon them fulfilling their ‘duties’, since duties co-exist interdependently with rights.⁴⁴

Yet, the African Children’s Charter seeks to reinforce the wellbeing of the child because it explicitly asserts the supremacy of the rights guaranteed therein over any custom, tradition, cultural or religious practice inconsistent with them (article 1(3)). It does, however, leave some leeway for the sovereignty of the African state; the practices just mentioned are only ‘discouraged’ but not explicitly declared illegal. This supremacy is elaborated further under article 21(1).⁴⁵

Furthermore, according to the African Children’s Rights Committee, the obligation under article 1(1) to adopt legislative and other measures to give effect to the African Children’s Charter⁴⁶ ‘is subject neither to progressive realization, nor to available resources.’⁴⁷ The African Children’s Rights Committee proceeded to affirm that

44 African Children’s Rights Committee *Decision on the Communication submitted by Michelo Hansungule and Others (on behalf of Children in Northern Uganda) against the Government of Uganda* Communication 1/2005 (15-19 April 2013) para 59.

45 Article 21(1) stipulates: ‘State 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.’

46 Article 1(1): ‘Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.’

47 African Children’s Rights Committee (n 44) para 37.

'effective implementation of laws with due diligence is part of states parties obligation under the Charter.'⁴⁸

The question of refugee children has been explicitly tackled in article 23⁴⁹ of the African Children's Charter. Bekker considers that the provisions of article 23 offer a higher threshold of protection for displaced children than the corresponding provisions contained in the CRC.⁵⁰ This article, however, cannot be read separately from articles 3 and 4 of the same instrument, which respectively provide for the 'enjoyment of the rights and freedoms recognized and guaranteed' in the African Children's Charter by 'every child', without any discrimination along with the 'best interests of the child.'

Article 3, which deals with 'non-discrimination', raises the African Children's Charter to a higher level of protection than provided for in the CRC, although it is considered a 'non-autonomous' norm of the African Children's Charter. This article is viewed as such because, since it is at the core of the freedoms and rights guaranteed by the charter, it has no independent existence. In other words, it can be invoked exclusively in relation to the implementation of a right protected by the same Charter.⁵¹ However, in Sub-Saharan Africa, there have been a number of clear breaches of this norm. An obvious example is the turmoil in Darfur, where the *Janjaweed* militia systematically raped and murdered Darfurian refugee children,⁵² yet Sudan has been party to the African Children's Charter since 2005.⁵³

The CRC also contains a provision on non-discrimination in article 2.⁵⁴ Sudan ratified this instrument before its domestic crisis, in 1990.⁵⁵ Unfortunately, however, in the first few years of the conflict, the Sudanese government regularly described the situation in Darfur as

48 African Children's Rights Committee (n 44) para 38.

49 In this regard, DM Chirwa points out: 'It must also have been noted that the Charter endorses the wider definition of "refugee" in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.' DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 169.

50 G Bekker 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 5.

51 Kaime (n 3) 98.

52 Kaime (n 8) 185. See also *Sudan: New Darfur Documents* (20 July 2004).

53 Ratification table of the African Children's Charter available at: <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf> (accessed 10 October 2019).

54 Article 2 stipulates: '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.'

55 Ratification table of the CRC available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 10 October 2019).

‘tribal clashes’ and refused to acknowledge responsibility for its systematic attacks on civilians, and refugees included.⁵⁶

Another important point set out in article 23(2) of the African Children’s Charter⁵⁷ concerns the parties to the charter and their ‘cooperation’ with international organisations to better protect refugee children. This cooperation which, according to article 22(2) of the CRC, must be considered ‘appropriate’ by the signatory states of the convention⁵⁸ is, in contrast, seen by the African Children’s Charter as obligatory and without any restriction. The problem with this paragraph of article 23 of the African Children’s Charter is that it is not clear whether NGOs – which article 22(2) of the CRC explicitly considers – are included in the category of ‘existing international organizations.’ Consequently, the African Children’s Charter can be interpreted either way, without any explicit provisions that include or exclude NGOs.

In this regard, Thomas affirms that democratic values are served, rather than threatened, by NGOs and the conditionalisation of sovereignty. The role of NGOs in international compliance monitoring has destabilised the situation in which repressive regimes ignore their political opponents while seeking legitimacy abroad. Repressive regimes cannot refrain from making concessions to NGOs pressure for greater respect for human rights, and therefore open the door to democratic transformations such as those which occurred in several African countries, for example, South Africa.⁵⁹

A debate has also been raised about the fact that article 23(2) of the African Children’s Charter provides for exclusive cooperation with ‘existing’ organisations, which is intended to be a restriction ‘[i]n a way that only organizations that were already in existence when the charter came into effect fall under article 23’⁶⁰ and, as such, they are allowed to assist with the protection of refugee children’s rights on the continent. Be that as it may, the AU, and especially its Assembly, has always endeavoured to improve the life of refugee children in Africa. Considerable progress has been made in this regard although it is clear that the respect of article 23 of the African Children’s Charter and of

56 Human Rights Watch *Failing Darfur* (September 2008).

57 Article 23(2) stipulates: ‘States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.’

58 Article 22(2), first sentence, of the CRC stipulates: ‘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.’

59 DC Thomas ‘International NGO’s, state sovereignty, and democratic values’ (2001) 2 *Chicago Journal of International Law* 394.

60 M Gose *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, University of Western Cape (2002) 122.

article 22(2) of the CRC relies substantially on state practice and on the work of the African Children's Rights Committee.⁶¹

Positive state practice, however, often, *de facto*, is lacking due to the socio-economic conditions of the countries on the continent.⁶²

In recent years, several countries have submitted their initial reports to the African Children's Rights Committee. In each case, the authorities of the countries in question have shown optimism about the treatment of refugee children. But, for example, not in the case of Niger where, for years, the phenomenon of refugee children has been considered stranger to the country.⁶³

In Burkina Faso, most refugee children have been provided with identity documents and can benefit from a fund called 'soins et entretien des réfugiés' to cover both medical care and school tuition.⁶⁴ Similar support has been provided in Senegal and Cameroon.⁶⁵

Refugee children in Kenya have the same social, economic and cultural rights as other children in the country. This includes the right to privacy, family life, non-discrimination, as well as a right to free primary education. However, the country continues to be ill-equipped to deal with increasing incidences of sexual and gender-based violence against refugee children.⁶⁶ In contrast, Uganda seems to have faced many difficulties in providing refugee children with basic medical and educational facilities 'owing mainly to the unfavourable environment within which [these children] live.'⁶⁷

The same situation applies in Mali where, in spite of the existence of a specific domestic provision on the equal treatment of refugees and nationals in many key aspects of daily life,⁶⁸ difficulties in detecting and protecting non-accompanied refugee children remain considerable.⁶⁹

61 Gose (n 60) 22-23.

62 A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 32.

63 African Children's Rights Committee, *Niger, Initial State Report* (2008) 35. At that page, it is affirmed that the phenomenon of refugee children is '[l]ittle known in Niger [...].'

64 African Children's Rights Committee *Burkina Faso, Initial State Report* (2006) 116.

65 African Children's Rights Committee *Senegal, Initial, First and Second Report* (2009) 85; African Children's Rights Committee, *Cameroon, Initial State Report* (2009) 50.

66 African Children's Rights Committee *Kenya, 1st State Party Report* (June 2013) 87-88.

67 African Children's Rights Committee *Uganda, Initial State Report* (2007) 27.

68 Mali Loi n° 1998-40 du 20 juillet 1998 portant sur le statut des réfugiés [Mali], N° 1998-40 (18 May 1998) article 13: 'Le bénéficiaire du statut de réfugié reçoit le même traitement qu'un national en ce qui concerne l'accès aux soins médicaux, au marché du travail, à la sécurité sociale et à l'éducation, notamment pour ce qui est des frais d'inscription et des œuvres universitaires'.

69 African Children's Rights Committee *Mali, Initial State Report* (2007) 95.

More recently, the African Children's Rights Committee called upon the South African government to eliminate all forms of discrimination against refugee children by removing barriers which hinder access to basic services such as education, health care, birth registration and child protection services. In particular, the African Children's Rights Committee urged the authorities of South Africa to ensure that refugee children are able to access basic services without the need to present any form of documentation.⁷⁰ In this regard, the AU also recommends that African states ensure, through legislative policy, that refugee children have adequate access to gender-responsive and culturally appropriate health care, education and shelter.⁷¹

The authority of the African Children's Rights Committee remains debatable, however, as it lacks the power to impose any form of sanction, and its decisions are not binding for the parties. It can only make recommendations which are then submitted to the AU Assembly, although the African Children's Charter is silent as to how the AU Assembly can act upon them. Finally, article 44(2) of the African Children's Charter provides for confidentiality in the communication received by the African Children's Rights Committee. For the African Children's Rights Committee, this confidentiality has been considered more of a 'shield to hide behind' when it comes to assessing human rights violations of refugee children in Africa, rather than a means of exposing them.⁷²

5 SOVEREIGNTY: BLURRED THRESHOLDS IN AFRICA

A defining aspect of national sovereignty is the right of states to determine which persons are allowed to enter their national borders. Many African states exercise this power by placing restrictions on who can and who cannot enter and remain within their borders. Traditionally in international law, sovereignty has been considered as the unlimited power of the state that is subjected exclusively to those rules of law that it has explicitly accepted. Article 2(7) of the Charter of the UN stipulates:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.⁷³

Yet, in a growing number of fields, states are bound by universal rules irrespective of explicit acceptance of them. On one hand, there is an

70 African Children's Rights Committee *South Africa, Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child* (March 2019) 4.

71 AU policy (n 18) 80.

72 Lloyd (n 62) 26. See, also Chirwa (n 49) 170.

73 UN Charter of the United Nations (24 October 1945) 1 UNTS XVI.

increasing number of rules of *jus cogens* (peremptory norms) to which all states are considered bound.⁷⁴ On the other hand, there is a practical need to follow universal technical rules in many fields. For example, the African Children's Rights Committee, in its 2011 Communication over Children of Nubian Descent in Kenya, clearly contends that

although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions.⁷⁵

A second aspect of sovereignty concerns international solidarity. The more each state is full master of its own territory, the less each state feels responsible for what happens in other sovereign states. Nonetheless, this situation is gradually changing with other states that may share some responsibility for what happens within states in troublesome areas of the world.⁷⁶ In Africa, a typical example of this circumstance is the concept of 'burden sharing' enshrined in article 2(4) of the OAU Refugees Convention.⁷⁷

International solidarity has often been considered by doctrine at the cornerstone of refugee protection. This principle states that a refugee is a person of concern to the international community. It also ascertains the obligation to extend refugee status and protection to those obliged to flee persecution and to treat them with dignity. It declares the state's duty to share the liability of finding durable solutions for people deprived of a community.⁷⁸ The principle expounded in the provision of the OAU Refugees Convention, which reflects the historical reality that several states, due to their geographical position, are required to accept larger numbers of

74 Articles 53 and 64 of the 1969 Vienna Convention of the Law of the Treaties stipulate, respectively: '53) A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'; '64) If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' See: UN Vienna Convention on the Law of Treaties (23 May 1969) UNTS, vol 1155, No 18232, 331.

75 African Children's Rights Committee *Decision on the Communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) against the Government of Kenya* Communication 2/2009 (22 March 2011) para 48.

76 H Schemers 'Different aspects of sovereignty' in G Kreijen (ed) *State, sovereignty, and international governance* (2002) 185-186.

77 Article 2(4) stipulates: 'Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.'

78 G Martin 'International solidarity and cooperation in assistance to African refugees: burden-sharing or burden-shifting?' (1995) 7 *International Journal of Refugee Law*, special issue 253.

refugees than others,⁷⁹ have been widely lauded⁸⁰ and its logic originates in the premise that helping refugees is a jointly held moral duty and obligation under international law.⁸¹ International solidarity could be considered as part of what Reisman defined in 1990 as the ‘people’s sovereignty rather than the sovereign’s sovereignty.’⁸²

A third aspect of sovereignty is that it also performs a positive role in the international legal order, the state being, in many instances, the executive branch of the international community.⁸³ National authorities increasingly argue that there are practical reasons for tightening border controls, often appealing to the safeguard of ‘national security’ (regarding this expression, see, for example articles 9, 28, 32 and 33 of the Geneva Convention on Refugees as well as article 6(1) of the OAU Convention on Refugees, article 12(2) of the Banjul Charter, articles 8(1), 13(3)(b), 22(3), 22(4), 26(2), 39(2) and 40(2) of the Convention on the Protection of the Rights of All Migrants Workers and Members of their Families).

Osisanya describes ‘national security’ as the ‘ability of a state to cater for the protection and defence of its citizenry.’⁸⁴ However, although one of the objectives of the AU is ‘to defend the sovereignty, territorial integrity and independence of its Member States’ (article 3(b) of its 2000 Constitutive Act) there is no general consensus on a given definition of ‘national security.’⁸⁵

Against this backdrop, it is not surprising to find that the language of human rights and the potential scrutiny which rights protection entailed were almost entirely absent from the preoccupations of the founders of the Organization of the African Union (OAU, predecessor of the AU) in the early 1960.⁸⁶

- 79 J Van Garderen & J Ebenstein ‘Regional developments: Africa’ in A Zimmermann (ed) *The 1951 Convention Relating the Status of Refugees and its 1967 Protocol: A commentary* (2011) 193.
- 80 The UNHCR Executive Committee (ExCom) reaffirms in conclusion No 100 (LV A/AC.96/1003) *International cooperation and burden and responsibility sharing in mass-influx situations* (8 October 2004) the ‘[i]mportance of international burden and responsibility sharing in reducing the burdens of host countries, especially developing countries’ (preamble).
- 81 A Suhrke ‘Burden-sharing during refugee emergencies: the logic of collective versus national action’ (1998) 11 *Journal of Refugee Studies* 398: ‘By institutionalizing the sharing in accordance with agreed principles of equity, states can discharge these obligations in a manner that simultaneously promotes national interests. Organized sharing means more predictable responses, greater international order [...] during a refugee emergency.’
- 82 WM Reisman ‘Sovereignty and human rights in contemporary international law’ (1990) 84 *American Journal of International Law* 869.
- 83 Schemers (n 76) 186.
- 84 S Osisanya National Security versus Global Security, UN Chronicle (October 2014) <https://unchronicle.un.org/article/national-security-versus-global-security> (accessed 10 October 2019).
- 85 AU Constitutive Act of the African Union. Lomé (11 July 2000) UNTS, vol 2158, No 3733, 328.
- 86 AB Akinyemi ‘The Organization of African Unity and the concept of non-interference in internal affairs of member states’ (1972-1973) 46 *British Yearbook of International Law* 394.

6 CONCLUSION: FINAL ASSESSMENT AND RECOMMENDATIONS ON HOW TO IMPROVE THE PROTECTION OF REFUGEE CHILDREN IN AFRICA

The adoption of the African Children's Charter represents a regional response to human rights concerns, and it reflects the reality of children's human rights issues in Africa. However, the nature of the charter can still be considered as embryonic, which is also evident in the lack of any real academic debate and, subsequently, lack of consensus on what 'children's rights' may mean in different African cultures. Moreover, given the socio-economic conditions on the continent, it is almost impossible for most countries to fully comply with the rights enshrined in the African Children's Charter.⁸⁷

Olowu observes that the African Children's Charter does not represent a mere list of rights but, rather, it constitutes a different way of viewing children and their relations within society and their place in it.⁸⁸ Yet, despite of the existence of the African Children's Charter and the CRC, dealing with the plight of refugee children in Africa is for the most part left to international NGOs, with both regional and national initiatives lacking any real impetus. It is true that article 23(2) of the African Children's Charter provides for state cooperation with international organisations in order to guarantee stronger protection of children in Africa. However, the implementation of the norms contained in the African Children's Charter is still largely insufficient to genuinely improve the situation of refugee children on the continent.⁸⁹

In third world nations, which are usually neither free nor democratic,⁹⁰ the legal protection of refugee children has many shortcomings. Apart from the legal protection often being inaccessible to children themselves and their families, it is also very difficult to inculcate a culture of respect for the rights and welfare of the child and, consequently, to raise the legitimacy of children's rights.⁹¹ Far from constituting a panacea that solves all the problems of refugee children

87 Kaime (n 8) 193. In this regard, see also: Lloyd (n 62) 32. For a national example of difficult practice in the protection of minors see, for example: C Fritsch, E Johnson & A Juska 'The plight of Zimbabwean unaccompanied minors in South Africa: a call for comprehensive legislative action' (2009-2010) 38 *Denver Journal of International Law and Policy* 623-658.

88 D Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 35.

89 Kaime (n 8) 194.

90 Freedom House *Freedom in the World* (2019) 12-13: '[M]any countries in the region still struggled to deliver basic freedoms and protect human rights [...] Space for political activity continued to close in several countries [...] Several of the continent's aging authoritarian leaders continued to cling to power [...].'

91 Kaime (n 3) 144.

in the region, the African Children's Charter remains an instrument of great potential to protect a category of vulnerable individuals.⁹² If the African Children's Charter remains an instrument with great potential to protect refugee children, African states should undertake a number of initiatives to, for example, prioritise the best interests of the child and provide a continuum of care and support for all unaccompanied and separated refugee children, including those who are trafficked, to ensure that they have access to key services such as education, family tracing and well-functioning, professional guardianship systems.

The AU considers the issue of family tracing particularly important. Indeed, the organisation encourages countries to give priority to family tracing and reunification for separated and unaccompanied refugee children. Where tracing is unsuccessful, other mechanisms should be put in place to allow for the adoption of the children when possible. In this last scenario, where children are allowed to be adopted by citizens, they should be given the opportunity to choose their nationality upon attaining majority in accordance with national law.⁹³ In addition, the AU recommends that African states ensure the protection of stateless children and observe the best interests of the child.⁹⁴ A recent report released by the Scalabrini Centre in Cape Town indicates that in the South African provinces of Limpopo and Gauteng, in the first six months of 2019, in 151 cases it was deemed necessary by residential social workers that family tracing be undertaken for a refugee child. In 109 cases, family reunification within South Africa was considered a possibility. However, in 73 of these cases attempts to reunify family in South Africa were ongoing or had failed.⁹⁵

African states should make an additional effort to encourage the integration of refugee children by providing them with education, training and economic opportunities equal to those of nationals, and by facilitating their naturalisation and promoting family reunification policies as recommended in article 10 of the CRC⁹⁶ and article 23 of the African Children's Charter. In this regard, the AU is clear in

92 Kaime (n 3) 185. However, as G Bekker contends: 'The eve of the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights presents the ideal opportunity to reassess, consolidate and streamline rights protection on the continent. As part of this process, serious consideration ought to be given to the question of whether the rights of African children are adequately served by the *status quo* or whether they might be better served by the abolition of the tasks institution of the African Committee of Experts and the reassigning of the tasks entrusted by the ACRWC to it, to the African Commission on Human and Peoples' Rights.' G Bekker 'The African Committee of Experts on the Rights and Welfare of the Child' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 263.

93 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (n 18) 60.

94 AU policy (n 18) 64.

95 Scalabrini Centre (n 43) 26.

96 Article 10(1) stipulates: '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.'

encouraging the integration of children of long-term refugees by providing them with education, and economic opportunities equal to those of nationals, facilitating their naturalisation and promoting family reunification policies.⁹⁷

Finally, it should not be taken for granted that the rights of refugee children will automatically be protected under national laws by implementing the relevant international instruments adopted, possibly putting in place domestic mechanisms for the enforcement of those instruments.

The general acceptance – in Africa as in other areas of the world – of legal obligations with respect to the protection of human rights has been an important step forward. It is recognised that every category of persons has a right to protection of the most fundamental human rights. However, this right is not complete without an obligation from the world community to guarantee these rights. International cooperation calls for all states be bound by some minimum requirements of international law without being able to claim that their sovereignty allows them to reject basic international regulations.⁹⁸

While institutions responsible for the promotion of human rights and the protection of refugee children in Africa have made some progress in advancing these rights, there are still a number of challenges. The most important of these impediments is the lack of political will on the part of states to implement recommendations of the African Children's Charter and, in general, of the AU. This is because states all too often continue to view the protection of refugee children as a matter of national sovereignty. As can be seen from the discussion above, this notion is corroborated by the lack of follow-up mechanisms embedded within the African Children's Charter procedures.⁹⁹

Against this backdrop, the 2017 Children's Bill in Kenya clearly rejects any form of discrimination towards refugee children.¹⁰⁰ The South African government is also going to considerable lengths to eradicate any form of xenophobic discrimination. This effort was reflected by the introduction, in March 2019, of the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. Through this plan, the government commits to 'decolonise the mind' through '[u]sing the education system to instil it in the minds of children that every person is entitled to their human rights and no person has superiority over another.'¹⁰¹

97 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (n 18) 63.

98 Schemers. (n 77) 187-192.

99 Bekker (n 50) 28-29.

100 Government of Kenya *The Children Bill* (2017). See, for example, article 33(2)(h) facilitating '[t]he enhancement of the best interests of children among displaced or unaccompanied children held in care, whether in refugee camps or in any other institution.'

101 Government of South Africa *National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance* (March 2019) 59.

Within this context, the AU strongly encourages the implementation of the Programme of Action of the World Conference against Racism and Xenophobia, held in Durban in 2001. This could be achieved through the adoption of national legislative and policy frameworks, including measures to ensure the fair and non-discriminatory treatment of forced migrants, regardless of their status, with particular focus on preventing discrimination against children.¹⁰² In particular, in the Declaration which resulted from the Durban Conference, participants noted that

with concern the large number of children and young people, particularly girls, among the victims of racism, racial discrimination, xenophobia and related intolerance and stress[ed] the need to incorporate special measures, in accordance with the principle of the best interests of the child and respect for his or her views, in programmes to combat racism, racial discrimination, xenophobia and related intolerance, in order to give priority attention to the rights and the situation of children and young people who are victims of these practices.¹⁰³

Although participants reaffirmed the sovereign right of each state to formulate and apply its own legal framework and policies when it came to the protection of refugees, they nonetheless agreed that these policies should be consistent with applicable human rights instruments, norms and standards, and should remain free from any form of discrimination whatsoever.¹⁰⁴

I would like to conclude this study by quoting Reisman, who stated:¹⁰⁵

No one is entitled to complain that things are getting too complicated. If complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for 'the good old days' and continue to trumpet terms like 'sovereignty' without relating them to the human rights conditions within the states under discussion, do more than commit an anachronism. They undermine human rights.

Will Africa learn this lesson soon? I do very much hope so.

102 AU policy (n 18) 73.

103 UNGA Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance A/CONF.189/12 (31 August 8 September 2001) para 72.

104 UNGA (n 103) para 47.

105 Reisman (n 82) 876.