

From Kenya to Tanzania through Mauritania, Cameroon and Sudan: the approach of the African Children's Committee to the principle of non-discrimination in selected communications

Robert Nanima*

<https://orcid.org/0000-0001-8825-3376>

ABSTRACT: The effectiveness of a human rights monitoring body lies in the seamless fusion of its normative and institutional framework that leads to the development of jurisprudence. Out of seven concluded communications, five concern the violation of the principle of non-discrimination. Using a conceptual desktop research approach, this article argues that the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) can do more in realigning the normative underpinnings to the jurisprudential developments regarding the principle of non-discrimination. This article looks at the normative understanding of the principle of non-discrimination under the African Charter on the Rights and Welfare of the Child and evaluates five selected communications that deal with discrimination. Finally, a reflection on the Committee's approach paves the way for proposals in the application of the principle of non-discrimination.

TITRE ET RÉSUMÉ EN FRANÇAIS

Du Kenya à la Tanzanie, en passant par la Mauritanie, le Cameroun et le Soudan : l'approche du Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant face au principe de non-discrimination dans certaines communications

RÉSUMÉ: L'efficacité d'un mécanisme de surveillance des droits de l'homme repose sur une interaction fluide entre son cadre normatif et institutionnel, conduisant au développement d'une jurisprudence cohérente et adaptée. Parmi les sept communications finalisées par le Comité Africain d'Experts, cinq concernent des violations liées au principe de non-discrimination. Cet article examine la compréhension normative du principe de non-discrimination tel qu'il est inscrit dans la Charte Africaine des Droits et du Bien-être de l'Enfant et analyse en profondeur cinq communications pertinentes à ce sujet. En adoptant une méthode de recherche documentaire conceptuelle, cette contribution soutient que le Comité Africain d'Experts pourrait renforcer son approche en alignant davantage ses fondements normatifs sur les évolutions jurisprudentielles concernant la non-discrimination. Une réflexion critique sur l'approche actuelle du Comité ouvre des perspectives pour une application plus efficace et cohérente du principe de non-discrimination.

* Associate Professor, Faculty of Law, University of the Western Cape, South Africa, LLB (Makerere) Dip LP (Law Development Centre) LLM LLD (Western Cape), rnanima@uwc.ac.za

KEY WORDS: African Children's Charter; child; African Children's Committee; communication; due diligence; non-discrimination; obligation; persuasive jurisprudence

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1 INTRODUCTION

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for the African Committee on the Rights and Welfare of the Child (African Children's Committee) as the body that monitors the implementation of the Children's Charter provisions.¹ The working methods of the African Children's Committee include the consideration of communications on alleged violations of the provisions of the African Children's Charter.² The Children's Committee uses communication guidelines to direct its engagement with applicants and respondent states to communications.³ The Guidelines to the Communications Procedure deal with various aspects such as access to the African Children's Committee; form and content of the communications and their preliminary review and processing by the Secretariat; the appointment of Rapporteurs and Working Groups to work on specific communications; and the joinder and disjoinder of communications.⁴

1 African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1990) art 32.

2 Art 42 African Children's Charter.

3 Revised Guidelines for the Consideration of Communications and Monitoring the Implementation of decisions, <https://www.acerwc.africa/en/page/guidelines-consideration-communications-and-monitoring-implementation-decisions> (accessed 19 December 2023).

4 Art 42 African Children's Charter.

Compared to other human rights monitoring bodies, the African Children's Committee has concluded a relatively small number of communications, but that does not tarnish the fact that its jurisprudence is developing.⁵ It remains imperative to identify trends in communications on specific aspects. This contribution latches onto the African Children's Committee's development of jurisprudence in the context of the principle of non-discrimination. As such, the article looks at specific cases where the African Children's Committee has found a violation of the principle of non-discrimination. It argues that the African Children's Committee can do more to ensure that the jurisprudential developments are realigned to the normative underpinnings regarding the principle of non-discrimination. First, the article elaborates on the reason for the focus on non-discrimination as an evolving principle in the jurisprudence of the Children's Committee. Second, it revisits five selected communications that hinge on non-discrimination and establishes its evaluation of its normative framework to the communications. A reflection on the African Children's Committee's approach paves the way for proposals in the application of the principle of non-discrimination.

Furthermore, the author takes on a doctrinal approach to evaluate the reasoning behind the African Children's Committee's findings concerning the principle of non-discrimination. This is concretised by the fact that the principle of non-discrimination is one of the four that inform the child rights-based approach under the African Children's Charter. The insights are drawn from the jurisprudential developments on two fronts. First, the contribution takes on a chronological approach and looks at the following communications: *Children of Nubian Descent*;⁶ *Mauritanian Enslaved Brothers*;⁷ *Sudanese Nationality*;⁸ *Cameroonian Child Rape*;⁹ and *Tanzanian Girls*.¹⁰ These decisions were made over 11 years and this raises an expectation to look out for development and changes over time.

5 Eg, as of 5 December 2023, the African Commission had received 832 complaints, with 184 pending. A total of 648 communications have been concluded. The African Children's Committee has only received 24 communications and concluded 7, as of 5 December 2023. See <https://www.acerwc.africa/en/communications/table> (accessed 19 December 2023).

6 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*, No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*).

7 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*).

8 *African Centre of Justice and Peace Studies and People's Legal Aid Centre v Sudan*, No 5/Com/001/2015, decided May 2018 (*Sudanese Nationality*).

9 *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, No 6/Com/002/2015, decided May 2018 (*Cameroonian Child Rape*).

10 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*).

2 SETTING THE SCENE: WHY NON-DISCRIMINATION?

The African Children's Committee has to date received 23 communications of which seven have been decided on merit.¹¹ Five communications have been finalised and declared inadmissible and ten communications are pending.¹² This contribution by design looks at the communications decided on the merits. This is because it concerned the Children's Committee's jurisprudence on substantive elements of the African Children's Charter.

Out of the seven concluded communications, five deal with the violation of the principle of non-discrimination. In light of the low number of communications by the African Children's Committee, it makes sense to have an evaluation of the principle of non-discrimination from a normative, institutional or jurisprudential approach as a critical starting point. This is largely because of the gap in literature on this subject. The author is not aware of existing literature that solely evaluates the principle of non-discrimination under the African Children's Charter.¹³ The available literature largely points to general overviews of the child rights-based approach by the African Children's Committee and the substantive rights.¹⁴

In addition, available literature rather points to the engagement of the principle of non-discrimination by the United Nations (UN) Committee on the Rights of the Child.¹⁵ Abrahamson looks at the principle of non-discrimination from the perspective of the Convention on the Rights of the Child (CRC).¹⁶ In his comparison of the provisions of CRC on non-discrimination concerning other human rights treaties, he does not add the African Children's Charter on the basis that it is not strictly an international human rights treaty.¹⁷ He looks at the United

11 See results, https://www.acerwc.africa/en/communications/table?title=&field_member_state_target_id=All&field_decision_target_id=479 (accessed 19 December 2023).

12 See <https://www.acerwc.africa/en/communications/table> (accessed 19 December 2023).

13 The author can attest to recent academic engagements to develop a commentary on the African Children's Charter poised to be launched in late 2024.

14 See results of a search, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Julia+sloth+nielsen+non-discrimination&btnG=here; https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=benyam+dawit+mezmur+non-discrimination&btnG=; and https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=African+charter+on+human+and+peoples+rights+non-discrimination&btnG= (accessed 10 November 2024).

15 Eg, see B Samantha 'The principle of non-discrimination in the UNCRC' (2005) 13 *International Journal of Children's Rights* 433-461; JG Vaghri and others *Monitoring state compliance with the UN Convention on the Rights of the Child* (2002).

16 B Abramson 'Article 2. The right of non-discrimination' in A Alen and others (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008).

17 Abramson (n 16) 5-9.

Nations Charter;¹⁸ the Universal Declaration of Human Rights (Universal Declaration);¹⁹ the International Covenant on Civil and Political Rights (ICCPR);²⁰ and the International Covenant on the Economic, Social and Cultural Rights (ICESCR).²¹ It is argued that the relegated importance accorded to the African Children's Charter presents an incomplete picture concerning its normative and institutional underpinning that has led to the development of the principle of non-discrimination in Africa.²²

In her edited volume, Olga correctly analyses the evolving nature of the rights of the child.²³ While it may not be by design, there is limited engagement of the child rights-based principles with a rather expansive evaluation of how various states, such as Greece, France, Canada, Denmark, Germany and India, have implemented the rights of the child.²⁴ While this approach offers an insightful narrative by states that are party to CRC, a deliberate and in-depth engagement of the principle of non-discrimination is lost.²⁵ It goes without saying that the research is squarely on CRC, which presents a gap and an opportunity to carry out this study.

Lansdown looks at the principle of non-discrimination under CRC,²⁶ and takes time to analyse each attribute of the principle in line with article 3. He looks at three attributes: first, non-discrimination in the realisation of all rights for all children within the jurisdiction;²⁷ second, based on status, actions, or beliefs, of parents, guardians, or family members;²⁸ and, third, special measures to address discrimination.²⁹ This approach lends credence to this research to review the various principles that underscore the understanding of the principle of non-discrimination under article 3 of the African Children's Charter. This also presents a gap with regard to the non-engagement of peculiar aspects on the principle of non-discrimination such as 'fortune' under the African Children's Charter.

18 As above; arts 1(3), 13(1)(b), 55(c) & 76(c) of the Charter of the United Nations, 892 UNTS 119.

19 Abramson (n 16) 5-9. See Universal Declaration (1948) GA Res 217A (III) (UN Doc A/810, 1948).

20 Abramson (n 16) 5-9. See art 2(1) of ICCPR 999 UNTS 171 (1966; in force 1976).

21 Abramson (n 16) 5-9. See art 2(2) of ICESCR 993 UNTS 3 (1966; in force 1976).

22 It is argued that in the era of decolonisation and decoloniality, regional instruments ought to be recognised as part of international law and looked at from how they may be a platform for the global instruments and monitoring bodies to learn from.

23 CJ Olga *The rights of the child in a changing world 25 years after the UN Convention on the Rights of the Child* (2015).

24 Olga (n 23) 1, 61, 97, 123, 151 & 167.

25 Olga (n 23) generally.

26 G Lansdown 'Article 2 the right to non-discrimination' in Z Vaghrietal and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child: an analysis of attributes* (2022) 11.

27 Lansdown (n 26) 15.

28 Lansdown (n 26) 16.

29 Lansdown (n 26) 17.

This contribution scrutinises the communications against Tanzania,³⁰ Mauritania,³¹ Sudan³² and Kenya.³³

3 THE PRINCIPLE OF NON-DISCRIMINATION

CRC emphasises the role of the state in ensuring the application of the principle of non-discrimination.³⁴ A quick look at the provision is important in appreciating the context of the African Children's Charter because the African Children's Charter is complementary to CRC. The relevant provision of the CRC states:³⁵

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 guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Four critical points emanate from this provision. It (i) places a mandate on the state. This means that the obligation on the state party is mandatory and the state cannot deviate from it. The mandate on the state is to (ii) refrain from acts that may lead to discrimination. Furthermore, it requires that the state (iii) takes active steps to monitor the extent of discrimination; and (iv) take steps to mitigate this.³⁶ In contrast, the principle of non-discrimination as provided for in the African Children's Charter states that '[e]very 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, religion, political or other opinion, national and social origin, fortune, birth or other status'.³⁷

The foregoing article emphasises the position taken by the African Children's Charter and highlights the obligation on the state. It is from this approach that some pointers are harnessed from this provision and discussed below.

30 *Tanzanian Girls* (n 10).

31 *Mauritanian Enslaved Brothers* (n 7).

32 *Sudanese Nationality* (n 8).

33 *Children of Nubian Descent* (n 6).

34 Since the African Children's Charter complements CRC, a comparison of the two instruments is instructive in assessing the interpretation of CRC as a platform on which the African Children's Charter finds its footing through the application of art 46 in the use of persuasive jurisprudence. The issue of complementarity is not novel to the African Children's Committee. See Report on the 8th session of the CRC Committee January 1995 CRC/C/38. At 8 the CRC Committee recognises that CRC and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) have a complementary and mutually-reinforcing nature.

35 Art 2(1) CRC.

36 For a detailed normative discussion of art 2, see *Implementation handbook for the Convention on the Rights of the Child* 19-37, <https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf> (accessed 1 February 2024).

37 Art 3 African Children's Charter.

3.1 Agency on the child

First, article 3 requires an agency on the child to have entitlements to rights and freedoms under the African Children's Charter.³⁸ The Children's Charter has handed down principles to guide the normative understanding of the principle of non-discrimination. As will be shown, the African Children's Charter has used article 46 (which allows the use of inspiration from other sources of the law) to draw on inspiration from other sources to interpret article 3. This has included the use of guidance from other human rights bodies such as CRC and the CEDAW Committee, the African Commission on Human and Peoples' Rights (African Commission), the African Charter on Human and Peoples' Rights (African Charter) and the African Court on Human and Peoples' Rights (African Court).

In addition, the child is mandated to enjoy all the rights and freedoms in an environment that is provided by all stakeholders, starting with the state. It is interesting to note that the mandate is not specifically visited in the state. This potentially dangerous predicament is solved by the African Children's Charter which offers insights into the state party's obligations. The African Children's Charter mandates the state to recognise the rights, freedoms and duties enshrined in the African Children's Charter.³⁹ Based on the mandatory requirement, consequently, the state is mandated to undertake necessary steps within the bounds of their constitutional processes and all kinds of measures (including legislative measures) to give effect to the provisions of the African Children's Charter.⁴⁰ Furthermore, the wording may also be interpreted to mean that all stakeholders, persons or entities in the environments where a child is have an obligation to urge the state as the main duty holder to ensure that the child enjoys their rights.⁴¹

3.2 Obligation on the state as an active (rather than a passive) player

Second, it is argued that the active identification of the child affected by discrimination includes the engagement of proactive steps, such as the increased delivery of accessible basic services such as education, health care and birth registration, coupled with an increase in the allocation of

38 General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection' para 9.

39 Art 1 African Children's Charter.

40 As above.

41 As such, while the state is accountable under the African Children's Charter; the various stakeholders also remain accountable in using their working methods to push for conditions that ensure that the child enjoys all the rights under the African Children's Charter without any discrimination.

funds, human resources and the required facilities.⁴² As such, the state is actively involved in identifying children affected by discrimination and is expected to take deliberate steps to remedy the situation.⁴³ The active identification may start with the commitment by a state party to non-discrimination against women and girls, which requires it to recognise child marriage as a form of sex and gender-based discrimination, and to take appropriate measures towards its elimination.⁴⁴ To this end, critical information on children who may be suffering the brunt of discrimination has to be actively and continually identified and subsequent steps taken to ensure that children are not discriminated against. In addition, the African Children's Committee reiterates, by implication, the need for the use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination.⁴⁵ The African Children's Committee has in the recent past made recommendations to state parties to ensure non-discrimination as a constitutional guarantee.⁴⁶

3.3 The status of the child is irrelevant

Third, the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.⁴⁷ This gives the application of the principle of non-discrimination a broad-based contextual application. The first point of call is to have a non-exhaustive list of vulnerable children.⁴⁸ The wording of the article by

42 Concluding Observation of the African Committee of Experts on the Rights and Welfare of the Child on the Initial Report of the Republic of Angola para 11, https://www.acerwc.africa/sites/default/files/2022-06/Angola_CO_Initial_Report_7.pdf (accessed 5 February 2024).

43 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to implementation of the principle of non-discrimination. See General Comment 5 (n 38) 11.

44 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage para 11, <https://www.acerwc.africa/es/key-documents/general-comments> (accessed 2 February 2024).

45 General Comment 5 (n 38) para 9 states that dealing with discrimination may not require 'identical treatment' but rather 'taking special measures in order to diminish or eliminate conditions that cause discrimination'. The state retains the margin of appreciation to ensure that it uses both objective and subjective approaches to ensure that non-discrimination is applied.

46 See Concluding Observation of the African Committee of Experts on the Rights and Welfare of the Child on the initial Report of the Democratic Republic of Algeria para 14, https://www.acerwc.africa/sites/default/files/2022-06/Concluding_Observations_Algeria.pdf (accessed 5 February 2024). The Committee welcomed the constitutional guarantee for equality of everyone and non-discrimination.

47 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. General Comment 5 (n 38) 10.

48 This list is continually extended as the context demands. Eg, the General Comment on sexual exploitation adds to this non-conclusive list other vulnerable children such as victims of sexual violations, including children with disabilities,

design is to the end that specific contextual imperatives regarding the child are irrelevant.⁴⁹ For instance, the existence of parents or guardians, and their ethnic group, colour, sex, language, religion, political or other status are irrelevant, especially if they may stifle the child's enjoyment of the rights under the African Children's Charter.⁵⁰ The African Children's Committee gives a clarion call to state parties to ensure that birth registration is enforced regardless of the whereabouts of the child's parents or guardians, their ethnicity, group, colour, sex, language, religion, political or other opinion from a national, social origin or other status.⁵¹ This shows how non-discrimination, while it is explicitly mentioned in article 3, is a principle that permeates through the entire African Children's Charter. This is supported by literature that looks at non-discrimination as both a substantive right and a principle.⁵² In addition, there is emphasis on the fact that the principle of non-discrimination applies in all environments where a child is, whether there is armed conflict, tension, strife, refugee settings or in places of peace.⁵³

3.4 The use of differential treatment

Fourth, a question that comes to the fore is the use of differential treatment or positive discrimination as an approach to non-discrimination.⁵⁴ The African Children's Committee uses the spellings 'deferential' in the *Children of Nubian Descent and Sudanese Nationality*, and 'differential' in the *Mauritanian Enslaved Brothers and Tanzanian Girls*. For accuracy, the author refers to the term 'differential' – and it is acknowledged that they refer to the same thing. The cardinal rule is that a child can be justifiably treated differently from others based on their age, as long as the differentiation is proven to have a legitimate aim, that is, a necessary solution to achieve that

children in care institutions, children in conflict situations, children in street situations, and displaced and migrant children. General Comment 7 on art 27 of the African Children's Charter 'Sexual exploitation' para 40.

49 Art 3 African Children's Charter.

50 As above.

51 Art 6 African Children's Charter. See also General Comment on art 6 of the African Children's Charter 'Right to birth registration, name and nationality' para 16.

52 All the articles point to this fact. See other instructive literature such as S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712-738. See also S Karvatska & I Toronchuk 'The right to non-discrimination: interpretive practice of the ECtHR' (2020) 7 *European Journal of Law and Public Administration* 24-46.

53 General Comment 6 on art 22 of the African Charter on the Rights and Welfare of the Child on Children in Situations of Conflict paras 38-40.

54 CRC guides state parties to use legitimate forms of discrimination that have a positive dent on the rights of the child. Eg, discrimination on account of evolving capacities of the child seeks views of a child who has information on the subject at hand and with regard to their capacities, use of affirmative action or programmes that seek to special consideration to children with vulnerabilities. See *CRC handbook* (n 36) 31.

aim, and to be proportional to the achievement of the result.⁵⁵ While the African Children's Charter does not provide for differential treatment, it allows the African Children's Committee to draw inspiration from international law on human rights, and other instruments adopted by the United Nations (UN) and by African countries in the field of human rights, and from African values and traditions.⁵⁶ For instance, the African Children's Committee recognises that the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Women's Protocol) reiterates the principles of non-discrimination and provides for the right to freedom from discrimination based on sex or gender.⁵⁷ It is argued that if the application of differential treatment is based on the child rights-based approach and the added value that the African Children's Charter provides, it may be used to increase the application of differential treatment. Although the African Children's Committee has come through strongly to reiterate other sources of law,⁵⁸ it is yet to be seen when it will apply the principle of possible differential treatment as a point of departure from a finding of a violation of the principle of non-discrimination.

4 EVALUATION OF COMMUNICATIONS

This part evaluates five communications by the African Children's Committee with regard to the way in which the principle of non-discrimination was dealt with. The five communications are engaged on account of the brief facts, the recommendations by the African Children's Committee in light of the principle of non-discrimination and a discussion. The conversation extends to the communications against Kenya, Sudan, Mauritania, Cameroon and Tanzania.

4.1 *Children of Nubian Descent*

This was the first communication which was filed in 2009, and the African Children's Committee handled its decision in 2011 with a

55 N Brando & L Lundy 'Discrimination and children's right to freedom of association and assembly' (2024) 37 *Harvard Human Rights Journal*, <https://journals.law.harvard.edu/hrj/2022/12/discrimination-and-childrens-right-to-freedom-of-association-and-assembly/> (accessed 20 January 2024).

56 Art 46 African Children's Charter. A detailed discussion of this article is beyond the scope of this contribution, but a very critical provision that gives the Committee leeway to use other instruments in the promotion and protection of the rights of the child.

57 Joint General Comment (n 44) para 11.

58 See General Comment 1 (art 30 of the African Charter on the Rights and Welfare of the Child) on 'Children of incarcerated and imprisoned parents and primary caregivers' 2013 para 18. The African Children's Committee recognises the inspiration from art 2 of the United Nations Convention on the Rights of the Child (CRC) 1577 UNTS 3 (1989); the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS (1976) 171; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS (1976) 3.

finding on the violation of the principle of non-discrimination by Kenya against children of Nubian descent. It was reported that, historically, the Nubians were forcibly conscripted into the colonial British army and upon demobilisation, they were never returned to Sudan.⁵⁹ Although the British colonial authorities allocated land to Nubians, the post-colonial government of Kenya regarded them as aliens.⁶⁰ Consequently, the lack of ancestral land in the state party, and the failure to recognise their claim to land was linked to the denial of Kenyan citizenship.⁶¹ Consequently, the children of the Nubian community did not have citizenship, and the lack of valid documentation on the part of their parents meant that they could not easily receive the benefits that children with citizenship or legal status in Kenya had.⁶² This was further complicated by the fact that the children of Nubian descent had no legitimate expectation from the state and would most probably remain stateless.⁶³ The respondent state filed no response to the communication.

In dealing with the issue of non-discrimination, the African Children's Committee reiterated five critical principles. These principles are discussed below in light of the normative principles and the subsequent three communications on non-discrimination.

First, the African Children's Committee introduced racial and ethnic discrimination as prohibited and binding as *jus cogens* under international law.⁶⁴ While this was a point of departure from the normative underpinnings, it reiterated various principles. The Children's Committee, by implication, uses international law as the yardstick to place agency on the child as the recipient of the rights and freedoms under the African Children's Charter, and that discrimination should not be an exception.⁶⁵ In addition, the African Children's Committee by implication reiterated that the state is actively involved in identifying children affected by discrimination and is expected to take deliberate steps to remedy the situation.⁶⁶ Furthermore, the Children's Committee reiterates the principle that the state is taken to play an active rather than a passive role in how it responds other than failing to act. As such, the failure of the state to address the discrimination against the Nubian children was evidence of the state playing a passive role.⁶⁷ It was to this end that the African Children's Committee was not convinced that the state practice that has led

59 *Children of Nubian Descent* (n 6) para 2.

60 *Children of Nubian Descent* (n 6) para 3.

61 As above.

62 *Children of Nubian Descent* (n 6) para 5.

63 *Children of Nubian Descent* (n 6) para 56.

64 *Children of Nubian Descent* (n 6) para 5.

65 General Comment 5 (n 38).

66 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to the implementation of the principle of non-discrimination. General Comment 5 (n 38) para 11.

67 Joint General Comment (n 44) para 11.

children being stateless for long, coupled with the discriminatory treatment, was proportional or necessary.⁶⁸

Second, the African Children's Committee introduced the concept of a burden to justify fair or positive discrimination. It stated that where the facts indicate a *prima facie* case of discrimination, the burden shifts to the state to justify the difference in treatment and how this may amount to fair discrimination.⁶⁹ This is amplified in the findings where the Children's Committee confirms that this burden cannot be extinguished when a state (in this case, Kenya) elects not to respond to the allegations levied against it by the complainant.⁷⁰

Third, the African Children's Committee pronounced itself on the application of fair discrimination. It used jurisprudence from the African Commission and underscored three grounds that have to be proved by the state for discriminatory treatment to be justified, namely, 'the reasons for possible limitations must be founded in a legitimate state interest and ... limitations of rights must be strictly proportionate [*sic*] with and absolutely necessary for the advantages which are to be obtained'.

From the above, the valid reasons for discrimination are legitimacy, proportionality and absolute necessity. Interestingly, this is the first communication where the African Children's Committee refers to fair discrimination and alludes to a ground that could be used to justify it. It is argued that although the Children's Committee does not refer to the concept as 'positive discrimination' or 'differential treatment', it ought to be noted that various reasons may justify different outcomes.⁷¹ Although positive discrimination occurs where a disadvantaged group gets preferential treatment, the state may legitimately negatively discriminate against groups as well, for instance, through the denial of voting rights to non-citizens.⁷² While it is not a form of preferential treatment to the vulnerable group as non-citizens, it is a form of legitimate discrimination on the basis of citizenship. From an introspection, it would have been expected that the African Children's Committee would refer to article 46 (to draw inspiration from other sources of international human rights law and international humanitarian law) but it did not.

Fourth, the African Children's Committee reiterated the need for the state to take measures to facilitate procedures for the acquisition of nationality for children who would be stateless and not otherwise. This position upheld the principle that measures such as birth registration need to be enforced regardless of the whereabouts of the child's parents or guardians, their ethnicity, group, colour, sex, language, religion, political or other opinion from a national, social origin or other status

68 *Children of Nubian Descent* (n 6) para 56.

69 *Children of Nubian Descent* (n 6) para 57.

70 *Children of Nubian Descent* (n 6) para 5.

71 See Brando & Lundy (n 55).

72 See interesting conversation on this by JA Goldston 'Holes in the rights framework: racial discrimination, citizenship, and the rights of noncitizens' (2006) 20 *Ethics and International Affairs* 321-347.

is a given.⁷³ Most importantly, the Committee reiterated its broad-based contextual application of the principle that the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.⁷⁴

Fifth, the African Children's Committee enunciated a principle to the end that the violation of the principle of non-discrimination may lead to consequential violations of other provisions. It noted that the indivisibility of rights in the African Children's Charter was underscored by the consequential impact of the denial of nationality to children of Nubian descent by the state. This was evident in the finding that the state had as a consequence violated its obligations under articles 1 (to respect, protect, promote and fulfil its obligations under the African Children's Charter) and 14 (health).

It is also worth noting that the communication informed the subjective development of the jurisprudence on non-discrimination in the wording of General Comment 5 on state party obligations.⁷⁵ Some specific aspects of the normative underpinnings did not come through in this communication. Others include the application of the principle of non-discrimination in all environments such as peace, conflict and host communities,⁷⁶ and the mandate to ensure that all stakeholders (starting with the state) have an obligation to a child in the enjoyment of their rights.⁷⁷ The author hastens to add that since the facts of the communication did not involve children in spaces of conflict, humanitarian settings, as refugees or internally displaced, it is expected that a communication with such facts will build on this jurisprudence.

Regarding the violation of state obligations under article 1, the applicants never alleged a violation of the said article. The African Children's Committee only refers to the specific articles that have allegedly been violated by the Kenyan government. These include articles 6(2), (3) and (4); 3; 14(2)(b), (c) and (g); and 11(3) of the African Children's Charter.

4.2 *Mauritanian Enslaved Brothers*

This communication was received in 2011 and the decision was handed down in 2017. The brief facts are that two children were born to the Haratine sect, which automatically recognised them as slaves.⁷⁸ They served in this context to the El Hassine family and their chores involved

73 Art 6 African Children's Charter. See also General Comment on art 6 of the African Charter on the Rights and Welfare of the Child: 'Right to birth registration, name and nationality' para 16.

74 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised like rural children, children of imprisoned mothers, children on the move and the gendered dimension. See General Comment 5 (n 38) 10.

75 General Comment 5 (n 38).

76 General Comment 6 (n 53) paras 38-40.

77 As above.

78 *Mauritanian Enslaved Brothers* (n 7) para 5.

looking after the family's heads of camels, and working for the whole week without remuneration.⁷⁹ The El Hassine family subjected the two boys to corporal punishment and denied them the right to education.⁸⁰ When the matter was brought before the lower courts, judgment and a fine of \$1 500 were handed down by the lower courts. Having been aggrieved by the decision, attempts to appeal were not supported by the state prosecutor.⁸¹ After a failure to solve the case at the domestic level, the African Children's Committee found a violation of the principle of non-discrimination under article 3. Other violations that were found by the Children's Committee included the best interests of the child; the right to life, survival and development;⁸² the right to education, leisure, recreation and cultural activities; and protection from economic exploitation.⁸³ In addition, the African Children's Committee found a violation of protection against harmful cultural and social practices and the prevention of trafficking in and abduction of children.⁸⁴

Concerning discrimination, the complainants argued that since they were treated differently from children who were not slaves, this was a violation of the principle and right to non-discrimination. As such, the respondent's failure to prevent and investigate acts of discrimination, and ensuring the punishment of perpetrators with a view of ensuring redress to the victims, amounted to discrimination.⁸⁵ The complainants further argued that the treatment of the two children and the failure of the government to prevent such treatment and to provide an effective remedy violated their rights to education, survival and development, leisure, recreation, and cultural activities as a result of the discriminatory engagements by the state.⁸⁶ The respondent state did not specifically address its mind to the issues of discrimination.⁸⁷ Interestingly, it gave a general approach by the government in ensuring that the rights of the child were not violated, such as a legislative framework that protected children against abuse;⁸⁸ the development of a plan of action against child labour;⁸⁹ the enrolment of the children in school;⁹⁰ and the prosecution of the perpetrators.⁹¹

In the evaluation of the violation of the principle of non-discrimination, the African Children's Committee showcased three points in its approach in this communication. First, it reiterated that for

79 *Mauritanian Enslaved Brothers* (n 7) paras 6-7.

80 As above.

81 As above.

82 *Mauritanian Enslaved Brothers* (n 7) para 12.

83 As above.

84 As above.

85 *Mauritanian Enslaved Brothers* (n 7) para 35.

86 As above.

87 *Mauritanian Enslaved Brothers* (n 7); see the silence in the respondent's submissions on the arguments on the merits of the communication in paras 36-41.

88 *Mauritanian Enslaved Brothers* (n 7) para 36.

89 *Mauritanian Enslaved Brothers* (n 7) para 37.

90 *Mauritanian Enslaved Brothers* (n 7) para 38.

91 *Mauritanian Enslaved Brothers* (n 7) para 39.

a state to justify the use of differential treatment, three aspects should exist, namely, 'a legitimate state interest, limitations that are proportionate with, and necessary for the advantages for which they are obtained'.⁹² It should be stated that this approach maintained consistency by the African Children's Committee in referring to its earlier jurisprudence on differential treatment.⁹³ Second, the Children's Committee relied on persuasive jurisprudence as referred to in article 46, such as communications from the African Commission and the Inter-American Commission.⁹⁴

Third, and closely linked to the foregoing position, the African Children's Committee used the extent to which a state upholds its legal responsibilities. With an emphasis on the acts of discrimination by private individuals, the Children's Committee recalled that the state has the duty to protect children from discrimination by taking preventive measures against violations by private individuals and providing remedial actions to correct the violations.⁹⁵ The cumulative effect of the second and third pointers was the application of the due diligence principle that requires the state to take steps to prevent and investigate human rights violations, impose the appropriate punishment and ensure adequate compensation.⁹⁶ The introduction of the due diligence principle is a reiteration of the agency on the child to have entitlements to rights and freedoms under the African Children's Charter.⁹⁷ In addition, the use of the due diligence principle is a clarion call that the state has to actively identify individual children and groups of children (slaves in this communication) whose recognition and subsequent realisation of their rights require special measures.⁹⁸ By implication, it is correct to assert that the state fails to be actively involved in the engagement of the non-discrimination discourse.⁹⁹ To this end, the state is not committed to ensuring non-discrimination against the children who are slaves.¹⁰⁰ Closely related to the above, the failure by

92 *Mauritanian Enslaved Brothers* (n 7) para 61, notes 29 & 62, note 31.

93 See General Comment 1 (n 58) para 18; *Children of Nubian Descent* (n 6); *Sudanese Nationality* (n 8) as discussed above.

94 *Mauritanian Enslaved Brothers* (n 7) para 62; *Children of Nubian Descent* (n 6) and *Sudanese Nationality* (n 8) as discussed above. In addition, the point of departure was the application of persuasive jurisprudence that was not covered by art 46 such as textbooks and legal literature. It is reiterated that the application of art 46 is still not unpacked and qualified as to the bounds of its use. It is argued that the application of persuasive jurisprudence without reference to the interpretation of art 46 is a missed opportunity to establish the bounds of its application.

95 *Mauritanian Enslaved Brothers* (n 7) para 62, note 30.

96 As above. The due diligence principle is amplified in paras 47-58. For more on the due diligence principle, see RD Nanima 'Evaluating the role of the African Committee of Experts on the Rights and Welfare of the Child in the COVID-19 era: visualising the African child in 2050' (2021) 21 *African Human Rights Law Journal* 52-73. See also RD Nanima 'Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations' (2020) 53 *De Jure Law Journal* 307-331.

97 General Comment 5 (n 38).

98 Art 1 African Children's Charter.

99 See General Comment 5 (n 38) para 11.

100 See discussion on this principle in part 3.

the state to support the two minors by integrating them into their society is a failure to show commitment and a lack of the use of equitable treatment measures to mitigate the effects of discrimination by the state (as a duty bearer) and different stakeholders.¹⁰¹

Regarding the violation of state obligations under article 1, the applicants expressly alleged a violation of the said article in relation to other articles such as articles 3, 4, 5, 11, 12, 16 and 29. The African Children's Committee finds a violation of article 1 and other provisions of the African Children's Charter. This indicates that the African Children's Committee will find a violation of an article when it is expressly pleaded by the applicant.

4.3 *Cameroonian Child Rape*

This was the third communication to be decided concerning non-discrimination. It was received in 2015 and decided in 2018. The complainants claimed violations of articles 1, 2, 5, 7 and 17 of the African Children's Charter by the respondent state. These articles related to state party obligations; the definition of a child; the right to life, survival and development; freedom of expression; and protection against child abuse and torture.¹⁰² The facts alleged showed that the victim had been raped by an important individual in the community on three occasions.¹⁰³ Attempts to have justice were delayed by the police and, as a result, the Court dismissed the case.¹⁰⁴ When the complainant's mother went to a local radio station to express her dissatisfaction with the outcome of the case, she was charged with judicial defamation.¹⁰⁵

The African Children's Committee reiterated the agency on the child even in instances where the applicant's assertions in the complaint do not point to the violation. In this regard, it stated:¹⁰⁶

Article 3 of the Charter stipulates that all children are entitled to the enjoyment of the rights provided therein irrespective of all grounds including sex. This provision is clear that any form of gender based discrimination against girls is prohibited, however, it does not vividly portray that sexual violence is a form of gender based discrimination as argued by the applicants.

This position reiterates that non-discrimination should be looked at in a wider perspective which inculcates all grounds that would show discriminatory acts, and that their status is irrelevant in qualifying the existence of discrimination. In addition, any form of discrimination should not be encouraged but rather prohibited. Finally, despite the failure to articulate the form of discrimination, the African Children's

101 General Comment 5 (n 38) 9.

102 *Cameroonian Child Rape* (n 9) para 6.

103 *Cameroonian Child Rape* (n 9) para 18.

104 *Cameroonian Child Rape* (n 9) para 14.

105 As above.

106 *Cameroonian Child Rape* (n 9) para 59.

Committee would go ahead to read in the violation in light of its evaluation of the facts before it.

The African Children's Committee reiterated the active role of the state in identifying vulnerable children and taking steps to remedy their situations. To this end, it used a two-step approach by, first, applying article 46 of the African Children's Charter to draw inspiration from other sources of human rights law. This was informed by the jurisprudence of the Inter-American Commission of Human Rights,¹⁰⁷ the African Commission¹⁰⁸ and the European Court of Human Rights and Fundamental Freedoms.¹⁰⁹ Second, the African Children's Committee relied on the jurisprudence of the CEDAW Committee and applied the principle of due diligence,¹¹⁰ with the aid of *X and Y v Georgia* from the CEDAW Committee, where it was held that there is a violation of the principle of non-discrimination where the respondent state fails to take legislative measures to protect the victim from domestic violence. The CEDAW Committee reiterated that even where the state was not directly responsible for the violation of the principle of non-discrimination, it was important that the failure to exercise due diligence to investigate and prosecute the perpetrators of the crime made it accountable under international law.¹¹¹ As such, the African Children's Committee found that the sexual abuse committed against the child disabled her from enjoying the protection under the African Children's Charter.¹¹² It also added that although the discriminatory act had not been perpetrated by state actors, the state has failed to deliver its obligation to protect the child as far as it failed to investigate the alleged violation.¹¹³

Regarding the violation of state obligations under article 1, the applicants expressly alleged a violation of the said article in addition to violations of articles 3 and 16. The African Children's Committee found the respondent state in violation of its obligations under article 1 (obligation of state parties); article 3 (non-discrimination); and article 16 (protection against child abuse and torture) of the African Children's Charter. This still points to the finding of violations with respect to provisions that have been pleaded by the applicant.

4.4 *Sudanese Nationality*

In *Sudanese Nationality*, parents who were from areas that were now gazetted to South Sudan wanted to maintain their nationality with Sudan. They were not considered nationals of Sudan and, as a consequence, the children were also denied nationality. The main issue

107 *Cameroonian Child Rape* (n 9) para 54.

108 *Cameroonian Child Rape* (n 9) para 53.

109 *Cameroonian Child Rape* (n 9) paras 49 & 50.

110 *Cameroonian Child Rape* (n 9) para 63.

111 *Cameroonian Child Rape* (n 9) para 63.

112 *Cameroonian Child Rape* (n 9) para 64.

113 *Cameroonian Child Rape* (n 9) paras 65 & 66.

was whether the violation of the principle of non-discrimination led to the violation of the right to acquire nationality.¹¹⁴ The African Children's Committee held the view that the enjoyment of the right to non-discrimination was not a condition after a balancing act before it was applied.¹¹⁵ Consequently, the Committee correctly stated that the right cannot be denied in disregard of the principles that govern non-discrimination as provided for in article 3 of the African Children's Charter.¹¹⁶

The African Children's Committee adopted a conceptual approach requiring that the state party should not use discriminatory regulations on different groups of a population in the grant of nationality.¹¹⁷ It found that, as such, the law of the Sudan on the acquisition of nationality was discriminatory since it allowed fathers (excluding the mothers) of Sudanese children to automatically confer nationality on their children.¹¹⁸ In addition, the African Children's Committee expounded on the use of reciprocity and retaliation. This was based on the fact that a similar law was applied by South Sudan to deny nationality to children from Sudan.¹¹⁹ The African Children's Committee stated that the respondents' attempt to use reciprocity and retaliation was not applicable in areas of human rights, but in other areas such as trade, intellectual property and technology transfer.¹²⁰ This was an important assertion in terms of qualifying retaliation and reciprocity regarding the application of the principle of non-discrimination.¹²¹ This meant that the status of the child was irrelevant and had no bearing on the enjoyment of the rights under the African Children's Charter.¹²²

The African Children's Committee departed from the literal approach that looked at non-discrimination as a principle and not a right in *Children of Nubian Descent* and took on a conceptual approach that establishes a link between the principle of non-discrimination and the right to acquire nationality.¹²³ This approach creates an interesting pattern upon which the African Children's Committee builds to develop its jurisprudence. First, it refers to non-discrimination as both a principle and as a right – an inherent entity of which the state cannot deprive a child.¹²⁴ This approach adds value to the placement of a

114 *Sudanese Nationality* (n 8) para 31.

115 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.

116 *Sudanese Nationality* (n 8) para 32, lines 11-13.

117 *Sudanese Nationality* (n 8) paras 37-38.

118 *Sudanese Nationality* (n 8) paras 39-41.

119 *Sudanese Nationality* (n 8) para 48.

120 *Sudanese Nationality* (n 8) para 51.

121 As above.

122 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised like rural children, children of imprisoned mothers, children on the move and the gendered dimension.

123 *Sudanese Nationality* (n 8) para 31.

124 *Sudanese Nationality* (n 8) para 32, line 1.

contextual agency on the child to have entitlements to rights and freedoms under the African Children's Charter.¹²⁵

Second, it states that the enjoyment of the right to non-discrimination is not subject to a balancing act for the principle to be applied.¹²⁶ Consequently, the African Children's Committee correctly stated that the right cannot be denied in disregard of the principles that govern non-discrimination as provided for in article 3 of the African Children's Charter.¹²⁷ This means that the state cannot use the principle of non-discrimination to violate the rights of a child.

Third, the African Children's Committee shared the view that in the context of nationality and non-discrimination, the 'link between the prohibition of discrimination and the right to nationality emanates from the very meaning and benefit of nationality'.¹²⁸ As such, it advises that the benefits that an individual has with a nation as a result of a social and legal bond ought to flow to the children without the application of arbitrary and discriminatory laws.¹²⁹ It is argued that this is in line with the principle that the status of the child is irrelevant and does not have any bearing on the enjoyment of the rights under the African Children's Charter.¹³⁰ The point of departure is that the African Children's Committee uses a conceptual approach to apply its broad-based contextual application.

Fourth, using the conceptual approach, the African Children's Committee then decided the allegation of the violation of article 3 by answering two questions: (i) whether Sudan's nationality laws have discriminatory provisions on the acquisition of nationality; and (ii) whether Sudan's nationality laws have discriminatory provisions on the deprivation of nationality. In answering question 1, the African Children's Committee uses a dual approach where it first relies on its jurisprudence in General Comment 2 and *Children of Nubian Descent* to explain the link between the principle of non-discrimination and the acquisition of nationality.¹³¹ Second, it refers to persuasive jurisprudence from other human rights monitoring bodies on the international and national scene. For instance, there is a reference to the *Expelled Dominicans and Haitians v the Dominican Republic* of the Inter-American Commission, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Namibian High Court case of *Unity Dow*. The common denominator granulated from all these decisions is the need for mechanisms at the state level to avoid the use of discriminatory regulatory regulations or processes on

125 General Comment 5 (n 38) as discussed in part 3.

126 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.

127 *Sudanese Nationality* (n 8) para 32, lines 11-13.

128 *Sudanese Nationality* (n 8) para 33.

129 As above.

130 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. General Comment 5 (n 38) para 10.

131 *Sudanese Nationality* (n 8) para 36 refers to the African Children's Committee General Comment 2 on art 6 of the African Children's Charter.

different groups of a population in granting nationality.¹³² This dual approach leads to the recommendation that the Sudanese law on the acquisition of nationality is discriminatory as far as it allows fathers of Sudanese children to automatically confer nationality on their children other than mothers.¹³³

Regarding question 2, the African Children's Committee conceptualises the arbitrary deprivation of nationality as a possible violation of the principle of non-discrimination.¹³⁴ It does this in four ways: first, it qualifies the extent to which a state may use sovereignty to decide to confer, withdraw or regulate the nationality of an individual.¹³⁵ It argues that the arbitrary deprivation of nationality is a limit to the sovereignty of states. As such, state sovereignty is not a magic wand at the beckon of states to arbitrarily deny an individual of their nationality.¹³⁶ This pronouncement by the African Children's Committee creates a basis to place an agency on the child in light of the enjoyment of the various rights and freedoms under the African Children's Charter.¹³⁷

Second, the African Children's Committee still reiterates the use of persuasive jurisprudence from other human rights monitoring mechanisms to adopt a definition of 'arbitrariness'. To this, a General Comment of the Human Rights Committee¹³⁸ and the case of *Girls Yean and Bosico v Dominican Republic*¹³⁹ are used to state that if a state uses discrimination to deprive one of his nationality, arbitrariness is rendered present.¹⁴⁰ This position by the African Children's Committee adds value to the positioning of the state as an active player in the engagement of the non-discrimination discourse by relating to good practices when it visits countries on field missions.¹⁴¹ The pronouncement calls for the state to go beyond a commitment to actual deliberate steps in ensuring that there is no arbitrariness in handling matters of nationality.¹⁴² It is desirable that where the African Children's Committee uses persuasive jurisprudence, article 46 is unpacked and qualified to the bounds of its use (just as it did in this communication).

Third, the African Children's Committee undertakes a value analysis of the provisions of the state's laws in comparison with the

132 *Sudanese Nationality* (n 8) paras 37-38.

133 *Sudanese Nationality* (n 8) paras 39-41.

134 *Sudanese Nationality* (n 8) paras 42-53.

135 *Sudanese Nationality* (n 8) para 42.

136 *Sudanese Nationality* (n 8) para 42.

137 This is the import of General Comment 5 as discussed in part 3.

138 General Comment on the right to respect privacy, family, home and correspondence and protection of honour and reputation art 17 para 4; in *Sudanese Nationality* (n 8) para 43.

139 Judgment of 8 September 2005 para 140; in *Sudanese Nationality* (n 8) para 45.

140 As above.

141 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to the implementation of the principle of non-discrimination. See General Comment 5 (n 38) para 11.

142 Joint General Comment (n 44) para 11.

position of the African Children's Charter. This is evident in the analysis of the laws that govern the conferment, withdrawal and regulation of nationality in Sudan.¹⁴³ This analysis fell within the bounds of violation of the principle of non-discrimination as the African Children's Committee related the non-willingness of the respondent state to confer nationality on the complainants.¹⁴⁴ By implication, the African Children's Committee reiterated the position that the state retains the obligation to actively identify individual children (born of South Sudanese parents) and groups of children whose recognition and subsequent realisation of their rights require special measures (such as of children of South Sudanese mothers whose fathers' nationality was revoked).¹⁴⁵

Fourth, and as a consequence, the African Children's Committee addressed the question of the place of the use of reciprocity and retaliation. It noted that the respondent state reiterated its position because of a similar law that was being applied by South Sudan.¹⁴⁶ Using a hypothetical, the African Children's Committee stated that where state Y is violating its child rights obligations concerning children who are nationals of state X, the latter should reciprocate to the former. It correctly stated that while the principles of reciprocity and retaliation may operate in areas of the law such as trade, intellectual property and technology transfer, they do not extend to human rights obligations.¹⁴⁷ This was an important assertion in terms of qualifying retaliation and reciprocity regarding the application of the principle of non-discrimination.¹⁴⁸ It may be argued that this communication calls for legislative and administrative measures to address the challenges that children of South Sudanese parents (especially South Sudanese mothers, where the fathers do not have Sudanese nationality). This requires the need for the use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination.¹⁴⁹ The African Children's Committee takes a stance on deferential treatment as a result of the application of the Sudan Nationality Act as a position that is against the object and purpose of the principle of non-discrimination in the African Children's Charter. There is a clear reiteration that the status of the child is irrelevant and has no bearing on the enjoyment of the rights under the African Children's Charter.¹⁵⁰

Regarding the violation of state obligations under article 1, the applicants never alleged a violation of the said article. It is interesting

143 *Sudanese Nationality* (n 8) paras 46-49.

144 *Sudanese Nationality* (n 8) para 49.

145 Art 1 African Children's Charter.

146 *Sudanese Nationality* (n 8) para 48.

147 *Sudanese Nationality* (n 8) para 51.

148 As above.

149 General Comment 5 (n 38) as discussed in part 2.

150 The Committee takes on practical steps and *ejusdem generis*, identifies a non-conclusive list of children who are poor and most marginalised such as rural children, children of imprisoned mothers, children on the move and the gendered dimension. See General Comment 5 (n 38) 10.

to note that the African Children's Committee does not expressly state so as well. It rather states that it finds the respondent state in violation of its obligations under article 3 on non-discrimination, articles 6(3) and (4) on the right to nationality and prevention of statelessness, and article 11 on education. From the tenor of the African Children's Committee, it reads a violation of article 1 of the African Children's Charter.

4.5 *Tanzanian Girls*

The uncontested facts by the complainants that show discrimination indicate that, first, the primary and secondary schoolgoing girls were subjected to forced pregnancy testing and expulsion from schools.¹⁵¹ Second, the statistics showed a disturbing trend in the numbers of girls that dropped out of school due to pregnancy, with over 55 000 female students between 2003 and 2011, and 2 433 girls in primary and 4 705 in secondary schools in 2012.¹⁵² Third, the practice of forced pregnancy testing was done on girls as young as 11 years and it was not done according to the standard procedures.¹⁵³ In addition, the results of the testing were not communicated to the students but shared with the school staff – a position that led to an alleged violation of their privacy, and exacerbated the stigma.¹⁵⁴

It suffices to note that the practice was neither prescribed by the Education Regulations nor included as a ground for expulsion in the Education (Expulsion and Exclusion from School) Regulation of 2002.¹⁵⁵ It was further contended that since the expulsion of the girls was a universal practice in public schools in Tanzania, the girls who discovered that they were pregnant dropped out of school to escape the humiliation and stigma.¹⁵⁶ There was no exception in the application of the expulsion and exclusion even in instances where the pregnancy was due to sexual abuse or incest.¹⁵⁷ Married girls are not allowed to register or to remain in school under the Education (Imposition of Penalties to Persons Who Marry or Impregnate a School Girl) Rules of 2003.¹⁵⁸ It was also noted that expulsion and exclusion is a permanent measure that disallows girls from readmission into public schools, not to mention the subjection of girls to unlawful detention and/or harassment by the investigating officers.¹⁵⁹ The respondent state did not contest the facts but argued that it retained the margin of appreciation regarding the circumstances in the provision of the right

151 *Tanzanian Girls* (n 10) para 2.

152 *Tanzanian Girls* (n 10) para 2.

153 *Tanzanian Girls* (n 10) para 3.

154 As above.

155 *Tanzanian Girls* (n 10) para 4.

156 As above.

157 As above.

158 *Tanzanian Girls* (n 10) para 5.

159 *Tanzanian Girls* (n 10) para 6.

to education and, as such, had the prerogative to limit the rights of the girls to education if it aimed to achieve a given result.¹⁶⁰

The African Children's Committee laboured to contextualise differential treatment as one of the complementary elements of the right (not the principle) to non-discrimination.¹⁶¹ It is necessary to differentiate because the African Children's Committee clarifies that non-discrimination may pass as a principle, as a right or as both. It identified three complementary elements to non-discrimination as differential treatment, interference and rights and freedoms in the African Children's Charter.¹⁶² With the aid of textbooks, the African Children's Committee upheld the persuasion that these three elements inform the application of the rights under the African Children's Charter and CRC.¹⁶³ It also reiterated the grounds for differential treatment to be (i) reasonability; (ii) objectivity; and (iii) to achieve a legitimate purpose.¹⁶⁴ This position embraces the earlier stance in *Children of Nubian Descent* where the state bears the burden to justify the difference in treatment and how this may amount to fair discrimination.¹⁶⁵ Another important aspect that the African Children's Committee noted was that the right to non-discrimination was absolute and not bound by a balancing test.¹⁶⁶ This is a reiteration of its position in *Sudanese Nationality*.¹⁶⁷ Interestingly, the African Children's Committee qualified the use of necessity as a defence for the state in the application of differential treatment. It stated that a restriction on a right is necessary if there is no other alternative to achieve the intended objective.¹⁶⁸

Regarding the expulsion of pregnant girls from school, the African Children's Committee stated that the act of the respondent state in the expulsion of pregnant girls from school perpetuated negative and discriminatory attitudes which, in turn, led to child marriage and teenage pregnancy.¹⁶⁹ It is argued that by implication the African Children's Committee states that an act of a state party that perpetuates negative and discriminatory attitudes and tendencies is a violation of its obligations under the African Children's Charter. It is to this end that the African Children's Committee found that the state's perpetuation of the expulsion of pregnant girls with no re-entry, forced pregnancy testing, detention of pregnant girls, and the affected girls' socio-economic status not only amounted to a violation of the provisions of the African Children's Charter, such as the rights to health and education, other than article 3.

160 *Tanzanian Girls* (n 10) para 27.

161 *Tanzanian Girls* (n 10) para 53.

162 *Tanzanian Girls* (n 10) para 53.

163 As above.

164 As above.

165 *Children of Nubian Descent* (n 6) para 57.

166 *Tanzanian Girls* (n 10) para 53.

167 *Sudanese Nationality* (n 8) para 32, lines 7-10.

168 *Tanzanian Girls* (n 10) para 54.

169 *Tanzanian Girls* (n 10) para 55.

Some pointers are discernible when one compares and contrasts the principles in part 3 above and this communication. First, the African Children's Committee reiterates the agency on the child to have entitlements to rights and freedoms under the African Children's Charter.¹⁷⁰ It calls upon the state to actively identify the individual children and groups of children, not for purposes of punishment but for their recognition and subsequent realisation that their rights require special measures.¹⁷¹ It may be argued that the act of the state in perpetuating the vice of forced pregnancy testing eludes its role as an active player in the engagement of the non-discrimination discourse.¹⁷² Other than generalising these to more general principles, it is argued that the communications offer interpretation from a jurisprudential perspective to understanding normative elements of non-discrimination. These jurisprudential developments should then be incorporated into the broader understanding of the principle of non-discrimination.

Regarding the violation of state obligations under article 1, the articles that the applicants expressly alleged violations of were the only ones that formed the finding by the Committee. The African Children's Committee found a violation of its obligations under article 1 (obligation of state parties); article 3 (non-discrimination); article 4 (best interests of the child); article 10 (protection of privacy); article 11 (education); article 14 (health and healthcare services); article 16 (protection against child abuse and torture); and article 21 (protection against harmful social and cultural practices).

5 WAY FORWARD

This article has evaluated the argument that the African Children's Committee could do more in realigning the normative underpinnings to the jurisprudential developments on the principle of non-discrimination. An evaluation of the normative framework spoke largely to 12 principles as discussed in part 3 above.¹⁷³ An evaluation of the selected five communications indicated that not all the 12 principles have been engaged by the African Children's Committee to the latter. Some specific principles that stand out include the agency of the child, the state party as an active player and the question of differential treatment. It should be noted that the African Children's Committee has had divergent approaches in the interpretation of the principles in the five selected communications. First, it has used literal engagement of the principles, on the one hand, and adopted implicit approaches on the other. This was evident in *Children of Nubian Descent*. The African Children's Committee has adopted principles that are not necessarily in

170 General Comment 5 (n 38).

171 Art 1 African Children's Charter.

172 The Committee reiterates that this calls for dedicated additional resources that should be consciously identified and devoted to implementation of the principle of non-discrimination. See General Comment 5 (n 38) 11.

173 See part 3 on the 12 principles.

tandem with the normative approach but rather act as a vehicle to ensure that non-discrimination (as a principle and a right) is upheld by state parties, as shown in *Sudanese Nationality*, *Mauritanian Enslaved Brothers* and *Tanzanian Girls*. Some of the divergent conceptual approaches by the African Children's Committee still embrace some of the 12 principles.¹⁷⁴ A review of the Children's Committee's approach in its Concluding Observations to state parties should be done to establish the trend concerning both its normative and jurisprudential framework.

In relation to the above, there are specific principles that, by implication, by the fact that the matters are considered by the African Children's Committee on their merits, have been applied. These include (i) that the status of the child is irrelevant and does not have any bearing on the enjoyment of the rights; (ii) the African Children's Committee is not suggestive of an exclusive list of vulnerable children; (iii) that non-discrimination applies in all environments; (iv) that the child is mandated to enjoy all the rights and freedoms in all environment, starting with the state; (v) that a finding of a violation of this principle is interlinked with a failure by the state to uphold obligations under article 1; and, finally, (vi) that all stakeholders, persons or entities should ensure that the child enjoys his or her rights.

It has been established that there is minimal literature on the principle of non-discrimination on article 3 of the African Children's Charter. Most of the wealth of the literature is on CRC. An evaluation of the normative aspects of the principle points to four major guiding principles, as discussed in part 3. A closer look at the communications has revealed with clarity that they add value to the overall conception of non-discrimination and there is intent to apply the principle in three narratives: first, as a principle in its standing as part of the child rights-based approach; second, as a right; and third, as both a principle and a right.

Without prejudice to the foregoing, the five communications reveal various points of intersection and departure concerning the rest of the principles. An appreciation of these principles is critical to informing the way forward. This part summarises the approach of the African Children's Committee and hints on a way forward.

5.1 Agency on the child

As a matter of principle, all five communications reiterate the normative foundations of attaching an agency to the child as the recipient of the rights and freedoms under the African Children's Charter, and that discrimination should not be an exception. The difference is in the departure from a literal approach in *Children of Nubian Descent* and *Cameroonian Child Rape* to a conceptual stance in *Sudanese Nationality* and *Mauritanian Enslaved Brothers*, and a contextual approach in *Tanzanian Girls*. The literal approach in

174 See the analysis in part 4.

Children of Nubian Descent is in reference to the interpretation of article 3 in light of the facts in the communication without labouring to develop jurisprudence at this stage. This is understandable as this was the first decision of the African Children's Committee. For instance, the findings on ethnic and racial discrimination as prohibitions under international law reflect this position. The conceptual stance was applied in *Sudanese Nationality* as regards the qualification of non-discrimination as both a principle and as a right. The due diligence principle was also applied in *Mauritanian Enslaved Brothers*. As a right, the qualification would be in the use of the obligation of result as the litmus test to establish the extent to which the state had upheld its obligations under the African Children's Charter. The contextual approach *Tanzanian Girls* shows the steps taken by the African Children's Committee to contextualise known elements of the principle of non-discrimination in international law. While the conceptual was greatly tilted to the factual elements of the communications, the contextual approach finds its positioning in the use of legal principles that would be used to align the understanding of the principles of non-discrimination for a legislative setting; the unpacking of the principles of the right to non-discrimination, the use of differential treatment, and the centrality of the child in answering the African child question.

5.2 Obligation on the state as an active (rather than a passive) player

In addition, the African Children's Committee reminds state parties to remain active rather than passive players in the engagement of the non-discrimination discourse. It should be noted that in all five communications, the African Children's Committee does not expressly state that states should be active players. Rather, the call is implied across the five communications. It is discernible that the African Children's Committee's wording in all five communications is suggestive of the fact that (i) the failure to take steps to correct the violations;¹⁷⁵ (ii) the application of a discriminatory law;¹⁷⁶ (iii) the failure to exercise due diligence;¹⁷⁷ and (iv) the perpetuation of discriminatory practices (that may lead to unfortunate lived realities for children),¹⁷⁸ makes the state a passive other than an active player. The African Children's Committee should impress this obligation on states and also call on other stakeholders to be accountable in their activities. For instance, civil society and national human rights institutions are critical stakeholders in ensuring that states are accountable for steps taken to ensure the implementation of the African Children's Charter.

175 *Children of Nubian Descent* (n 6) para 74.

176 *Sudanese Nationality* (n 8) para 49.

177 *Mauritanian Enslaved Brothers* (n 7) paras 47-58, 62.

178 *Tanzanian Girls* (n 10) para 55.

5.3 Differential treatment as positive discrimination

The African Children's Committee has taken strides to develop its jurisprudence on the use of differential treatment. This concept is considered in all five communications. In *Children of Nubian Descent* the African Children's Committee acknowledged that for differential treatment to be justified, the state ought to explain the use of grounds of legitimacy, proportionality and absolute necessity. In *Sudanese Nationality* it evaluates the three grounds with the state's application of the Nationality Act. In *Mauritanian Enslaved Brothers* the African Children's Committee reiterates the three grounds enunciated in *Children of Nubian Descent*.¹⁷⁹ In *Tanzanian Girls* the African Children's Committee contextualises three elements of differential treatment, interference, and rights as the complementary elements of the right to non-discrimination.¹⁸⁰

Second, the African Children's Committee introduced the concept of a burden to justify fair or differential treatment as a preserve of the state – if differential treatment is to be used. It stated that where the facts before the African Children's Committee indicate a *prima facie* case of discrimination, the burden shifts to the state to justify the difference in treatment and how this may amount to fair discrimination.¹⁸¹ This position is reiterated in *Tanzanian Girls*.¹⁸² The placement of the burden on the state is important in ensuring that the duty bearers do not abuse the principles governing non-discrimination. Without prejudice to the foregoing, an actual engagement of the grounds for differential treatment should be deliberately subjected to facts to ensure that an informed application of the principle is used.

5.4 Use of inspiration from other sources under article 46

What is interesting to note, in all the communications, is that the African Children's Committee refers to persuasive jurisprudence. The point of departure is the reference to textbooks and commentaries as persuasive jurisprudence. A reading of article 46 of the African Children's Charter does not expressly point to the use of textbooks as persuasive jurisprudence. Rather, it refers to the use of inspiration from international human rights law as provided for specifically in (i) the African Charter; (ii) the then Charter of the OAU (now the Constitutive Act of the African Union); (iii) the Universal Declaration; and (iv) CRC. On a general front, persuasive jurisprudence may be obtained from other instruments adopted by the UN and by African countries in the

179 *Mauritanian Enslaved Brothers* (n 7) paras 61, notes 29 & 62, note 31; *Children of Nubian Descent* (n 6); *Sudanese Nationality* (n 8).

180 *Tanzanian Girls* (n 10) para 53.

181 *Children of Nubian Descent* (n 6) para 57.

182 As above.

field of human rights, and African values and traditions.¹⁸³ The author argues that any materials other than the specific and general sources in article 46 should include international human rights law or African values and customs. The African Children's Committee should prepare a guiding note or a document on the application of article 46. As of now, it is rarely placed in context, let alone mentioned in the communications. A conceptual or contextual appreciation of the application of article 46 is instructive in its application.

5.6 Non-discrimination: principle, right or both?

The African Children's Committee envisages an important approach to non-discrimination. While it refers to the same as one of the cardinal four principles that inform the child rights-based approach, it also refers to the same as a right. For instance, it should be recalled that in *Children of Nubian Descent*, non-discrimination is approached as a principle. In *Sudanese Nationality*, the African Children's Committee interchangeably refers to non-discrimination as a right and a principle. This approach introduces a triple obligation on the state to, first, ensure that the child is not deprived of their inherent entity, on the one hand,¹⁸⁴ and, second, to use the right to non-discrimination as a basis for the enjoyment of the right to nationality; third, to uphold the place of the principle of non-discrimination as one that is not subject to a balancing act.¹⁸⁵ It is acknowledged that the reference to the principle as a right is not fatal in implementing the rights of the child. In domestic circles, the right to non-discrimination is often tagged with the right to equality.¹⁸⁶ However, there is a lack of clarity on whether the reference to non-discrimination as a right or a principle, by design, is default or chance. For the sake of jurisprudential development, this kind of application requires thinking through the approach used.

5.7 Reciprocity and retaliation as non-qualifiers to the application of the principle of non-discrimination

The African Children's Committee pronounced itself on specific principles that may apply in international law, in bilateral treaties, but not in instances where human rights are at stake. To this end, as such, while the principles of reciprocity and retaliation may operate in areas of the law such as trade, intellectual property and technology transfer, they do not extend to human rights obligations.¹⁸⁷ As noted earlier, this

183 Art 46 African Children's Charter.

184 *Sudanese Nationality* (n 8) para 32, line 1.

185 *Sudanese Nationality* (n 8) para 32, lines 1, 2 & 3.

186 See the Constitution of the Republic of South Africa, 1996 sec 9; Constitution of the Republic of Kenya 2010, art 27; Constitution of the Republic of Uganda 1995, art 21.

187 *Sudanese Nationality* (n 8) para 51.

stance by the African Children's Committee lays to rest the use of the foregoing principles in qualifying the application of the principle of non-discrimination.¹⁸⁸ There is a need for the Children's Committee to deliberately call on state parties to use its other mechanisms, such as the communications procedure and state party reporting, to ensure that there is a move for universal harmonisation of domestic laws with the provisions of the African Children's Charter.¹⁸⁹

5.8 Use of due diligence

The African Children's Committee introduces the principles of due diligence in the *Mauritanian Enslaved Brothers* and *Tanzanian Girls* communications. Although the principle helps in the need for states to interpret and implement their obligations from the perspective of result, the principle points to the need for the former to use the principle to actively identify individual children and groups of children whose recognition and subsequent realisation of their rights require special measures.¹⁹⁰ It is also clear that the active identification of individuals and groups of children should not be for punishment but for recognition and realisation of their rights and the required special measures.¹⁹¹ The African Children's Committee should not waiver in its commitment to advise state parties in the use of due diligence as far as they should evaluate their obligation based on the result of measures used to address the violations of the rights of the child.¹⁹² In addition, the development of jurisprudence on the grant of compensation for both pecuniary and non-pecuniary loss should be developed. A tabulated annex is hereby attached at the end of the contribution.

6 CONCLUSION AND RECOMMENDATIONS

The topic of non-discrimination from a broader context is extremely relevant to human rights, largely because, while it can be a stand-alone principle, it also doubles as a right. The relevance of its application lies in the ability of the state as a duty bearer and stakeholder to benefit from its application and as both a principle, and a right, depending on the context.

Regarding the proposals on improving the application of the principle of non-discrimination, the African Children's Committee may engage in various aspects as hinted. First, the agency on the child should be informed by the deliberate centrality of the child by the Children's Committee to inform all interventions on the prevention of

188 J Doek *Harmonisation of laws on children: some practical guidance* (2007), <https://app.box.com/s/ca19481c7d5dc225abff> (accessed 30 January 2024).

189 As above.

190 Art 1 African Children's Charter.

191 As above.

192 *Mauritanian Enslaved Brothers* (n 7) paras 47-58; *Children of Nubian Descent* (n 6) paras 46-57.

discrimination. Second, the obligation on the state party should be a collective responsibility that is engaged by all stakeholders, such as civil society and national human rights institutions, to ensure accountability in the prevention of discrimination. Third, while differential treatment remains a critical defence by the state, the African Children's Committee can do more to deliberately evaluate the existence or lack of grounds in each communication where the matter is raised. Fourth, this is intrinsically linked to the use of persuasive jurisprudence in article 46. The preparation of a guidance note or resource document on the application of article 46 is instructive in giving clarity on the use of sources that are not used by the African Children's Committee. Fifth, the reference to non-discrimination as a principle and a right is good practice in light of the spirit of interpretation that ensures that the child benefits in all contexts that require a literal, contextual or conceptual approach. Sixth, obtaining increased harmonisation of the domestic laws is imperative in achieving a universal consensus in the application of the principle. Finally, the due of due diligence offers an introspective platform for state parties to review their approaches to the engagement of their obligations. An evaluation of the state parties' extent of the engagement of their obligations is recommended.

ANNEX

Tabulated engagement of the principle of non-discrimination

No	Principle	Nubian	Mauritania	Cameroon	Sudan	Tanzania
1	Agency on the child to have entitlements to rights and freedoms under the African Children's Charter	X	X		X	X
2(a)	Obligation on the state to actively identify individual children and groups of children whose recognition and subsequent realisation of their rights require special measures	X	X		X	X
2(b)	State as an active (committed) rather than a passive player in the engagement of the non-discrimination discourse	X	X	X	X	X
3	Use of equitable rather than equal treatment in the use of special measures to mitigate the effects of discrimination			X		
4	Use of deferential treatment or positive discrimination	X	X	X	X	X
5	Use of persuasive jurisprudence	X	X		X	X
6	The status of the child is irrelevant and does not have any bearing on the enjoyment of the rights. Broad-based contextual application	X	X		X	X
7	The African Children's Committee proffers a non-exhaustive list of vulnerable children	X	X	X	X	X

8	Ensuring that birth registration is enforced regardless of the whereabouts of the child's parents or guardians, or other status	X	X	X	X	X
9	Non-discrimination applies in all environments		X	X	X	X
10	The child is mandated to enjoy all the rights and freedoms in an environment; starting with the state.		X	X	X	X
11	The finding of a violation of this principle is interlinked with a failure by the state to uphold obligations under article 1.	X	X		X	X
12	All stakeholders, persons or entities have an obligation to ensure that the child enjoys his or her rights.		X	X	X	X

Key

X	Principle referred to by the Committee (directly and by implication)
	Principle not referred to by the Committee at all
X	Principle referred to, but not the article
	Desirable that the principle is referred to