

No second chance for first impressions: The first amicable settlement under the African Children's Charter

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Summary

In 2016 the African Children's Committee dealt with its first amicable settlement under the African Children's Charter. The article discusses amicable settlements within the African human rights system, and analyses Government of Malawi v Institute for Human Rights and Development in Africa – the first amicable settlement dealt by the African Children's Committee. Some thematic reflections are proffered relating to the definition of a child, child marriage, the notion of 'serious and massive violations' of children's rights, reparations, the mandate to initiate an amicable settlement, and the follow-up to the amicable settlement reached.

Key words: *Africa; human rights; confidentiality; implementation; article 59*

1 Introduction

During the drafting of the United Nations (UN) Convention on the Rights of the Child (CRC), the possibility of providing children with an opportunity to seek an international remedy through a complaints

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mechanism was broached.¹ The inclusion of socio-economic rights in CRC, which at the time many considered to be non-justiciable, reportedly was mentioned as one reason why a communications procedure to CRC would not be acceptable.² Moreover, the possibility to explore such a complaints mechanism was 'deferred' with a view to promoting a spirit of non-contested implementation of CRC.

The same reasoning did not seem to occupy the minds of the drafters of the African Charter on the Rights and Welfare of the Child (African Children's Charter). The African Children's Charter contains a specific provision on individual communications.³ The monitoring body of the Charter, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has adopted Guidelines for the Consideration of Communications,⁴ which cover amicable settlements (also known as 'friendly settlements'). Amicable settlements are intended to facilitate the non-contentious resolution of individual cases.⁵ In many cases where an amicable settlement has been used, it has presented an important avenue of resolution to both parties. One could even argue that it bodes well for the notion of settling disputes in Africa through negotiations.

Article 46 of the African Children's Charter is critical to a discussion on amicable settlements. A similar provision in the African Charter on Human and Peoples' Rights (African Charter) – article 52 – has been used by the African Commission to deal with amicable settlements.⁶ Article 46 of the African Children's Charter provides:

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

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- 1 During the negotiations of the CRC, the NGO *Ad Hoc* Group reportedly insisted on the importance of a positive atmosphere for the implementation of the CRC that could be undermined if a complaints procedure was to be established.
 - 2 S Pinheiro 'Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child' 10 December 2009 A/HRC/WG.7/1/CRP.4 2.
 - 3 The relevant provision, art 44(1), provides that '[t]he Committee may receive communications from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter'.
 - 4 African Committee of Experts on the Rights and Welfare of the Child Guidelines for the Consideration of Communications.
 - 5 An amicable settlement also has similar characteristics that are at the core of the state party reporting process. Central to the state party reporting is constructive dialogue, which often is characterised by engaging with a state in a non-judgmental and diplomatic manner with a view to assisting the state to benefit from recommendations to address the gaps that might exist in law, policy and practice.
 - 6 Art 52 African Charter.

As a result this article draws insights from the African Charter, but also to a limited extent on the UN human rights system, especially the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC).⁷ In fact, within the UN treaty body system, it is only the Optional Protocol to the Covenant on Economic, Social and Cultural Rights on a Communications Procedure (OP-CESCR)⁸ and OPIC that have provisions explicitly allowing for the possibility of a friendly settlement.⁹

Moreover, the regional human rights systems in Europe and the Americas have a more nuanced and lengthy experience in dealing with amicable settlements. The Inter-American Commission on Human Rights (Inter-American Commission) reported that as at July 2015, approximately 121 friendly settlements had been approved in reports it issued.¹⁰ In further recognition of the role of friendly settlements the re-organisation of its Executive Secretariat has included a new Section of Friendly Settlements and Follow-Up.¹¹ In 2009 the European Court of Human Rights (European Court) was reported to have had concluded friendly settlements or 'unilateral withdrawals of petitions'.¹² Albeit limited, the experiences of the two regional human rights systems serve as an inspiration for the African Children's Committee.

This article, which is not a comprehensive assessment of the strengths and weaknesses of the amicable settlement procedure, proceeds in five steps. Following the introduction a discussion unfolds on amicable settlements in the African human rights system, with a focus on the African Commission. This is followed by a discussion of the African Children's Charter, the African Children's Committee, and its Guidelines on the communications procedure with a focus on the sections on amicable settlements.¹³ Part 4, which is the core of the article, analyses the first amicable settlement dealt with by the

7 The Optional Protocol entered into force on 14 April 2014. After two sessions of the Open-Ended Working Group, in 2009 and 2011, the Human Rights Council, followed by the General Assembly, adopted the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) on 19 December 2011, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/10/PDF/N1146710.pdf?OpenElement> (accessed 8 May 2019).

8 Optional Protocol to ICESCR (UN Doc A/Res/63/117).

9 However, the practice is that in instances where parties reach an agreement, the treaty bodies may suspend the consideration of the individual communication.

10 OAS 'Inter-American Commission on Human Rights Friendly Settlements', http://www.oas.org/en/iachr/friendly_settlements/default.asp (accessed 8 May 2019).

11 As above.

12 International Federation for Human Rights 'Practical Guide: The African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights' (2010) 29, https://www.fidh.org/IMG/pdf/african_court_guide.pdf (accessed 8 May 2019).

13 This piece is not a comprehensive diagnostic assessment of the strengths and weaknesses of the amicable settlement procedure.

Committee, namely, *Institute for Human Rights and Development in Africa v The Government of Malawi*.¹⁴ The analysis covers the complaint, the amicable settlement reached, and some thematic reflections on the definition of a child, child marriage, the notion of 'serious and massive violations' of children's rights, reparations, the mandate to initiate an amicable settlement, and follow-up to the amicable settlement reached. A conclusion sums up the article.

2 Amicable settlements in the African human rights system

At the core of the African human rights system¹⁵ is the African Charter, supplemented by the African Women's Protocol,¹⁶ the African Court Protocol and the African Children's Charter. Unlike the Inter-American human rights system, where only the Inter-American Commission is involved in promoting friendly settlements,¹⁷ in the African human rights system all three bodies – the African Commission, the African Court on Human and Peoples' Rights (African Court)¹⁸ and the African Children's Committee – fulfil this role.

The African Charter and the Rules of Procedure do not give the African Commission an explicit mandate to play a role in friendly settlements. In fact, a close reading (some would argue and say a 'strict reading') of the relevant provisions of both the African Charter (articles 47 and 48) and its Rules of Procedure (Rule 98) suggests that there is no doubt that the amicable settlement procedure is provided for only in respect of interstate communications. One may question whether the African Commission has the requisite expertise to deal with amicable settlements.¹⁹ Nonetheless, while its provisions are silent on amicable settlements, the Commission has recommended that governments resolve cases amicably, including with individuals, as opposed to the Commission resolving them in a recommendation.²⁰

14 Communication 4/Com/001/2014 African Committee of Experts on the Rights and Welfare of the Child (2014), <https://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/> (accessed 1 June 2019).

15 On the African human rights system in general, see F Viljoen *International human rights law in Africa* (2012).

16 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

17 D Padilla 'An African human rights court: Reflections from the perspective of the Inter-American system' (2002) 2 *African Human Rights Law Journal* 189.

18 Art 9 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).

19 From this it could follow that an amicable settlement should not be viewed as one of the core activities of the African Commission.

20 See eg the case of *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

One of the criticisms levelled against the African Commission is its initial overemphasis on the attainment of amicable resolutions.²¹ The Commission's description of its primary purpose with regard to individual communications, which is to 'initiate a positive dialogue, resulting in an amicable resolution',²² has led some to arrive at the conclusion that such an approach is an obstacle to the provision of a remedy to victims.²³ It also suffices to note that the deference to the state at times portrayed amicable settlements in a negative light from the viewpoint of the victims.²⁴

It may also be contended that in some instances, because of the inequality of the parties, a victim might be 'forced' to accept a less than adequate remedy. For instance, in *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon*²⁵ the complainant agreed to discontinue a communication in return for temporary permission to broadcast, as well as the release, by the state, of radio equipment it had confiscated.²⁶ By contrast, in the case of the Inter-American Commission such a 'remedy' would not have been allowed as one of the Commission's duties in terms of friendly settlements is to terminate the procedure if it appears that the outcome will be unfair to the victim.²⁷

Here, the early years' practice of the Commission can be differentiated from that of the European Court. The European Court approves an amicable settlement and transfers the case to the Committee of Ministers whose duty it is to supervise friendly settlements, thus ensuring that the victim is not unfairly disadvantaged.²⁸ Furthermore, with regard to obtaining the views of the complainant, the Inter-American Commission and the European Court take seriously the clear consent of the applicant with regard to the terms of the settlement agreement. Where a party withdraws consent, the Inter-American Commission terminates the procedure,²⁹ and where the European Court feels that the applicant has not clearly

21 G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 499.

22 *Free Legal Assistance Group* (n 20) para 39.

23 Bekker (n 21) 501. Eg, in *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997) para 42, despite the complainant's dissatisfaction with the state's remedies, leading to the reopening of the case, the African Commission had earlier attempted to prevail on the government to resolve the situation amicably. A similar position was evident in *Recontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) with regard to attempts to amicably settle an issue on administrative detention.

24 In *Kalenga v Zambia* (2000) AHRLR 321 (ACHPR 1994), while the state wrote a letter to the African Commission confirming the resolution of the case, the Commission accepted this position without verification with the complainant.

25 (2006) AHRLR 75 (ACHPR 2006).

26 *Free Legal Assistance Group* (n 20) para 4.

27 https://www.oas.org/en/iachr/friendly_settlements/about-friendly-settlements.asp (accessed 8 May 2019).

28 Art 29(4) European Convention on Human Rights.

29 Inter-American Commission (n 27).

consented to the terms of the settlement agreement, it may not permit the amicable settlement to proceed.³⁰

Concern has also been raised that amicable settlements might not take into account the broader human rights interests of society.³¹ This is because it is a process that is not open to outside role players, and that it excludes the possibility of third party intervention in the form of an *amicus curiae*.³² It may also be argued that an amicable settlement implies that violations have not occurred.³³ Some of these criticisms appear to be based on the early experience of the Commission that seemed to undermine the added value of amicable settlements.

However, the arguments that underscore the potential shortcomings of amicable settlements should be assessed. First, amicable settlements could, and often do, contain remedies that could satisfy the needs and rights of the complainant.³⁴

Second, the deference the Commission has displayed towards states in being overly ready to recognise the presence of an amicable settlement should not be seen as a limitation of amicable settlements in general. Rather, it should serve as a ground to develop guidelines to clarify the existence of, as well as compliance with, the terms of an amicable settlement.³⁵ The Inter-American Commission had a similar approach whereby it created the 'Friendly Settlement Group' which was tasked with analysing and improving the friendly settlement procedure.³⁶ The Commission has similarly also drafted an impact report to offer further clarification on friendly settlements.³⁷

Third, in instances where massive and grave violations have been committed, and the broader interests of society appear to be involved, the Commission should not approve amicable settlements. Notably, the Rules of Procedure of the Inter-American Commission mandate it to make a decision regarding friendly settlements always 'on the basis of respect for the human rights recognised in the American Convention on Human Rights, the American Declaration and other applicable instruments'.³⁸ In the *Velásquez Rodríguez* case the Inter-American Commission contended that a friendly settlement could not have been promoted, because the violations of rights were

30 *Paladi v Moldova* ECHR (10 July 2007) App 39806/059 paras 51-53.

31 *Bekker* (n 21) 504.

32 As above.

33 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 176.

34 Inter-American Commission on Human Rights 'Impact of the friendly settlement procedure' OEA/Ser L/V/II Doc 45/13 (18 December 2013) para 5.

35 The Inter-American Commission has over three decades of experience in which the improvement in its handling of friendly settlements is evident; Inter-American Commission (n 34) para 7.

36 https://www.oas.org/en/iachr/friendly_settlements/default.asp (accessed 22 March 2019).

37 *Free Legal Assistance Group* (n 20) para 14.

38 Art 41(1) Inter-American Commission on Human Rights Rules of Procedure.

such that they could not be remedied through conciliation.³⁹ The Inter-American Court correctly held that a friendly settlement should only be attempted in a situation where the circumstances of that case render it 'necessary and suitable'.⁴⁰

Finally, as mentioned above, in the African human rights system the notion of amicable settlement is not the preserve of the African Commission. The African Court Protocol provides that 'the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter'.⁴¹ The relevant provisions of the Charter once again appear to be articles 47 and 48, which limit amicable settlements in respect of interstate communications. Since the African Court has not yet engaged with amicable settlements, it remains premature to suggest the manner in which its approach to the issue will develop. This article now turns to amicable settlements under the African Children's Charter.

3 Amicable settlements and the African Children's Charter

The African Children's Charter explicitly provides for the submission and consideration of individual communications. Accordingly, '[t]he Committee may receive a communication, from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter'.⁴² This explicit reference stands in stark contrast to the African Charter which only offers rules that must be complied with when bringing a communication to the African Commission, but does not state who may bring a communication.⁴³

In 2014 the African Children's Committee developed and adopted the Revised Guidelines for the Consideration of Communications provided for in article 44 of the African Charter on the Rights and Welfare of the Child (Revised Guidelines).⁴⁴ The previous Guidelines for the Consideration of Communications provided for in article 44 of the African Children's Charter contained no elements on amicable

39 *Velásquez Rodríguez v Honduras (Preliminary Objections)* IACHR (26 June 1989) (Ser C) No 1 (1994) para 14. In the *Nicaraguan Population of Miskito Origin* case the state requested that a body such as the Commission supervise a friendly settlement over a matter including a gross violation of human rights, since it is the Commission and not the respondent state that recommends what measures should be put in place. See Inter-American Commission on Human Rights *Report on the Situation of a Sector of the Nicaraguan Population of Miskito Origin OEA/Ser L/V/II.62 Doc10 Rev 3*, 29 November 1983.

40 *Free Legal Assistance Group* (n 20) para 44.

41 Art 9 African Court Protocol.

42 Art 44(1) African Children's Charter.

43 Art 56 African Charter.

44 African Committee of Experts on the Rights and Welfare of the Child 'Guidelines for the Consideration of Communications'.

settlements.⁴⁵ However, the Revised Guidelines have a dedicated section entitled 'Amicable settlement'.⁴⁶

This section of the Revised Guidelines starts off with 'General Principles'. The Revised Guidelines state that '[p]arties to a communication may settle their dispute amicably any time before the Committee decides on the merits of the communication'.⁴⁷ Two important observations are crucial here. First, the procedure is optional. Second, one could question whether an amicable settlement can be initiated after a case has been registered, but even before a decision on admissibility is made. The reference to 'any time before the Committee decides on the merits' seems to suggest this possibility.

It is also indicated in the Revised Guidelines that 'the terms of settlement reached must be based on respect for the rights and welfare of the child recognised by the African Children's Charter'.⁴⁸ It is not a clear-cut process to determine what would constitute a settlement term that is considered to respect the rights recognised in the Charter. The Rules of Procedure under the OPIC contain a similar paragraph.⁴⁹ Furthermore, the European Convention and Inter-American Commission's Rules of Procedure contain a similar sentence, stating that the friendly settlement procedure should proceed 'on the basis of respect for human rights'.⁵⁰ As an example, the Inter-American Court has held that in cases involving forced disappearances and where the state denies such acts, 'it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, to humane treatment and to personal liberty'.⁵¹

The Revised Guidelines envisage two types of amicable settlements – one under, and another outside, the auspices of the African Children's Committee.⁵² In the context of the former, the Committee facilitates, leads and offers its good offices for the negotiation.⁵³ It may also appoint one or more members of the Committee to facilitate the negotiations towards an amicable settlement.⁵⁴ In the case of the latter, the Committee plays a secondary role where the agreement is reached and subsequently reported to the Committee.⁵⁵ In both

45 Available at <https://ihrda.uwazi.io/en/document/7ywjn5ennrb?page=1> (accessed 24 June 2019).

46 Sec XIII African Children's Committee 'Revised Guidelines for the Consideration of Communications' (Revised Guidelines).

47 Sec XIII (1)(i) Revised Guidelines.

48 Sec XIII(1)(ii) Revised Guidelines.

49 Rule 25(6) Optional Protocol on a Communications Procedure (OPIC) (n 7) Rules of Procedure.

50 Art 39(1) European Convention; art 41(1) Inter-American Commission Rules of Procedure.

51 *Velásquez Rodríguez* (n 39) para 46.

52 Secs XIII(1)(i) & (iii) Revised Guidelines.

53 Sec XIII(1)(i) Revised Guidelines.

54 Sec XII(2)(iii) Revised Guidelines.

55 Sec XIII(1)(iii) Revised Guidelines.

instances, however, the approval of the amicable settlement by the Committee is a requirement, in the absence of which it may continue with the consideration of the communication.⁵⁶

The Revised Guidelines answer in the affirmative the question of whether the Committee may initiate an amicable settlement of its own volition.⁵⁷ Instruments that govern friendly settlements in the European Court and Inter-American Commission allow these bodies to initiate such a procedure at any point of the proceedings.⁵⁸ The Revised Guidelines also provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement'. One such ground is '[i]f the subject matter of the communication involves serious and massive violations of children's rights'. What would constitute 'serious and massive' violations is open to interpretation.

Time is a critical element in determining the presence or otherwise of an alleged violation pertaining to children's rights.⁵⁹ The negotiations for an amicable settlement cannot be allowed to continue without reasonable time limits. Consequently, the Guidelines indicate that '[t]he Committee may, prior to consideration of the merits of a communication, set a time period for the parties to express their interest in reaching an amicable settlement'.⁶⁰ Moreover, a report on amicable settlement transmitted to the parties has to be returned to the Secretariat of the Committee with signatures within 14 days of receipt.⁶¹

4 *Institute for Human Rights and Development in Africa v The Government of Malawi*

4.1 The complaint

Malawi ratified the African Children's Charter in 1999. In October 2014 the Committee received a communication, *Institute for Human Rights and Development in Africa v The Government of Malawi*.⁶² The Institute for Human Rights and Development in Africa (IHRDA) alleged a number of violations of the provisions of the African Children's Charter by the government of Malawi. IHRDA contended that the impugned provisions were article 1 (on the nature of state parties'

56 Secs XIII(1)(vi) & XIII(2)(viii) Revised Guidelines.

57 Sec XIII(2)(i) Revised Guidelines.

58 Art 39(1) European Convention; art 41(1) Rules of Procedure of the Inter-American Commission on Human Rights.

59 G Lansdown (Save the Children) 'Every child's right to be heard: A resource guide on the UN Committee on the Rights of the Child General Comment No 12' (2011) 72.

60 Sec X(2) Revised Guidelines.

61 Sec XIII(2)(vi) Revised Guidelines.

62 *IHRDA* (n 14).

obligations), article 2 (on the definition of a child) and article 3 (on the prohibition of discrimination).

The crux of the complaint was that the Constitution of Malawi, which provides in section 23(5) that '[f]or the purposes of this section, children shall be persons under sixteen years of age', constituted a violation of article 2 of the African Children's Charter. Article 2 of the Children's Charter provides that 'a child means every human being below the age of 18 years'. The communication further contended that since the ratification of the Children's Charter by Malawi in 1999, the state party had not undertaken any legislative measures to address this shortcoming. This, it was argued, violated the relevant part of article 1 of the Charter, which provides as follows:

Member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake 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.

The communication also alleged that the distinction made in the Constitution between children below 16 years of age and those between 16 and 18 years violated the prohibition of non-discrimination in article 3 of the African Children's Charter, and is not justified. Article 3, on non-discrimination, provides 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.

Article 3 of the African Children's Charter does not explicitly mention discrimination on the basis of 'age' as an explicit ground on which discrimination is prohibited. However, 'age' could easily be read in within 'other status' as it is comparable to the other grounds explicitly mentioned in article 3 of the Charter. Section 20 of the Malawian Constitution contains most of the explicit grounds on which discrimination is prohibited under the Charter.⁶³

According to the complainants, the impact of section 23(5) was that a number of children within the jurisdiction of the state party had been left without the protection that they should have under child rights law. Furthermore, linked to this central element of the complaint was the contention that the constitutional provision also was not aligned with other subsidiary legislation, such as the Marriage, Divorce and Family Relations Law, which increased the minimum age of marriage from 15 to 18 years. As a result of the

63 The grounds mentioned in sec 20 include 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition'.

overarching constitutional definition of a child, the complainants argued that children above 16 but below 18 benefit from the protection to which they were entitled as a result of Malawi's international human rights law obligation, in particular, the African Children's Charter.

The African Children's Committee in 2015 declared the communication admissible. However, before proceeding on the merits the Committee was approached by the two parties indicating that they would like to resort to an amicable settlement. The Revised Guidelines allow such a process if the request is made before the Committee makes a decision on the merits of a communication.⁶⁴ Therefore, during its 28th ordinary session in October 2016 the Committee offered its good offices to facilitate a discussion between the two parties on the terms for an amicable settlement. The amicable settlement was reached under the auspices of the African Children's Committee, as provided for in section XIII(2) of the Revised Communication Guidelines

Noting that this was the first amicable settlement brought before the Children's Committee, it has been argued that its initiation prevented the Committee from producing an 'authoritative analysis and novel jurisprudence', in the form of a decision, which could have made other state parties such as Malawi initiate similar changes, was a weakness of the mechanism.⁶⁵ However, it has also been argued that this procedure may help to 'reduce potential tensions that may arise during contentious proceedings' and that it also allows for 'more room for constructive dialogue between the parties'.⁶⁶

4.2 The amicable settlement reached

As part of the amicable settlement the government of Malawi agreed to undertake efforts to amend its constitutional provision with a view to complying with article 2 of the African Children's Charter by 31 December 2018.⁶⁷ In the interim, and while the amendment of the constitutional provision was underway, the government also agreed to undertake all possible administrative measures to ensure that all persons in the state party below the age of 18 enjoy the rights in the Charter.⁶⁸ With a view to ensuring follow-up, it was also agreed that the government would submit periodic reports on the developments related to the implementation of the agreement. Based on publicly-available information, the Malawian Government

64 Sec XIII Revised Guidelines.

65 MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 311.

66 BD Mezmur & MU Kahbila 'Follow-up as a "choice-less choice": Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *African Human Rights Yearbook* 211.

67 M Yadessa 'Malawi amends its Constitution to comply with article 2 of the Charter' (2017) 1 *ACERWC Tribune* 11.

68 As above.

submitted to the Committee four progress reports, the last of which reportedly was on 7 February 2018, updating it on the progress the government had made.⁶⁹ The submission of periodic reports assists the Committee to carry out its duty of following up and supervising the implementation of the terms of amicable settlements.⁷⁰

4.3 Some reflections on the amicable settlement

4.3.1 Definition of a child

The definition of a child is very central to the children's rights discourse.⁷¹ It determines the scope of application of a law both at the international and domestic levels and differentiates the kind of special promotion and protection rights to which children are entitled as compared to adults.⁷²

The government of Malawi in its report to the CRC Committee in 2015 indicated that 'there is no broad definition of a child' as the definition contained in section 23(5) of the Constitution is 'only for purposes of that section'.⁷³ However, since the Constitution is the supreme law of the land,⁷⁴ it is only reasonable to consider section 23(5) as offering an overarching or broad definition of a child that has implications beyond the specific provision.

The government's report in terms of CRC still conceded that this variance between the Convention and the definition of a child in the Constitution 'may only be addressed through a referendum'.⁷⁵ Section 23 of the Constitution requires a higher level of voting threshold and process for its amendment.⁷⁶

Reference to subsidiary legislation can substantiate the argument that the Constitution has had a significant influence in defining a child. The Child Care Protection and Justice Act,⁷⁷ which is 'the most comprehensive piece of legislation for children in Malawi',⁷⁸ in section 2 provides a definition of the child as contained in section 23(5) of the Constitution.⁷⁹ It provides that 'child' means a person below the age

69 n 45.

70 Mezmur & Kahbila (n 66) 218.

71 Nyarko & Jegede (n 65) 310.

72 <https://ijrcenter.org/thematic-research-guides/childrens-rights/> (accessed 25 March 2019).

73 State Party Report, 3rd to 5th periodic reports of Malawi (CRC/C/MWI/3-5) (7 January 2015) para 2.

74 Sec 199 Constitution of the Republic of Malawi (1994).

75 State Party Report (n 73) para 3.

76 The wording proposing a more rigorous process of amendment emanated from a proposal by the Malawi Law Commission and adopted in 2010.

77 Act 22 of 2010.

78 Human Rights Council, Malawi National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (A/HRC/WG.6/22/MWI/1) (4 February 2015) para 26.

79 This is despite the fact that the report of the Malawi Law Commission proposed a definition of a child in line with the CRC.

of 16 years.⁸⁰ Section 160(A) of the Penal Code (Amendment) Act 1 of 2011 adopts the same definition. This would have serious consequences with respect to the kind of protection from which children in conflict with the law and who are between the ages of 16 and 18 would benefit. Child victims and witnesses in this age group face similar limitations.

This limitation affects Malawian and non-citizen children, including those that may find themselves in a vulnerable situation. For example, in 2015 there were a number of instances where unaccompanied migrant Ethiopian children, victims of trafficking, were detained in prison in Malawi for long periods under 'dire' conditions together with adults and common criminals.⁸¹ In November 2015 it was reported that 387 migrants, of whom one in six was an unaccompanied minor, were held in five prisons across the country, and 'were charged with illegal entry, fined USD 35 and imprisoned from two to nine months'.⁸² There is no evidence that the child migrants, especially those between the ages of 16 and 18, have benefited from a child-friendly justice system – partly as a direct result of the definition of a child contained in the Constitution. In fact, the CRC Committee had specifically asked the government to 'provide information about the 43 unaccompanied Ethiopian migrant children detained at Kachere Juvenile Prison'.⁸³ In this respect, it would not be surprising if the 'juvenile prison' housed only those below 16 years of age.

Therefore, apart from amending the constitutional provision, the government had promised the further harmonisation of subsidiary laws to comply with its obligations under international law⁸⁴ as one of the elements of the amicable settlement.⁸⁵ IHRDA indicated that the state has agreed 'to amend ... all other relevant laws to be in compliance with article 2 of the African Charter on the Rights and Welfare of the Child by 31 December 2018'.⁸⁶ However, there is no evidence that other subsidiary laws had been harmonised by the set deadline.

80 Sec 2 Child Care Protection and Justice Act 22 of 2010.

81 IOM 'Stranded Ethiopian child migrants return home from Malawi' 6 November 2015, <https://www.iom.int/news/stranded-ethiopian-child-migrants-return-home-malawi> (accessed 10 May 2019).

82 IOM 'Stranded Ethiopian child migrants return home from Malawi' 27 November 2015, <https://www.iom.int/news/stranded-ethiopian-child-migrants-return-home-malawi> (accessed 10 May 2019).

83 CRC Committee, List of Issues: Malawi (July 2016) (CRC/C/MWI/Q/3-5) para 13.

84 CRC Committee, Concluding Observations: Malawi (CRC/C/MWI/CO/3-5) (March 2017) para 13.

85 IHRDA 'Public Statement of IHRDA during the April 2018 Session of the ACERWC' (April 2018).

86 As above.

On the other hand, there are a number of domestic laws that define a child as a person below the age of 18, such as the Prevention of Domestic Violence Act. Under section 7 of the Liquor Act⁸⁷ it is an offence to supply liquor to any person under the age of 18 years.⁸⁸ In addition, the Employment Act⁸⁹ contains provisions that appear to define a child as a person below the age of 18. According to the Act a person below the age of 18 years is prohibited from undertaking hazardous work.

4.3.2 *Child marriage*

Malawi has a high prevalence of child marriage. As of 2017, 42 per cent of girls were married by the time they reached 18 years of age.⁹⁰ The approach adopted by the Constitution in relation to child marriages to a certain extent appears to echo the definition of a child contained in section 23(5). Section 22(6) of the Constitution states that '[n]o person over the age of eighteen years shall be prevented from entering into marriage'. Of course, this provision does not violate the relevant provisions of the African Children's Charter, namely, article 21(2), which provides that '[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'.⁹¹

Closely linked to this is article 1(3) of the African Children's Charter, captioned '[o]bligation of state parties', which sets the initial manner in which state parties should address harmful practices. The article reads that '[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged'.

However, the exception entrenched in the Constitution in section 22(7) states that '[f]or persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians'. This exception not only violates the provisions of the Charter but is also at variance with the Marriage, Divorce and Family Relations Act, which provides that the minimum age of marriage is 18 years.⁹² The same can be said of section 22(8),

87 Cap 50:07 Laws of Malawi.

88 For the purpose of this section it is irrelevant whether the liquor is intended for the child or for the use of some other person, including an adult.

89 Cap 55:02 Laws of Malawi.

90 Girls Not Brides 'Malawi', <https://www.girlsnotbrides.org/child-marriage/malawi/> (accessed 28 March 2019).

91 A point worth emphasising is the confusing and sometimes conflicting guidance from international human rights law and the interpretation in respect of the minimum age for marriage and, if any, the extent to which exceptions to the age of 18 should be allowed.

92 Art 18 Act 5 of 2015.

which provides that the 'state shall actually discourage marriage between persons where either of them is under the age of fifteen years'. While there is in article 1(3) a general obligation to discourage harmful practices, in respect of child marriage the obligation of states particularly is to 'prohibit' and take 'effective action, including legislation' against the practice.⁹³

Unfortunately, despite their direct relevance to the definition of a child, there is no evidence that sections 22(7) and 22(8) of the Constitution were made a subject of the complaint brought by IHRDA. As a result it was not made part of the amicable settlement reached.

However, this begs the question of whether the African Children's Committee would have acted *ultra vires* if it had raised these two subsections on its own initiative and made them part of the final amicable settlement. There is nothing in the Revised Guidelines that seems to bar the Committee from taking the initiative to raise matters directly related to a communication before it, and being made a subject of an amicable settlement. Further, in any case, if this issue was raised by the Committee, it would not have been the first time that the attention of the government had been drawn to it.⁹⁴ For instance, in 2015, in its report to the Human Rights Council in the context of the Universal Periodic Review and child marriage, Malawi stated that its efforts to address child marriage in the state 'will be followed by the amendments of the Constitution'.⁹⁵ Thus, the non-inclusion of the need to also amend section 22(7) of the Constitution arguably is one of the shortcomings of the amicable settlement.⁹⁶ On a positive note, when the government of Malawi passed the amendment to the Constitution, sections 22(7) and (8) had been deleted.⁹⁷

4.3.3 Reparations

In individual communications, upon finding a violation, human rights treaty bodies can recommend various types of reparations. These

93 Art 21(2) African Children's Charter.

94 See similar concerns expressed by Human Rights Watch 'Good news for child protection in Malawi: Decision to redefine childhood should help deter child marriage Agnes Odhiambo' 3 November 2016, <https://www.hrw.org/news/2016/11/03/good-news-child-protection-malawi> (accessed 7 June 2019).

95 Human Rights Council, Malawi, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 (A/HRC/WG.6/22/MWI/1) (4 February 2015) para 28; also a Special Law Commission on the Technical Review of the Constitution had already emphasised the need to amend sec 22.

96 This is arguable, in part because sec XIII(1)(iii) underscores that '[i]n all cases of an amicable settlement, the terms of settlement reached must be based on respect for the rights and welfare of the child recognised by the African Children's Charter and other applicable instruments'. This section does not require the amicable settlement to be comprehensive.

97 Constitutional Amendment Act 36 of 2017.

include restitution, rehabilitation, compensation, measures of satisfaction, and guarantees of non-repetition.⁹⁸

The question of reparations for child victims, especially those victims of child marriage, is a complex one. The complexity in large part arises from the various rights violations implicated as a result of child marriage, as well as the long-lasting, sometimes life-long effect it could possibly have on victims.⁹⁹ For instance, where dowries and bride prices are involved in the child marriage, the case among a number of practising communities,¹⁰⁰ their role in reparations, including on compensations, add their own complexity.

In the 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, the obligation of states 'to provide adequate, effective and comprehensive reparation'¹⁰¹ to child victims of child marriage is outlined. While almost the whole gamut of reparations, including compensation, is highlighted as a possibility, states as a minimum are 'obliged to provide all victims of child marriage reparation in at least the forms of restitution and rehabilitation'.¹⁰² With respect to restitution, pregnant girls or those who have children can be assisted to 'have an opportunity to continue their education on the basis of their individual ability'.¹⁰³ In respect of rehabilitation, services such as legal aid, access to healthcare and medical services, and alternative vocational training, should be provided to restore, as far as possible, the victim's physical, mental, social and full inclusion in society.¹⁰⁴

The amicable settlement does not appear to have considered most of these reparation options. In fact, the agreement reached appears to be more forward-looking and emphasises prevention, rather than redressing the violations that have occurred as a result of the constitutional provisions that go against the Charter. Insofar as

98 Guidelines on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the Committee at its 118th session (17 October-4 November 2016) following the Committee's discussion on the report submitted by committee member Fabián Omar Salvioli on the specification of measures of redress within the scope of individual communications considered by the Committee (30 November 2016) (CCPR/C/158).

99 Eg, early pregnancy, maternal morbidity and mortality, school drop-outs and forced exclusion from school often accompany child marriages.

100 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2017) para 24.

101 Joint General Comment (n 100) para 59.

102 As above.

103 Art 11(6) African Children's Charter; Joint General Comment (n 100).

104 Joint General Comment (n 100).

monetary compensation is concerned, there is a recognition that it 'may not be feasible in areas of high prevalence',¹⁰⁵ such as in Malawi. However, since the provision of access to legal remedies for violations as well as the need to provide or facilitate access to rehabilitation services have been identified as obligations under international human rights law,¹⁰⁶ the amicable settlement could have considered this.

Such an omission could be because of a number of factors, including, in partial defence of the Committee, the fact that the Joint General Comment with the African Commission was only adopted in 2017 after the amicable settlement had been reached. Commendably, too, the obligation entered into under the amicable agreement by the state to undertake interim administrative measures to ensure that all persons in the state party below the age of 18 enjoy the rights in the Charter,¹⁰⁷ could be interpreted to include the possibility of reparations. Here, a leaf could be taken from the European system where there are still some obligations to which a state may be bound even after reaching an amicable settlement, including the possibility of an expression of regret for the actions that had led to the complaint.¹⁰⁸

The experience of the Human Rights Committee (HRC) underscores that guarantees of non-repetition are general in scope. The HRC sheds light on some examples of guarantees of non-repetition, such as the request to repeal or amend laws to bring them in accordance with human rights obligations; the improvement of conditions in places of detention; changes in procedure that may have been found to constitute a violation; as well as measures for training and awareness raising.¹⁰⁹ As to the latter, for example, it would have been interesting if the amicable settlement had included an obligation on the part of the state to raise awareness of the amendment of the Constitution, and any other subsidiary legislation. It is important to recall that Human Rights Watch has reported that most of those who work with and for children, especially magistrates, police officers and child protection workers, did not recognise 15 to 17 year-olds as children because of the constitutional provision.¹¹⁰ In fact, the CRC Committee had also

105 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee in the Rights of the Child on Harmful Practices para 51.

106 As above.

107 African Children's Committee Draft Report: 28th session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 21 October-1 November 2016, Banjul, The Gambia (ACERWC/RPT (XXVIII)), <https://www.acerwc.africa/wp-content/uploads/2018/07/28th-ACERWC-Report-English.pdf> (accessed 7 June 2019).

108 KO Kufuor *The African human rights system: Origin and evolution* (2010) 136.

109 Guidelines (n 98) paras 13(a)-(d).

110 Human Rights Watch 'Submission to the Committee on the Rights of the Child' 21 November 2016, https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MWI/INT_CRC_NGO_MWI_25922_E.pdf (accessed 8 May 2019).

recommended to the state that, apart from amending its laws expeditiously, it should 'ensure wide public awareness of such legislative changes'.¹¹¹

4.3.4 *Serious and massive violations of children's rights*

As mentioned above,¹¹² the Revised Guidelines provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement'. One such ground is '[i]f the subject matter of the communication involves serious and massive violations of children's rights'. What would constitute 'serious and massive' violations is open to interpretation.

It has been argued that in order to determine whether a violation was serious or massive two elements should be considered: purpose or planning and quantity.¹¹³ With respect to the element of purpose or planning, the human rights violations should have been committed as a means to an end, to achieve a goal in response to certain behaviour.¹¹⁴ Furthermore, the inclusion of the word 'series' in article 58(1) of the African Charter suggests that there should be the establishment of a 'pattern of abuse' systemically instituted by authorities.¹¹⁵ With regard to the element of quantity, this speaks to the number of violations committed and the number of victims against whom the violations were committed.¹¹⁶ In terms of the number of victims, it appears that the African Commission has always referred to serious or massive violations in cases where there has been more than one victim.¹¹⁷ In terms of the number of violations, it has been noted that, despite the exact wording of article 58(1) of the African Charter, the Commission has referred to serious or massive violations not only in cases where more than one communication was brought, but also in cases where one communication included violations in respect of more than one article of the Charter.¹¹⁸

At the outset it should be mentioned that the use of the conjunction 'and' in 'serious and massive' in the Revised Guidelines is not common. In international human rights law the literature usually refers to 'serious or grave',¹¹⁹ 'systemic or massive', and by using the disjunctive 'or'. For example, the African Charter refers to 'serious or

111 CRC Committee Concluding Observations: Malawi (CRC/C/MWI/CO/3-5) (March 2017) para 13.

112 See part 3 above.

113 Murray (n 33) 111-113.

114 Murray 111.

115 Murray 112.

116 Murray 113.

117 As above.

118 As above.

119 For more details on the concept of a serious violation of human rights law, see Geneva Academy of International Humanitarian Law and Human Rights 'What amounts to "a serious violation of international human rights law"? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty'

massive violations'.¹²⁰ However, Murray notes that the Commission has itself referred to 'serious *and* massive', 'gross', 'grave', 'serious' and 'massive' violations,¹²¹ which is proof of inconsistency in wording, as opposed to a deliberate attempt to differentiate cases.¹²² Heyns and Killander are of the opinion that the Commission should interpret the African Charter in a way that affords a high protection of the rights contained therein that may appear from a literal reading of the text.¹²³ Thus, it could be argued that the African Commission's practice of using different terms when referring to article 58(1) violations should not be seen in a bad light; instead, the flexibility should be welcomed, and perhaps be emulated by the Children's Committee.

In the amicable settlement reached there is no indication whether consideration was given to assessing whether the alleged violation would constitute 'serious and massive' violations. Indeed, the impact of the definition of a child that excludes those that are 16 and 17 years old from protection, as discussed above,¹²⁴ has wide-ranging and very serious implications.

In moving forward, there are additional lines of inquiry that the African Children's Committee will need to pose, in particular, whether there are some nuances that need to be taken into account in dealing with 'massive and serious violations' in the context of the rights of the child. For example, it should be considered whether there are rights that are so fundamental to the realisation of the rights of the child that a violation thereof should qualify as constituting a 'massive and serious violation'; also, whether a single violation can constitute 'serious and massive' in the context of the rights of the child. What about violations of children's socio-economic rights? It would also be difficult to answer a question whether a violation is 'serious and massive' without having regard to context. As a result, as to the

Academy Briefing 6 August 2014, https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf (accessed 7 June 2019). Within the UN treaty body system, the Committee against Torture (Convention Against Torture art 20); the Committee on the Elimination of Discrimination against Women (Optional Protocol to the Convention on the Elimination of All Forms of Discrimination art 8); the Committee on the Rights of Persons with Disabilities (Optional Protocol to the Convention on the Rights of Persons with Disabilities art 6); the Committee on Enforced Disappearances (International Convention for the Protection of All Persons from Enforced Disappearance art 33); the Committee on Economic, Social and Cultural Rights (Optional Protocol to the International Covenant on Economic, Social and Cultural rights art 11); and the Committee on the Rights of the Child (OPIC art 13) have the mandate to initiate inquiries if they receive reliable information on serious, grave or systemic violations by a state party.

120 Art 58(1) African Charter.

121 Murray (n 33) 110-111.

122 Murray 110.

123 C Heyns & M Killander 'Africa in international human rights textbooks' (2007) 15 *African Journal for International and Comparative Law* 135.

124 See discussions in parts 4.3.1 and 4.3.2 above.

approach of the Committee, it may be possible to juxtapose Odinkalu's observation made in the context of the Commission that 'the expression "serious or massive violations" ... is merely a framework whose details may be worked out by experience'.¹²⁵

The Revised Guidelines provide a number of grounds upon which the Committee 'may terminate its facilitation of an amicable settlement' but do not provide grounds upon which it does not even start the facilitation of an amicable settlement in the first place. In this respect, the question arises as to whether some articles in the Charter should be considered off-limits for amicable settlements. Arguably, some provisions of the Charter that could be explored for this purpose include the definition of a child; the right to life (the application of the death penalty to persons who committed the crime while below the age of 18);¹²⁶ and the absolute prohibition of torture.¹²⁷ The prohibition of torture and the application of the death penalty for offences committed by persons while below the age of 18 are absolute, and even constitute customary international law.¹²⁸ The latter, for example, has been declared to be a peremptory norm, meaning that it is binding on all states whether or not they are parties to international treaties.¹²⁹

However, the experience of the European Court suggests otherwise, meaning that the identification of specific articles as being beyond the amicable settlement process perhaps is neither necessary nor possible. According to Webber, the record of friendly settlements thus far reached through the European Court covers all 13 guaranteed freedoms under the European Convention on Human Rights.¹³⁰

4.3.5 *Mandate to initiate amicable settlement*

The relatively broad mandate of the African Children's Committee involves initiating and dealing with amicable settlements. This can, for

125 CA Odinkalu & R Mdoe *Article 58 of the African Charter on Human and Peoples' Rights. A legal analysis and proposals for implementation* (1996) 5.

126 Art 5 African Children's Charter.

127 If state parties enter reservations to any of these provisions, it is highly likely that the African Children's Committee will find such reservations to be against the object and purpose of the instrument.

128 WA Schabas 'International law and abolition of the death penalty' (1998) 55 *Washington and Lee Law Review* 813.

129 Amnesty International 'The exclusion of child offenders from the death penalty under general international law' (2003), <https://www.amnesty.org/download/Documents/100000/act500042003en.pdf> (accessed 7 June 2019); *Michael Domingues v United States*, Inter-American Commission of Human Rights, IAm Comm of HR (22 October 2002), Case 12.285, Merits, Report 62/02 paras 84-85. Also see CA Bradley 'The juvenile death penalty and international law' (2002) 52 *Duke Law Journal* 485.

130 GS Weber 'Who killed the friendly settlement? The decline of negotiated resolutions at the European Court of Human Rights' (2007) 7 *Pepperdine Dispute Resolution Law Journal*, as cited in VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 407.

instance, be differentiated from the OPIC¹³¹ which has provisions governing 'friendly settlements',¹³² a term used interchangeably with 'amicable settlements', where the question of who can initiate a friendly settlement is less clear. Unlike the mandate of the Children's Committee which can take the initiative to start an amicable settlement, the wording in the OPIC appears restricted to making 'available its good offices', including in the context of inter-state communications.¹³³ This restrictive approach to initiating amicable settlements is further reinforced by the Rules of Procedure for the OPIC. For example, Rule 25(1) of OPIC indicates that it is '[a]t the request of any of the parties pursuant to article 9 of the Protocol' that 'the Committee shall make available its good offices to the parties with a view to reaching a friendly settlement'.

This restriction is not without practical limitations. For instance, there currently are approximately 87 cases pending before the CRC Committee,¹³⁴ the great majority of which are against Spain alleging 'subjecting [an] unaccompanied child to medical test to determine ... age'.¹³⁵ As a result, it may be argued that a friendly settlement with the government of Spain with a view to addressing some of the potential shortcomings in age determination processes could serve the best interests of the child. However, the proposal to initiate a process for such a friendly settlement appears to be beyond the mandate of the CRC Committee.

For the Committee, the mandate to initiate amicable settlements could also mean resolving cases involving serious violations or urgent matters as swiftly as possible. For example, in cases involving a child who is complaining about the denial of free and compulsory primary education, children rendered stateless because of discrimination, and asylum-seeking children who are deprived of their liberty, the children could all suffer significant physical, mental and developmental damage as a result of the non-disposal of their cases within a short period of time. In fact, some children might even become adults while their communications are being processed, meaning that immediate and important decisions in favour of their rights would be undermined because of the lapse of a significant period of time. As a result, there could be additional compelling arguments why bodies dealing with communications involving children, as compared to those dealing with adults, should be more motivated to resolve

131 OPIC entered into force in 2014. It has currently been ratified by 44 states including two African states, namely, Gabon and Tunisia. See https://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC-OP-IC.pdf (accessed 7 June 2019).

132 Art 9 OPIC.

133 Art 12(3) OPIC.

134 <https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf> (accessed 7 June 2019).

135 As above.

communications amicably, sometimes at the initiative of the Children's Committee itself.

4.3.6 Follow-up

The Revised Communication Guidelines mandate the parties to an amicable settlement to report to the Committee.¹³⁶ It is indicated that one of the elements of the amicable settlement reached was that the government had to periodically report its progress to the Committee,¹³⁷ and by the end of 2018 the government had provided five periodic progress reports,¹³⁸ which is commendable. Notably, since the adoption of the amicable settlement, Malawi has amended its Constitution.¹³⁹ Thus, the Constitution defines a child as a person under the age of 18,¹⁴⁰ and the exceptions for those under 18 to marry are abolished in the Constitution.¹⁴¹

At the presentation of its first state party report to the Committee, the Minister of Justice and Constitutional Affairs headed the Malawian government delegation.¹⁴² During the public hearing the state drew the attention of the Committee to the measures undertaken, as contained in periodic reports submitted. These measures include the establishment of a task force on the amendment; a national stakeholders' conference held on 16 December 2016; the Constitutional Amendment Act (15 of 2017) that was gazetted on 7 April 2017; and an initial audit on all laws on the definition of the child that has been completed by the Malawi Law Commission with the government identifying 27 laws that needed amendment.¹⁴³ The government of Malawi requested an extension of the date by which the government would be able to finalise the harmonisation of all laws from December 2018 to June 2019.¹⁴⁴

It should be noted that the full details of how the Committee carries out follow-up activities in relation to amicable settlements are

136 Sec XIII(1)(iii) Revised Communications Guidelines.

137 Draft Report (n 107).

138 IHRDA (n 85).

139 Mezmur & Kahbila (n 66) 211.

140 O Khamula 'Malawi Parliament raise child age definition from 14 to 18: Illegal to marry a girl before 18' *Nyasa Times* 15 February 2017, <https://www.nyasatimes.com/malawi-parliament-raise-child-age-definition-14-18-years-illegal-marry-girl-18/> (accessed 17 April 2019). As the change of the age of majority was an amendment of a section of the Constitution, the proposed change required a two-thirds majority (sec 197 of the Constitution of the Republic of Malawi) from the 193-member House..

141 Similar hearings on the implementation of decisions on communications on amicable settlements included an engagement with the delegation of the government of Kenya in the context of the *Children of Nubian descent*, as well as a delegation of the government of Senegal in relation to the *Talibé* decisions.

142 African Committee of Experts on the Rights and Welfare of the Child 31st ordinary session report para 9.

143 IHRDA (n 85).

144 African Committee of Experts on the Rights and Welfare of the Child 32nd ordinary session report para 84.

yet to be seen in terms of the creation of good practice. The manner in which follow-up to an amicable settlement is undertaken should also take into account the difference between individual measures and general recommendations. To avoid duplication, the latter can continue to benefit from follow-up during the periodic state party reporting process. However, there also is no indication in the Revised Guidelines that the follow-up procedure is carried out on a confidential basis. In the interests of transparency and to increase the visibility of the important role of the communications procedure, including amicable settlements, follow-up procedures to amicable settlements could be made public, as long as complainants agree and the process does not compromise children's best interests.¹⁴⁵

5 Concluding remarks

The amicable settlement agreed upon within the framework of the African Children's Charter has added significant positive pressure and urgency to convince parliamentarians and to complete the amendment process within a reasonable period of time. The lessons to be learnt from Malawi in respect of the definition of a child are relevant for a few African countries, such as Botswana, which has entered a reservation to the definition of a child under article 2 of the Charter.

This first amicable settlement sets a positive precedent in that parties to a communication make use of the offices of the African Children's Committee, and implement agreed-upon settlements in good faith. Understandably, the settlement reached is the first experience of the Committee, and not the final word on the issue. The Committee will need to reflect further, and draw from the experiences of other bodies, with a view to refining its working methods and exploring the possibility of amicably settling disputes as one of its core functions.

145 ESCR Committee 'Working methods concerning the Committee's follow-up to views under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' adopted at its 61st session 29 May-23 June 2017.