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The African Children's Charter and ending corporal punishment of children in Africa: A work in progress

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Summary: *Corporal punishment is the most common form of violence against children worldwide, including in Africa. Corporal punishment violates children's rights to respect for their human dignity and physical integrity. The African Charter on the Rights and Welfare of the Child provides for every child's right to be protected from violence and ill-treatment. The African Committee of Experts on the Rights and Welfare of the Child and other human rights bodies consistently examine states on their progress towards prohibiting and eliminating corporal punishment. In the context of the thirtieth anniversary of the African Children's Charter, this article aims to examine the progress made towards the prohibition and elimination of corporal punishment of children in all settings, in Africa. It highlights the challenges and shortcomings in implementing this campaign in Africa. The role of the African Children's Committee in promoting and protecting the human rights imperative to prohibit corporal punishment of children is also examined, especially as regards the legal barriers to end the corporal punishment of children in Africa.*

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1 Introduction

Every human being in the world has the rights to respect for human dignity and physical integrity and to equal protection under the law, regardless of gender, age, ethnicity, socio-economic circumstances, ability or disability, religion, or any other status. Corporal punishment violates children's rights to respect for their human dignity and physical integrity, as well as their rights to health, development, education and freedom from torture and other cruel, inhuman or degrading treatment or punishment.¹

Corporal punishment is the most common form of violence against children worldwide, including in Africa. Prohibiting its use raises the status of children in society who would be equally protected under the law on assault – whoever the perpetrator and whether or not the assault is inflicted as 'discipline' or punishment. Prohibiting corporal punishment can also have a positive effect in reducing other forms of violence against children. The UN Committee on the Rights of the Child (CRC Committee) defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.² According to the Committee, these include hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement – a whip, stick, belt, shoe or wooden spoon. However, it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).³ According to the CRC Committee, corporal punishment is invariably degrading.⁴ In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention on the Rights of the Child (CRC). These include, for example, punishment that belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child. The

1 Global Partnership to End Violence Against Children *Prohibiting all corporal punishment of children: Laying the foundations for non-violent childhoods* (2021) 3.

2 UN Committee on the Rights of the Child (CRC Committee) General Comment 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19, 28, paras 2 & and 37, *inter alia*).

3 CRC Committee (n 2) para 11.

4 As above.

CRC Committee has raised the issue of corporal punishment in other General Comments that it issued, including General Comment 1 on 'The aims of education' (2001);⁵ 10 on 'Children's rights in juvenile justice' (2007);⁶ 13 on 'The right of the child to freedom from all forms of violence' (2011);⁷ 20 on 'The implementation of the rights of the child during adolescence' (2016);⁸ 21 on 'Children in street situations' (2017);⁹ and 24 on 'Children's rights in the child justice system' (2019).¹⁰ Prohibiting corporal punishment therefore aims to ensure that children are equally protected under the law on assault, regardless of who the perpetrator is and whether or not the assault is inflicted as 'discipline' or punishment.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) provides for every child's right to be protected from violence and ill-treatment. The Charter requires states to ensure that discipline by parents and at school respects the child's human dignity.¹¹ The Children's Charter further calls on states to ensure that children are protected from all forms of torture and inhuman or degrading treatment by parents and others caring for the child¹² and that in the administration of juvenile justice, children in detention shall not be subjected to torture or inhuman or degrading treatment or punishment.¹³

As of June 2021, ten African states¹⁴ have prohibited corporal punishment of children in all settings.¹⁵ The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and other human rights bodies have made it very clear that all corporal punishment of children must be prohibited and eliminated, including within the family.¹⁶ The African Children's Committee increasingly examines states on their progress towards

5 CRC Committee General Comment 1 (2001): The aims of education (art 29(1)).

6 CRC Committee General Comment 10 (2007): Children's rights in juvenile justice.

7 CRC Committee General Comment 13 (2011): The right of the child to freedom from all forms of violence.

8 CRC Committee General Comment 20 (2016) on the implementation of the rights of the child during adolescence.

9 CRC Committee General Comment 21 (2017) on children in street situations.

10 CRC Committee General Comment 24 (2019) on children's rights in the child justice system.

11 Arts 11 & 20 African Children's Charter.

12 Art 16.

13 Art 17.

14 Benin; Cabo Verde; Congo; Guinea; Kenya; Seychelles; South Sudan; South Africa; Togo; Tunisia. Tunisia has not ratified the African Children's Charter.

15 <https://endcorporalpunishment.org/africa/> (accessed 1 June 2021).

16 African Committee of Experts on the Rights and Welfare of the Child General Comment 5 (2018) on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection.

prohibiting and eliminating corporal punishment and has made recommendations to prohibit and eliminate it in state parties.¹⁷

In the context of the thirtieth anniversary of the African Children's Charter, this article aims to examine the progress made towards the prohibition and elimination of corporal punishment of children in all settings, in Africa. It highlights the challenges and shortcomings in implementing this campaign in Africa. The role of the African Children's Charter in promoting and protecting the human rights imperative to prohibit corporal punishment of children is emphasised. Recommendations will therefore be made on the ways of overcoming the legal and socio-cultural barriers to end corporal punishment in Africa. The ultimate goal is to call on state parties to fully implement the African Children's Charter by effectively protecting children's best interests, including safeguarding their dignity and their physical and mental integrity.

2 The human rights imperative to prohibit corporal punishment

Corporal punishment is the most common form of violence against children in all regions, including in Africa. Where adults are legally protected from all assaults, the legality of corporal punishment denies children their right to equal protection under the law and clearly discriminates against them. The legal and social acceptance of this form of violence against children is highly indicative of children's marginal and often secondary status in societies where children are not seen as individual rights holders.

The obligation to prohibit all forms of corporal punishment against children falls directly under articles 19, 28(2) and 37 of CRC. Article 19:

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

¹⁷ <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrcw/> (accessed 1 June 2021).

Article 28(2):

States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

Article 37:

States Parties shall ensure that:

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

Article 4 of CRC emphasises that its implementation necessitates legislative as well as non-legislative measures: 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.'

Articles 2, 3, 6 and 12 are regarded as the four general principles underlying implementation of CRC, providing respectively for non-discrimination, the best interests of the child, the child's right to life, survival and development, and respect for the views of the child.

Since the very beginning of its work in examining state parties' reports on the implementation of CRC, the CRC Committee has raised the issue of corporal punishment of children with governments and recommended it be prohibited, including in the home.¹⁸ By March 2020¹⁹ the CRC Committee had made 486 Observations/recommendations on the issue of ending corporal punishment to 194 states. Recommendations are consistently to prohibit corporal punishment in all settings, including the home, and to support this with relevant measures of implementation. Once states have achieved prohibition, the Committee continues to monitor its implementation and enforcement. Many other UN and regional human rights treaty-monitoring bodies have confirmed that governments must prohibit all corporal punishment of children.²⁰ The issue is regularly raised under the Universal Periodic Review (UPR) process where states are examined by all United Nations (UN) member states on their overall human rights record. To date, many African states have expressed

18 <https://endcorporalpunishment.org/introduction/> (accessed 1 June 2021).

19 <https://endcorporalpunishment.org/human-rights-law/crc/> (accessed 1 June 2021).

20 Eg CRC Committee; UN Committee Against Torture; UN Committee on the Elimination of Discrimination Against Women; African Committee on the Rights and Welfare of the Child.

their commitment to law reform by accepting recommendations made under the UPR. It should also be noted that ending violence against children constitutes a global target in the development agenda. Under the Sustainable Development Goals (SDGs), all states have committed to ending all violence against children by 2030 (Target 16.2).²¹ The prohibition of all forms corporal punishment is a critical step towards the achievement of Target 16.2 and other SDG targets, including those related to health and well-being,²² and quality education.²³ The INSPIRE strategies²⁴ developed by the World Health Organisation and other agencies to support governments in achieving Target 16.2 recognises the prohibition of corporal punishment as key to ending violence against children and to reduce violence in society in the long term.

At the regional level, the obligation to prohibit corporal punishment against children is regulated by the African Children's Charter. The Charter makes provision for corporal punishment inflicted to children in schools, in the home and penal institutions.²⁵ For instance, in articles 11, 16 and 20 the Children's Charter calls on states to ensure that discipline by parents and at school respects the child's human dignity. Article 11(5) provides:

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

Article 20:

- (1) Parents, or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty
 - ...
 - (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

Article 16(1) of the African Children's Charter requires state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman

21 United Nations 'Transforming our world: The 2030 Agenda for Sustainable Development' A/RES/70/1.

22 SDG Target 3.5.

23 SDG Target 4(a).

24 World Health Organisation *INSPIRE: Seven strategies to end violence against children* (2016) 24.

25 As of June 2020, the Charter has been ratified or acceded to by 50 AU member states. See <https://www.acerwc.africa/ratifications-table/> (accessed 1 June 2021).

or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of [parent(s), legal guardian(s) or any other person who has the care of the child].

Furthermore, as regards children in penal institutions, article 17(2) (a) of the Children's Charter requires state parties to particularly ensure that no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment.

The implementation of the African Children's Charter is monitored by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In 2016 the African Children's Committee adopted Africa's Agenda for Children 2040: Fostering an Africa fit for children.²⁶ The Agenda is composed of 10 Aspirations that aim to 'restore the dignity of the African child' by ensuring the effective implementation of the African Children's Charter. Relevant to ending corporal punishment of children in Africa is Aspiration 7 which aims to 'ensure every child is protected against violence, exploitation, neglect and abuse'. Agenda 2040 therefore aspires that by 2040 no child should be subjected to corporal punishment.²⁷ Key benchmarks have been set as regards ending corporal punishment of children in Africa. By 2020 states should have prohibited corporal punishment as a form of discipline or punishment in schools, institutions and in the criminal justice system. Furthermore, by 2020 national partners should have initiated and engaged in national dialogue to discuss the feasibility of abolishing and eradicating corporal punishment from the private setting of the home. From all indications the benchmarks set for 2020 will not be met. With this missed key milestone, questions could be raised about the likelihood of achieving the ultimate milestones of 2040 which aim to eliminate corporal punishment of children. It will therefore be important to verify whether the African Children's Committee will adopt a revised strategy to achieve its initial targets, including those concerning the corporal punishment of children.

Another regional instrument which includes an obligation to prohibit and eliminate corporal punishment of children in all settings is the African Charter on Human and Peoples' Rights (African Charter).²⁸ The African Charter requires states that have ratified this

26 African Children's Committee *Africa's Agenda for Children 2040: Fostering an Africa fit for children* (2016) 11.

27 African Children's Committee (n 26) 39.

28 African Charter on Human and Peoples' Rights 1981.

Charter to ensure equal protection of the law (article 3); respect for personal integrity (article 4); respect for human dignity (article 5); and protection from torture and cruel, inhuman or degrading punishment and treatment (article 5) for all people. It should be noted that the African Commission on Human and Peoples' Rights (African Commission) which monitors the implementation of the African Charter has specifically stated that the use of corporal punishment by state parties was in violation of the African Charter. In 2000 the African Commission received a complaint²⁹ concerning the sentencing of eight students to 25 to 40 lashes in Sudan, under the country's criminal law. The African Commission concluded that the Sudanese legislation permitting flogging violated article 5 of the African Charter, and requested the government of Sudan to amend the criminal law in question, abolish the penalty of lashes, and compensate the victims. The African Commission clearly stated that '[t]here is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.'³⁰ The African Commission's decision is evidence that according to African human rights standards, the infliction of corporal punishment constitutes a human rights violation and for this reason, African states are required to take legislative measures to prohibit this practice. Sudan has since prohibited 'whipping by way of discipline' and flogging as a sentence for crime.³¹

3 State of corporal punishment of children in Africa

3.1 Prevalence

An overwhelming body of research associates corporal punishment with a variety of negative health and behavioural outcomes, including poorer mental health, cognitive development and educational outcomes, increased aggression and antisocial behaviour.³² It can damage family relationships and, far from teaching children to

29 *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).

30 *Doebbler* (n 29) para 42.

31 The Miscellaneous Amendments Law 2020 repeals whipping and replaces it with community service. It also amends arts 25, 68, 69, 80, 81, 125, 148(2), 151, 155, 156 and 174 of the Criminal Code 1991 to repeal flogging as disciplinary measure.

32 ET Gershoff 'Report on physical punishment in the United States: What research tells us about its effects on children' (2008) *Center for Effective Discipline* 30; see also ET Gershoff & A Grogan-Kaylor 'Spanking and child outcomes: Old controversies and new meta-analyses' (2016) 30 *Journal of Family Psychology* 453.

behave well, it teaches them that violence is an acceptable way to resolve conflict. In the school setting, corporal punishment is often associated with the reason why children drop out of school, or record poor school performances,³³ making them more vulnerable to other forms of exploitation.³⁴

A survey conducted by the United Nations Children's Fund (UNICEF) in sub-Saharan Africa revealed that 82 per cent of children aged between one and 14 years of age have reported experiencing violent discipline in the month preceding the survey, between 2012 and 2019.³⁵ This represented 83 per cent in the West and Central African sub-region.³⁶ A Multiple Indicator Cluster Survey in 2017/8 by Ghana Statistical Service found that almost all children (94 per cent) aged one to 14 years experienced some form of violent 'discipline' (physical punishment and/or psychological aggression) at home; 17 per cent experience severe physical punishment (hitting or slapping a child on the face, head or ears, and hitting or beating a child hard and repeatedly) and 78 per cent other physical punishments.³⁷ In the school setting, a Human Rights Watch study³⁸ conducted in 2017 revealed routine, widespread and sometimes brutal use of corporal punishment in schools in Tanzania. Almost all adolescents and students interviewed were subjected to corporal punishment at some point of their school experience. Teachers reportedly hit students irrespective of their gender or disability. Senior school officials or teachers reported caning students and not following government regulations on the infliction of corporal punishment in schools. Similarly, in Malawi, in a study of 104 childcare institutions (orphanages, special needs centres, church homes, transit care centres and reformatory centres) which involved interviews with staff in the institutions and focus group discussions with children, documented the use of corporal punishment, including children being whipped, forced to kneel and forced to do hard work.³⁹

33 MJ Ogando Portela & K Pells 'Corporal punishment in schools: Longitudinal evidence from Ethiopia, India, Peru and Vietnam' (2015) *Innocenti Discussion Paper 2*.

34 UNICEF, Plan West Africa et al *Too often in silence: A report on school based violence in West and Central Africa* (2010) 10.

35 <https://data.unicef.org/topic/child-protection/violence/violent-discipline/> (accessed 1 June 2021).

36 As above.

37 Ghana Statistical Service *Multiple Indicator Cluster Survey (MICS 2017/18)* (2018) *Survey Findings Report*.

38 Human Rights Watch *I had a dream to finish school: Barriers to secondary education in Tanzania* (2017) 8.

39 UNICEF Malawi & Ministry of Gender, Children and Community Development *All children count: A baseline study of children in institutional care in Malawi* (2011) 2.

The consistent positions of human rights treaty bodies reflect the seriousness with which the prohibition of corporal punishment of children is viewed under international human rights law. It also underlines the high priority that should be given to achieving law reform. There is much work to be done in Africa, but all indications are that progress is accelerating. Many African states have achieved prohibition in settings outside the home, including 28 states in schools, 50 as a sentence of the courts, and 32 in penal institutions.⁴⁰

3.2 Legality and need for law reform to prohibit corporal punishment

The prohibition of corporal punishment is fundamental to child protection. The experience of states that have achieved effective prohibition shows that legal protection supports change in attitudes and behaviour.⁴¹ Law reform provides clarity to children, parents, teachers, social services and law enforcement that no violence against a child is acceptable. Because corporal punishment has been almost universally accepted in all regions as a disciplinary measure in child rearing, it still is not generally perceived as harmful, abusive or even violent.⁴² It is even frequently argued that it is a good and necessary element of child rearing – ‘in the child’s best interests’. For this reason, legislation that prohibits ‘violence’ or ‘inhuman or degrading treatment’, or which protects ‘physical integrity’ or ‘human dignity’, is not readily interpreted as prohibiting all corporal punishment but can be seen as prohibiting only that which reaches a certain level of severity. For instance, in Malawi section 80 of the Child Care, Protection and Justice Act 2010 states that ‘no person shall subject a child to a social or customary practice that is harmful to the health or general development of the child’ but this is not interpreted as prohibiting all corporal punishment in child rearing. Consequently, in its Concluding Observations on Malawi’s initial report,⁴³ the African Children’s Committee urged the state party to ‘review relevant laws and expressly prohibit corporal punishment in all settings and create awareness in schools, among parents, community, traditional and cultural leaders, and among personnel of the justice system on the negative impacts of corporal punishment on the wellbeing of children’.

40 See <https://endcorporalpunishment.org/africa/> (accessed 1 June 2021).

41 TA Trifan et al ‘Have authoritarian parenting practices and roles changed in the last 50 years?’ (2014) 76 *Journal of Marriage and Family* 744.

42 Global Initiative to End All Corporal Punishment of Children *Ending corporal punishment of children: A short guide to effective law reform* (2019) 8.

43 Concluding Observations on initial report, para 21.

In many countries the right of parents, teachers and others to use 'reasonable' punishment (chastisement, correction or similar) exists in case law, and in some this is confirmed in legislation.⁴⁴ This constitutes a legal defence, so the law on assault does not apply to 'disciplinary' assaults on children by parents and others. In other words, the law provides a defence to parents when the corporal punishment is considered 'reasonable'. For instance, in Botswana article 61 of the Children's Act 2009 prohibits only 'unreasonable' correction of a child by parents, thereby allowing 'reasonable' correction; sections 27 and section 61 expressly state that the legal provisions protecting a child's dignity and prohibiting cruel treatment do not preclude the use of corporal punishment. Equally, in Ethiopia article 576 of the Criminal Code 2005 recognises the power of parents and others with parental responsibilities to take 'a disciplinary measure that does not contravene the law, for the purpose of proper upbringing' and article 258 of the Revised Family Code 2000 states that 'the guardian may take the necessary disciplinary measures for the purpose of ensuring the upbringing of the minor'. In other countries (for instance, Côte d'Ivoire, Niger, Gabon) there is no confirmation in law of a 'right' of parents to administer punishment, but legal provisions against violence and abuse are not interpreted as prohibiting all corporal punishment in child rearing. The law therefore needs to be amended to explicitly prohibit all corporal punishment and other cruel or degrading forms of punishment, in the home and all other settings where adults exercise parental authority over children. It should be added that a 'silent' repeal of provisions that allowed corporal punishment does not amount to prohibition as it does not necessarily send a clear message that corporal punishment is unlawful. Because corporal punishment has traditionally been so widely socially accepted, the law must be absolutely clear in order to avert misinterpretation, especially in case of litigation. For instance, in Rwanda Law 32/2016 of 28/08/2016 Governing Persons and Family passed in August 2016 repealed the Civil Code 1988, which previously recognised a 'right of correction' to parents under its article 347. The new Law does not mention the 'right of correction' but it does not explicitly repeal it and does not explicitly prohibit corporal punishment. Consequently, prohibition is still to be achieved in the home, alternative care settings and day care facilities.

Corporal punishment may be specifically provided for in national constitutions. In Eswatini, section 29(2) of the Constitution, 2005 states that 'a child shall not be subjected to abuse or torture or other

44 Global Initiative to End All Corporal Punishment of Children (n 42) 7.

cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction'. A constitutional reform will therefore need to be carried out and a law explicitly prohibiting corporal punishment in all settings should be enacted. Alternatively, a high-level court could rule that corporal punishment is in violation of section 29(2) of the 2005 Constitution and declare it unconstitutional. The process of law reform to prohibit corporal punishment, in accordance with international and regional human rights instruments, might be compounded in states with a plural legal system where corporal punishment may be lawful under customary and/or religious laws. In Nigeria, for example, the legal system is composed of a mix of Islamic law, English common law and customary/native law. Section 221 of the 2003 Child Rights Act prohibits corporal punishment as a sentence for crime. However, the Child Rights Act is in force only in the federal capital territory of Abuja and in states that have explicitly enacted it. Consequently, judicial corporal punishment is prohibited only in the federal capital territory and in some selected states. As regards corporal punishment in the home, section 295 of the Criminal Code (in the southern states),⁴⁵ section 55 of the Penal Code (in the northern states)⁴⁶ and the Shari'a penal codes in the northern states confirm the right of parents to use force to 'correct' their children. In sum, due to the uneven protection of children's rights across the country, it appears that the process of prohibition of corporal punishment will be disparate and inconsistent, mainly depending on individual states' political willingness to enforce this fundamental children's human rights.

It should be noted that in some states governments have issued policies, guidance or circulars advising against the use of corporal punishment. Such frameworks are positive and may discourage the use of corporal punishment in practice. However, on their own they do not amount to prohibition. For instance, in Rwanda the National Integrated Child Rights Policy, adopted by the Ministry of Gender and Family Promotion in 2011 and intended as a guide for legislation, states that 'physical abuse, including torture and cruelty against children and corporal punishment of children is prohibited in all settings' and defines all settings as including 'homes, communities, schools, all centres and institutions that have children, prisons and detention centres, etc'. In the same vein, in Ghana a letter from the Ghana Education Service dated January 2019 declared that all forms of corporal punishment are banned in public and private schools

45 Criminal Code Act Laws of the Federation of Nigeria 1990.

46 Penal Code CAP 345 Laws of the Federation of Nigeria 1990.

and instructed all pre-tertiary schools to adopt a 'positive discipline toolkit'. However, both section 13(2) of the Children's Act 1998 and section 41 of the Criminal Offences Act 1960 allow for 'justifiable correction' of children in Ghana. Corporal punishment, therefore, remains lawful in schools in Ghana. Overall, although these are positive steps, prohibition will be achieved only if legislation is properly enforced. It is important to note that the prohibition of corporal punishment can also be achieved through case law.

In some states high-level judgments have declared corporal punishment unconstitutional, struck down legislation authorising its use and/or called on the government to enact prohibition in some or all settings. For example, in 1999 the Zambian High Court⁴⁷ heard an appeal against a sentence of ten strokes of the cane handed down by the magistrate's court. The Court set aside the sentence of corporal punishment against the appellant. It further found that the sections providing for the use of corporal punishment as a sentence were in direct conflict with article 15 of the Zambian Constitution, declared them unconstitutional and ordered that they should be repealed from the Penal Code. The judgment was later confirmed in legislation to prohibit judicial corporal punishment. The Criminal Procedure Code (Amendment) Act 2003 and the Penal Code (Amendment) Act 2003 repealed articles 14 and 330 and articles 24(c), 27, 36(c), 39 and 40(1) of the Criminal Procedure Code 1934 and the Penal Code 1931 which authorised and regulated flogging.

3.3 Role of the African Children's Committee in ending corporal punishment

During its 12th session in November 2008 the African Children's Committee held a special session on the issue of prohibition of corporal punishment, and its harmful and often permanent effects on children.⁴⁸ This session enabled the Committee and representatives from civil society organisations to openly discuss the need to encourage state parties to commit themselves to legal reform for the explicit prohibition of corporal punishment. The African Children's Committee has increasingly examined state parties to the African Children's Charter on their progress towards prohibiting corporal punishment and has recommended its prohibition in all settings, including the home. As of July 2019 the Children's Committee had published 26 recommendations/Observations on corporal

47 *Banda v The People* (2002) AHRLR 260 (ZaHC 1999).

48 Twelfth Meeting of the African Children's Committee, 3-8 November 2008, Addis Ababa, Ethiopia.

punishment to 25 states.⁴⁹ It should be noted that the Committee has equally issued recommendations to state parties regarding the implementation of prohibiting laws. Following its examination of Kenya's initial report in 2014, the Committee stated:⁵⁰

The Committee notes with appreciation the prohibition of corporal punishment under the Constitution, but recommends that it be implemented. The Committee encourages the State Party to raise awareness and give training on a continuous basis on alternative disciplinary measures.

Similarly, in 2019, to Benin the African Children's Committee stated:⁵¹

Despite the legal prohibition, corporal punishment remains high in the State Party, particularly in the family and school settings. The Committee recommends that the State Party undertakes trainings and sensitisations to families, teachers, and law enforcement officials on prohibition of corporal punishment and on positive disciplining mechanisms. The Committee also encourages the State Party to prosecute teachers and law enforcement officials who inflict abuse while treating and disciplining children. Additionally, the Committee recommends that the State Party empowers children through education about their right to be free from any form of abuse and procedures for reporting corporal punishment and abuse when they occur.

In 2018 the African Children's Committee adopted General Comment 5 on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection'.⁵² With General Comment 5 the Committee emphasised the need for prohibiting all forms of corporal punishment of children. The Committee highlighted that state parties must adopt legislation which prohibits all corporal punishment of children in all settings including the home (paragraph 5.3.1), also including in schools (paragraph 5.3.3) and in penal institutions and as a sentence for a crime (paragraph 5.3.2), as well as putting in place implementation measures (paragraph 5.3.1). The Committee expanded on its interpretation of article 1, stating that the perpetuation of harmful cultural practices cannot be defended on the basis of custom, tradition, religion or culture and must be eliminated (paragraph 7.1). All states, regardless of their governance systems and including federal states, have an obligation to recognise and implement the rights in the African Children's Charter (paragraph

49 <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/> (accessed 1 June 2021).

50 Concluding Observations on initial report (December 2014) para 23.

51 Concluding Observations on initial report (September 2019) para 23.

52 African Children's Committee (n 16).

5.2). Any retrogressive measures diluting or cutting back on rights already enjoyed are against international law (paragraph 3.10).

Under article 44 of the Children's Charter, the African Children's Committee can receive communications relating to any matter covered by the Charter, from any person, group or non-governmental organisation (NGO) recognised by the African Union (AU) or one of its member states, or by the UN. The African Children's Committee first dealt with the issue of corporal punishment of children in a 2014 decision.⁵³ In this case the Children's Committee found that the beating of *talibés*⁵⁴ by *marabouts*⁵⁵ amounted to corporal punishment and violated their rights under article 16; Senegal was found in violation of the African Children's Charter as it had not adequately protected *talibés* children from all forms of violence (paragraphs 65, 67 and 68).

The African Children's Committee expanded on this in 2017,⁵⁶ stating that it '[was] of the view that all forms of corporal punishment should be abolished, either in the home or any other setting'. By failing to protect the complainants from the physical and mental abuse to which they had been subjected during their enslavement, Mauritania was found to have 'violated its obligation to protect under article 16 of the Charter' (paragraph 88).

It should be pointed out that the African Children's Committee's decisions are not binding since the African Children's Charter does not provide for sanctions against non-compliant states. Nevertheless, as regards the above-mentioned complaints, the concerned states were required to report to the African Children's Committee within 180 days from receipt of the decisions, on all measures taken to implement the Committee's recommendations. Most importantly, the African Children's Committee's recommendations and decisions are evidence of its unequivocal support to the campaign for the eradication of corporal punishment of children in Africa. In its General Comment 5 the African Children's Committee clearly established a link between state parties' obligations under the African Children's Charter and the need to adopt legislations that prohibit all corporal punishment of children in all settings. The African Children's

53 Decision of 14 April 2014 on Communication 3/Com/001/2012 *Centre for Human Rights and la Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*.

54 Boys studying the Quran at a *madrassa*.

55 Muslim religious leaders and teachers.

56 Decision 3/2017 of 15 December 2017 on Communication 7/Com/003/2015 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*.

Committee consequently clarifies the provisions of article 16(1) of the Children's Charter which requires states to protect children from 'all forms of torture, inhuman or degrading treatment'. Indeed, the African Children's Committee expands its interpretation of 'protection from inhuman and degrading treatment' to the obligation to protect children from corporal punishment in all settings.

3.4 African Children's Charter and national frameworks prohibiting corporal punishment

The influence of the African Children's Charter in achieving the prohibition of corporal punishment is evidenced by existing national frameworks across the continent. National legislations prohibiting corporal punishment in some or all settings have specifically made reference to the African Charter. For instance, in Namibia the Child Care and Protection Act 2015, which came into force in January 2019, specifically states that the Act intends to give effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Child Care and Protection Act 2015⁵⁷ does not explicitly prohibit all forms of corporal punishment inflicted by parents, however light. Nevertheless, as regards alternative care settings and day care, section 228(3) of the Act states:

A person may not administer corporal punishment to a child at any residential child care facility, place of care, shelter, early childhood development centre, a school, whether a state or private school or to a child in foster care, prison, police cell or any other form of alternative care resulting from a court order.

In the same vein in Côte d'Ivoire, in 2009 the Minister of Education signed a ministerial order⁵⁸ advising against the administration of corporal punishment by teachers in public or private schools. In its Preamble the ministerial order makes explicit reference to CRC and the African Children's Charter. The ministerial order is yet to be confirmed by legislation. This implies that corporal punishment is not formally prohibited in schools. Be that as it may, it is important to note that the African Children's Charter serves as reference in official government instruments that aim to ban the use of the corporal punishment of children.

⁵⁷ Namibia Child Care and Protection Act 2015.

⁵⁸ *Arrêté N° 0075 /MEN/DELIC du 28 septembre 2009 portant interdiction des punitions physiques et humiliantes à l'endroit des enfants en milieu scolaire.*

Finally, in Sierra Leone corporal punishment is unlawful as a sentence for crime under the Child Rights Act 2007,⁵⁹ which repeals the Corporal Punishment Act 1960. The Child Rights Act 2007 explicitly states that its aims to provide for the promotion of the rights of the child compatible with CRC and the African Children's Charter. The Child Rights Act 2007 therefore recognises the role of the African Children's Charter in protecting children from violence as it repeals existing legislation allowing the use of corporal punishment.

3.5 African Children's Charter and high-level court judgments ruling against the use of corporal punishment in case law

The African Children's Charter has also been invoked in case law that ruled against the use of corporal punishment in some or all settings. In Zimbabwe, in the case of *The State v C (a Juvenile)*⁶⁰ in 2014, the Harare High Court condemned the use of judicial corporal punishment of children by referring to the African Children's Charter. The judgment by the Harare High Court stated that judicial corporal punishment violated the provisions of the new 2013 Constitution⁶¹ prohibiting physical or psychological torture and cruel, inhuman or degrading treatment or punishment. The judgment followed a review by the Harare High Court of a case dealt with by the magistrate's court in which a 14 year-old boy was convicted for rape and sentenced to judicial corporal punishment under section 353(1) of the Criminal Procedure and Evidence Act. In this judgment Muremba J declared that corporal punishment as a criminal sanction for juveniles was no longer lawful because the new Constitution 2013 placed no limitation on protection from inhuman treatment and, unlike the previous Constitution, made no explicit provision for 'moderate corporal punishment'. The Court further invoked the international human rights instruments ratified by Zimbabwe that have guaranteed the right to freedom from torture, inhuman and degrading punishment, including CRC and the African Children's Charter. In this regard it noted:

This elaboration of the children's rights in conformity with the regional and international conventions that Zimbabwe has ratified demonstrates that the new Constitution does not allow for the imposition of corporal punishment anymore. Clearly s 353 (1) of the Criminal Procedure and Evidence Act [Cap 9:07] is now a law which is inconsistent or *ultra vires* the Constitution.

59 Sierra Leone Child Rights Act 2007.

60 *The State v C (a Juvenile)* HH 718-14 / CRB R 87/14.

61 Constitution of Zimbabwe, 2013.

The Constitutional Court of Zimbabwe gave out a ruling⁶² in 2019 which confirmed the 2014 High Court ruling, finding judicial corporal punishment of juveniles to be unconstitutional and striking down article 353 of the Criminal Procedure and Evidence Act. Once again, international and regional human rights instruments ratified by Zimbabwe were invoked to justify the court decision. In constructing its reasoning, the Court found:

The primary focus on the rehabilitation of the juvenile offender is also present in Article 17(3) of the African Charter on the Rights and Welfare of the Child (the ACRWC), according to which 'the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation'.

Concerning the best interests of the child, the Court held:

The first fundamental principle is one contained in the provisions of Article 3.1 of the CRC. It is to the effect that in all actions concerning children, the best interests of the child shall be a primary consideration. Section 81(2) of the Constitution also provides that 'a child's best interests are paramount in every matter concerning the child. See also Article 4(1) of the ACRWC.

As a result, the Court struck down section 353 of the Criminal Procedure and Evidence Act as unconstitutional. The prohibition was extended to apply to sentences of corporal punishment which had already been imposed but were awaiting execution. It should be pointed out that through this case, the Constitutional Court had the opportunity to declare corporal punishment unconstitutional in all settings. Especially, considering the unlimited interpretation of section 53 of the Constitution. However, the Court chose to limit its interpretation to judicial corporal punishment. This constitutes a missed opportunity for Zimbabwe to achieve full prohibition of corporal punishment of children. As of June 2020, a 2017 High Court decision⁶³ which ruled that corporal punishment of children in homes and in schools was unconstitutional has not yet been ruled upon by the Constitutional Court. This case represents another opportunity for the Zimbabwean Constitutional Court to invoke the African Children's Charter and declare corporal punishment of children unconstitutional.

In South Africa, High Court judges have also invoked the African Children's Charter and its mechanism – The African Children's

62 *The State v Willard Chokuramba* CCZ 10/19 Constitutional Application CCZ 29/15.

63 *Pfungwa & Another v Headmistress Belvedere Junior Primary School & Others* (HH148-17 HC 6029/16) [2017] ZW HHC 148.

Committee's recommendations – to rule against the use of corporal punishment of children in the home. In 2017, in the case of *YG v The State*,⁶⁴ the Gauteng High Court declared the common law defence of 'reasonable chastisement' unconstitutional, particularly in light of sections 9, 10, 12 and 28 of the 1996 Constitution. The case was brought by a father who was found guilty of common assault against his son and who appealed the decision, referring to his right of 'reasonable chastisement'. The South African common law then recognised a defence to the charge of assault for parents who use force to discipline their children, provided this falls within the bounds of 'moderate or reasonable chastisement'. The Court stated that the parental 'right' to exercise 'moderate or reasonable' chastisement, as recognised in common law, ignores children's constitutionally-guaranteed rights to be protected from all forms of violence from public or private sources and to respect to their bodily and psychological integrity (section 12), to respect for their dignity (section 10), to equal protection under the law (section 9), and to be protected from maltreatment, neglect, abuse or degradation (section 28). In its arguments the Court made extensive reference to both CRC and General Comment 8 and their impacts on the national framework for the protection of children in South Africa. Crucially, the Court explicitly referred to the African Children's Committee's recommendation of 2014 which called on South Africa to ban corporal punishment in the home and to promote and provide information and training on positive discipline. The Court highlighted that the Committee had urged South Africa to 'harmonise its current national laws which permit parents to reasonably chastise their children'. The Constitutional Court confirmed this ruling in 2019,⁶⁵ finding the defence to be unconstitutional. This has effectively prohibited all corporal punishment of children in South Africa, which is yet to be confirmed in legislation.

4 Challenges

It has become evident that for the past 30 years, the African Children's Charter and its monitoring body – the African Children's Committee – are essential in the protection and promotion of children's rights in Africa. Using various mechanisms (general conclusions, General Comments, statements, and so forth) the African Children's Committee has repeatedly reminded state parties of their obligations to prohibit and eliminate all forms of corporal

64 *YG v The State* High Court of Gauteng Local Division Case A263/2016.

65 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* Constitutional Court ZACC34.

punishment children. However, in order to ensure that no child is subjected to corporal punishment by 2040, more efforts will need to be made. The prohibition of corporal punishment in the home still needs to be achieved in 45 African states. Some states are openly opposed to prohibition and/or have clearly expressed support for the use of corporal punishment of children. For instance, during the first cycle of the Universal Periodic Review (session 3) of Botswana in 2008 the government rejected recommendations to prohibit all corporal punishment, stating:⁶⁶

The Government ... has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act.

During the second cycle review which took place in 2013 (session 15) the government of Botswana stated its commitment to comply with its treaty obligations regarding 'cultural sensitivities that have a bearing on existing legislation' and in this regard would 'undertake educational awareness campaigns, including on corporal punishment; however, to date there is public support for the retention of corporal punishment'.⁶⁷ The government rejected recommendations to prohibit corporal punishment. Responding to one of the recommendations, it stated:

Botswana does not accept the recommendation. Public consultations have so far confirmed that Botswana still prefer the retention of corporal punishment. However, Government is committed to undertake educational awareness campaign before it can consider prohibition of corporal punishment of children in all settings.

The third cycle examination of Botswana took place in 2018 (session 29). Although consultations held with civil society during the drafting of the national report highlighted corporal punishment as 'being of paramount importance to CSOs',⁶⁸ the national report very parsimoniously addressed the legality of corporal punishment. The government 'noted' (did not support) recommendations to prohibit corporal punishment of children in all settings, including in the home. The government of Botswana clarified that "'noted" recommendations are those Botswana has taken some steps in but not fully implemented the recommendations or is unable to implement the recommendation within this reporting period'.⁶⁹

66 17 March 2009, A/HRC/10/69/Add.1, Report of the working group: Addendum.

67 22 March 2013, A/HRC/23/7, Report of the working group, para 92.

68 6 November 2017, A/HRC/WG.6/29/BWA/1, National report, para 7.

69 2 May 2018, A/HRC/38/8/Add.1, Report of the working group: Addendum.

Botswana has ratified the African Children's Charter since 2001. It has not submitted its initial report to the African Children's Committee.

Achieving law reform to explicitly prohibit corporal punishment in all settings remains a significant challenge in Africa. Many state parties to the African Children's Charter enact laws pertaining to children without including the explicit prohibition of corporal punishment. These missed opportunities undeniably constitute setbacks to the advancement of children's rights in Africa. An example of a missed opportunity is the Central African Republic (CAR) that ratified the African Children's Charter in 2016. This followed an advocacy mission to CAR for the ratification of the Charter by the African Children's Committee in 2014. In June 2020 the President promulgated the first Child Protection Code of the country.⁷⁰ Although the new Child Protection Code explicitly refers to both CRC and the African Children's Charter, it fails to prohibit corporal punishment of children in all settings. Article 3 defines children's ill treatment as any severe or disproportionate punishment or abuse committed against a child or any other deprivation directed against a child causing or likely to cause physical, psychological or economic harm or suffering. It therefore excludes all forms of corporal punishment, however light. In the same vein, article 44 provides that parents must administer family discipline in a way that ensures that the child is treated with humanity. This provision cannot be interpreted as prohibiting all forms of corporal punishment, however light.

Likewise, Gabon enacted its first Children's Code in 2019. Article 83 of the Children's Code 2019 prohibits any form of physical or psychological violence against the child. Given the traditional legal and social acceptance of corporal punishment, this provision cannot be interpreted as prohibiting corporal punishment, however light. Moreover, article 84 of the Children's Code 2019 contains a list of prohibited forms of violence against children but corporal punishment is not included. This is despite the fact that the African Children's Committee had made recommendations concerning the need to ban corporal punishment in the country. In 2015, in its Concluding Observations to Gabon,⁷¹ the Committee stated:

It is noted that violence and abuse against children is predominant within the family. Therefore, the Committee recommends the State Party to ban corporal punishment in all settings. Moreover, the Committee recommends the State Party to put in place a child friendly

70 Loi No 20.016 portant Code de Protection de l'Enfant en République centrafricaine.

71 Concluding Observations on initial report (November 2015) para 26.

and accessible reporting and rehabilitation mechanism for child victims.

The fact that the Gabonese Children's Code did not prohibit all forms of corporal punishment of children is evidence of the limits of the African Children's Committee's recommendations to state parties. It irrefutably establishes the need for further advocacy to address deep-rooted and harmful practices and beliefs, including corporal punishment of children.

Another shortcoming on the part of state parties in ending corporal punishment of children is evidenced in Sierra Leone. As mentioned above, the Child Rights Act 2007 specifically refers to the African Children's Charter and prohibits judicial corporal punishment. However, the Act equally confirms the concept of 'reasonable' and 'justifiable' correction, stating in article 33(2):

No correction of a child is justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child and no correction is justifiable if the child by reason of tender age or otherwise is incapable of understanding the purpose of the correction.

Consequently, corporal punishment is lawful in the home, alternative care settings, day care and schools. In 2017 the African Children's Committee issued recommendations⁷² to Sierra Leone regarding corporal punishment. The Committee stated:

The Committee notes with appreciation the various legislative measures taken to protect children from abuse and torture. However, sources of the Committee indicate that various forms of violence, including physical, physiological and sexual abuse, are still being perpetrated against children. In particular, the Committee was informed that corporal punishment is prevalent within the home and school settings. During the Constructive dialogue with the State Party, the Committee has also observed that the Child Rights Act tolerates reasonable punishment being perpetrated against children; the Committee recommends the State Party to repeal the relevant clause in the Act with a view to completely prohibit corporal punishment in all settings.

This dichotomy suggests that if the ratification of the African Children's Charter and other human rights instruments is an important step, the harmonisation of domestic frameworks with these instruments remains crucial for ensuring the best interests of the child.

It is also important to highlight cases of state parties that have had prohibiting draft laws in preparation for several years but have

⁷² Concluding Observations on initial report (December 2017) para 20.

not taken the necessary steps to enact these laws, despite the African Children's Committee's recommendations. In Comoros, the government reported to the African Children's Committee in May 2017 that the new Criminal Code had been adopted in 2014 and that it prohibits all corporal punishment. In its Concluding Observations⁷³ the Committee recommended that the government repeal provisions of the Criminal Code that authorise corporal punishment of children in the home and school. It called on the government to prohibit all forms of corporal punishment and impose sanctions on the perpetrators. However, as of January 2021 the Criminal Code has not yet been promulgated by the President and, therefore, is not in force.

Another significant challenge is for state parties to engage in constitutional reform when their constitutions make provision for corporal punishment of children. As mentioned above, section 29(2) of the Constitution 2005 of Eswatini provides for 'lawful' and 'moderate chastisement for the purpose of correction'. In its Concluding Observations on the initial report of Eswatini, the African Children's Committee recommended that the state party amend the Constitution to prohibit corporal punishment in all settings. Considering the typical procedure of constitutional reforms, achieving full prohibition of corporal punishment in Eswatini is likely to become a complex process.

5 Recommendations and conclusion

The process of transforming society's behaviour in child rearing and education, and its view of children, takes time. If states are to achieve substantial reductions in the prevalence of violent punishment of children by 2040 (Agenda 2040) they must urgently reform national legislation and work to make prohibition of all forms of corporal punishment of children a reality now. The Agenda 2040 requires states to prohibit corporal punishment as a form of discipline or punishment in schools, institutions and in the criminal justice system by 2020. This target has not been met. As of June 2021 only 28 African states have prohibited corporal punishment in public and private schools. Accelerated efforts are therefore recommended to fulfil this fundamental human rights obligation.

Civil society organisations can play a critical role – at national and regional levels – in advocating law reform to prohibit corporal

73 Concluding Observations on initial report (July 2017) para 18.

punishment of children. For instance, at regional level, the CSO Forum on the African Charter on the Rights and Welfare of the Child, which brings together civil society organisations from across Africa and child rights experts, represents a conducive platform for sharing experiences on national and sub-regional strategies to end the corporal punishment of children. The CSO Forum aims to strengthen the work of the African Children's Committee in carrying out its mandate. Placing a focus on the prohibition and elimination of corporal punishment high on the CSO Forum agenda would undoubtedly strengthen the campaign across Africa.

A crucial option to consider for promoting the campaign to end corporal punishment in Africa is to encourage taking legal action invoking human rights instruments, including the African Children's Charter. As previously seen in the cases of *The State v C (a Juvenile)* and *YG v The State*, respectively in Zimbabwe and South Africa, High Court judges take into account human rights instruments ratified by the country to strike down legal defence for corporal punishment of children. In case domestic remedies have failed, the African Children's Charter communication mechanism represents a remarkable tool to continue to exert pressure on national governments. Civil society organisations can provide the Children's Committee with additional information relevant to the admissibility and determination of the communication. As mentioned above, to date the Committee has addressed the issue of corporal punishment of children through the communication mechanism on two occasions.⁷⁴ Moreover, the Committee monitors the implementation of the outcomes of its decision. This constitutes further pressure on state parties to achieve law reform.

Even though the ultimate goal of the campaign is to achieve the prohibition of corporal punishment in all settings, including in the home, the African Children's Committee should encourage states to prohibit in some selected settings as the opportunity arises. For instance, as the theme of the 2020 Day of the African Child revolved around child-friendly justice systems, the prohibition of corporal punishment both in penal institutions and as a sentence for crimes could be promoted. As of June 2020 nearly half of the African states have still not prohibited corporal punishment of children in penal institutions, while five states are yet to prohibit corporal punishment

74 Decision of 14 April 2014 on Communication 3/Com/001/2012 *Centre for Human Rights and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal* and Decision 3/2017 of 15 December 2017 on Communication 7/Com/003/2015 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v the Republic of Mauritania*.

being handed down as a sentence for a crime committed by children under state, traditional and/or religious law.

The prohibition of all corporal punishment of children can also play a preventive and educational role. Reforming national legislation to achieve prohibition in all settings therefore is a milestone achievement. It sends a clear message to adults and children that corporal punishment is no longer acceptable and that the law protects children from all assault as it does for adults. Once prohibition is in place, states and societies must ensure its effective implementation in the best interests of the child in order to achieve an end to corporal punishment. In order to ensure that children are no subjected to corporal punishment by 2040, this will require society-wide measures to raise awareness and understanding of the law, aimed at changing social norms and attitudes around violence in child rearing. A concerted effort between the African Children's Committee, state parties and civil society, therefore, is recommended.