

An Analysis of the Role of African Values, Traditions and Morals in the Interpretation of Children's Rights

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Abstract

Both the *African Charter on Human and Peoples' Rights* (ACHPR) and the *African Charter on the Rights and Welfare of the Child* (ACRWC) expressly provide for African values, traditions and morals. This inclusion is a unique characteristic that illustrates the regionality of these two instruments. The question of how "African values" should be understood and interpreted, however, remains somewhat unclear with the possibility of challenges arising in its interpretation and application. The article considers how African values are incorporated into the ACHPR and the ACRWC to provide an understanding of African values. The article subsequently engages in an analysis of the significance of the incorporation of African values for the interpretation of children's rights by considering both criticism and praise which have been levelled against the inclusion of African values in the ACRWC and ACHPR. This analysis will ultimately aid in determining the contribution of African values to the interpretation and possible realisation of children's rights.

Keywords

African values; traditions; morals; children's rights; ACRWC; ACHPR; African human rights system.

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1 Introduction

The notion of human rights is not a novel idea in the African community. While African concepts of human rights are not necessarily structured according to Western terms, African values still recognise the concept and practice of human rights.¹ The central notions of human dignity and integrity, for example, in human rights discourse are acknowledged as being fundamental values by African value systems as they are manifested in the community's responsibility to provide for its members. Moreover, the traditional African value system embraces the fact that children are also worthy of the right to human dignity and that right being respected.² As succinctly submitted by Kaime:³

In short, children's rights discourse is a culturally legitimate enterprise within the African cultural context.

The African continent is culturally unique and this characteristic should be taken seriously when recognising and realising rights.⁴ Two regional instruments are central to the discussion, the *African Charter on Human and Peoples' Rights* (ACHPR)⁵ and the *African Charter on the Rights and Welfare of the Child* (ACRWC).⁶ As regional human rights instruments, the expectation is to place the human rights discourse in the specific African context.⁷ Both of these regional instruments emphasises the importance of African values, traditions and morals ("African values") in the interpretation of rights.⁸ Considered to be a unique element that highlights the regionality of these instruments, in comparison to the *United Nations Convention on the Rights of the Child* (CRC),⁹ for example, the African values enshrined in the ACHPR and ACRWC add a new dimension to the engagement with rights. The question of how "African values" should be interpreted, however, remains somewhat unclear. For example, the ACHPR and the ACRWC

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¹ Kaime *African Charter on the Rights and Welfare of the Child* 39.

² Sloth-Nielsen and Mezmur 2007 *AHRLJ* 347.

³ Kaime *African Charter on the Rights and Welfare of the Child* 40.

⁴ Customary law is considered in many instances and differs quite vastly from traditional Western law. Principles such as ubuntu are for example also considered in customary African law.

⁵ *African Charter on Human and Peoples' Rights* (1981) (the ACHPR).

⁶ *African Charter on the Rights and Welfare of the Child* (1990) (the ACRWC).

⁷ Chirwa 2002 *Int'l J Child Rts* 157.

⁸ See for example the Preamble and Arts 17, 18 and 29 of the ACHPR and the Preamble and articles 11, 31 and 46 of the ACRWC.

⁹ *United Nations Convention on the Rights of the Child* (1989) (the CRC).

refer to the concept of African values in different formulations.¹⁰ Some problems in the interpretation and application of "African values" have arisen due to the lack of an accurate definition, as well as the diversity in values and cultures that are present in the African continent.¹¹

This article considers the manner in which provision is made for African values in both the ACHPR and the ACRWC. This will be done by highlighting specific provisions of both these instruments and also considering their interpretation. Focusing on a children's rights perspective, however, the emphasis will be on the inclusion of African values in the ACRWC. At the centre of the analysis is establishing the significance of the incorporation of African values for the interpretation of children's rights by considering both the criticism and the praise which have been levelled against the inclusion of African values in the ACHPR and the ACRWC. This analysis will ultimately aid in determining the contribution of African values to the interpretation and possible realisation of children's rights.

2 The inclusion of African values in the *African Charter on Human and Peoples' Rights*

The ACHPR provides the foundation for the African human rights system.¹² In examining the inclusion of African values in the ACHPR, it is important to recognise the role and nature of the ACHPR. The ACHPR confirms and supports universal human rights principles, but the regionality that it affords to the recognition and protection of rights provides for the necessary contextualisation required in the African continent.¹³ The need for contextualisation was also recognised during the drafting of the ACHPR, with the suggestion that distinctively African considerations should be provided for in the text of the Charter and to acknowledge the importance of African values and morals.¹⁴

The Preamble to the ACHPR provides for the consideration of:

¹⁰ Article 18 of the ACHPR for example refers to "moral and traditional values", while Art 29 refers to "positive African cultural values". This is also seen in the ACRWC, which refers to "positive African morals, traditional values and cultures" in contrast to "African cultural values" in Art 31.

¹¹ Sloth-Nielsen and Mezmur 2008 *JAL* 167.

¹² Mutua 1995 *Va J Int'l L* 339.

¹³ Udombana 2004 *Stan J Int'l L* 110.

¹⁴ Udombana 2004 *Stan J Int'l L* 110. Also see in general Brems *Human Rights*.

the virtues of their historical tradition and the values of African civilisation which should inspire and characterize their reflection on the concept of human and peoples' rights.

African values should accordingly be considered when interpreting and understanding the rights in the ACHPR. A few substantive provisions also incorporate the concept of African values.

In the context of education, Article 17(3) provides that:

The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 17(3) thereby signifies the importance of the duty of the state to incorporate African values in relation to the right to education. Focusing on the role of the family, Article 18 stipulates that:

The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

Article 18 underscores that the family plays a central role in society and serves as the custodian of morals and traditional values.¹⁵ The accompanying duty of the state is made clear in Article 18(2), which places a duty on the state to assist the family in this regard.¹⁶ Taking into consideration the inclusion of African values in both Articles 17 and 18 it is clear that both the state and the family are obliged to promote and protect African values.

In the context of duties and the acknowledgement of African values, Article 29(7) plays a central role as it provides that every individual has the duty:

To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

From the formulation of Article 29(7), it is evident that it places a positive duty on the individual. While the addition of duties on the individual in the broader sense is regarded as a unique characteristic that provides a regional perspective, it has also drawn criticism.¹⁷ Understanding the specific duty to "preserve and strengthen positive African cultural values" seems to face some challenges in its interpretation, with Udombana

¹⁵ Article 18(1) of the ACHPR.

¹⁶ Kaime 2005 *AHRLJ* 226.

¹⁷ Udombana 2004 *Stan J Int'l L* 111; Sloth-Nielsen and Mezmur 2008 *JAL* 167; Eriamiatoe "Overview of the Country Studies" 36.

submitting that the duty "seems ambiguous".¹⁸ Considering the variety of values and cultures in Africa, as well as the lack of a clear definition of "positive values", the possibility of challenges relating to the interpretation is not unfounded. This is illustrated in the ACHPR, that provides for both "traditional values" and "positive African cultural values". Furthermore, if there is uncertainty regarding the interpretation, it could also lead to challenges in the application and ultimately the realisation of the rights.¹⁹ It has been argued that in the instance that there is a challenge in the interpretation, which results in a conflict between international human rights norms and African values, the international human rights norms should prevail.²⁰

At the core of the ACHPR is the aim to strike a balance between universal human rights norms and unique African elements.²¹ It is important to not view these elements on the face of it as conflicting with each other - but rather as a way to strengthen the interpretation of rights and to engage with rights in the African context.

3 The role of African values in the *African Charter on the Rights and Welfare of the Child*

The Preamble to the ACRWC directly acknowledges the central role of African values and that it should be considered by asserting that:²²

the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child.

Even though the ACRWC, like the ACHPR, is derived from universal sources, it requires that the rights of the child must be reflective of the realities that a child faces in Africa.²³ The Preamble of the ACRWC therefore stresses the importance of the cultural context that must be considered.²⁴ This is also in accordance with a child-centred approach, which places the child's rights at the centre of the analysis. Not only should the child's rights be recognised and protected, but the realisation of these rights should be sensitive to the child's culture and specific circumstances.

¹⁸ Udombana 2004 *Stan J Int'l L* 111; Sloth-Nielsen and Mezmur 2008 *JAL* 167.

¹⁹ Udombana 2004 *Stan J Int'l L* 111; Sloth-Nielsen and Mezmur 2008 *JAL* 167.

²⁰ Udombana 2004 *Stan J Int'l L* 111.

²¹ Udombana 2004 *Stan J Int'l L* 111.

²² Also see Lloyd 2002 *Int'l J Child Rts* 180.

²³ Kaime 2009 *African Journal of Legal Studies* 121.

²⁴ Thompson 1992 *ICLQ* 434.

The ACRWC recognises that the child holds "a unique and privileged position in the African society" and that for the child to fully develop their personality, the child must grow up in a family environment that promotes love, happiness and understanding.²⁵ The African concept of human rights enforces the notion that children are a valuable part of society as traditional African culture recognises the worth of children and the need to protect them.²⁶ This reinforces the child-centred approach as the focus is not only on the protection of the child but also on recognising the child's worth, thereby acknowledging the child as a rights-bearer in their own right.

Apart from the Preamble, the ACRWC does not make many direct references to African values in its provisions. Two substantive provisions that deal with specific rights include this concept: Articles 11 and 31. These two articles provide for the child's right to education²⁷ and the responsibilities of the child.²⁸ Article 46, on the sources of inspiration for the African Committee of Experts on the Rights of the Child (ACERWC), is the last example to include a reference to African values.²⁹

Like the ACHPR, the ACRWC education clause also includes the incorporation of African values. Article 11 is quite comprehensive in its recognition of education rights and Article 11(2) specifies the aims to which the education of the child should be directed. The ACRWC does not merely recognise the child's right to education but also provides scope and content to the right in the manner that it envisages how education should be used to achieve specific aims.

In comparing the ACRWC to the CRC it becomes clear that the aim of using education to develop the child's respect for culture is different in these two instruments. The CRC refers to education that must develop the child's respect for his or her parents and also for his or her own culture and that of others.³⁰ Of particular importance in the ACRWC is Article 11(2)(c), which stipulates that positive African values, morals and cultures should be preserved and strengthened by education.³¹ This approach ensures that the ACRWC applies a regional approach that is context-sensitive to the African

²⁵ Preamble to the ACRWC.

²⁶ Kaime *African Charter on the Rights and Welfare of the Child* 39.

²⁷ Article 11 of the ACRWC.

²⁸ Article 31 of the ACRWC.

²⁹ For further information on the ACERWC, see Arts 32-41 of the ACRWC.

³⁰ Article 29(1)(c) of the CRC; Beiter *Protection of the Right to Education* 217; Chirwa 2002 *Int'l J Child Rts* 162.

³¹ Article 11(2)(c) of the ACRWC; Chirwa 2002 *Int'l J Child Rts* 162.

child.³² This article is also framed more broadly than the Preamble, as it refers not only to African values and traditions but also includes "cultures" and "morals".

The regional and context-sensitive approach of the ACRWC is further strengthened by the fact that the ACRWC includes three new aims of education that are not listed in the CRC.³³ They are preserving national independence and territorial integrity;³⁴ promoting African unity and solidarity;³⁵ and promoting the child's understanding of primary health care.³⁶ The fact that a decision was made to include the first two additional aims is indicative that the struggle for independence from foreign powers was a point that required attention and once again signifies the African context that the ACRWC highlights. How these two aims should be included in terms of education should be seen in light of the struggle that the African continent experienced under colonial rule and the effect that this has had on the education system.³⁷ Fostering African unity and solidarity through education can be linked to the promotion of the understanding and appreciation of unique African histories and narratives.

The incorporation of African values in the child's education entails an emphasis on the child's culture. This means that education must be contextualised to meet the needs of different communities. This also strengthens the need for education to be adaptable. The child's education should therefore incorporate and be reflective of the child's cultural heritage, traditions, history and specific African challenges. Only then can the child's right to education be considered truly child-centred. The close connection that African values and traditions share with culture is thus confirmed by the ACRWC. What is clear is that the inclusion of this concept in the education clause is indicative of the fact that culture, traditions and customs should not be divorced from the child's education. Education should be inclusive of the child's African values.

³² Article 11(2)(c) of the ACRWC; Beiter *Protection of the Right to Education* 217.

³³ Articles 11(2)(e)-(h) of the ACRWC; Thompson 1992 *ICLQ* 435; Gose *African Charter on the Rights and Welfare of the Child* 114; Beiter *Protection of the Right to Education* 217.

³⁴ Article 11(2)(e) of the ACRWC.

³⁵ Article 11(2)(f) of the ACRWC.

³⁶ Article 11(2)(g) of the ACRWC.

³⁷ Beiter *Protection of the Right to Education* 218.

Building on the ACHPR, the ACRWC also provides for the responsibilities of children in Article 31, thereby reinforcing their rights.³⁸ A difference in the use of language is identified, however, as Article 31 states that every child shall have responsibilities towards his or her family, society, the state, communities that are legally recognised as well as the international community. In its General Comment dealing specifically with Article 31,³⁹ the ACERWC notes that the inclusion of responsibilities denotes that these are not legal duties that could lead to penal sanction if violated.⁴⁰ The enjoyment of the rights in the ACRWC is thus not conditional on the fulfilment of these responsibilities.⁴¹

This provision is subject to the child's age and ability, and any limitations contained in the ACRWC.⁴² Article 31 therefore contains two internal qualifiers.⁴³ The first internal qualifier centres on the child's participation rights and is inclusive of the child's age and evolving capacities. The second internal qualifier acknowledges that the responsibilities of the child are also subject to the provisions of the ACRWC.⁴⁴

These internal qualifiers clearly illustrate the ACRWC striking a balance between recognising the value of the child's role in society by being able to be active participants in their society in line with their responsibilities, whilst at the same time taking into account their age and abilities.⁴⁵ Children's responsibilities must therefore be clearly linked and proportionate to their evolving capacities.⁴⁶

³⁸ ACERWC *General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on "The Responsibilities of the Child"* (2017) (ACERWC *General Comment on Article 31*) para 7.

³⁹ See ACERWC *General Comment on Article 31*.

⁴⁰ ACERWC *General Comment on Article 31* para 9.

⁴¹ ACERWC *General Comment on Article 31* para 10.

⁴² The preambular paragraph of Art 31 provides: "Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty ..."; ACERWC *General Comment on Article 31* para 48.

⁴³ Sloth-Nielsen and Mezmur 2008 *JAL* 170; ACERWC *General Comment on Article 31* para 48.

⁴⁴ Sloth-Nielsen and Mezmur 2008 *JAL* 170, 172; ACERWC *General Comment on Article 31* para 48-50.

⁴⁵ ACERWC *General Comment on Article 31* para 11; Sloth-Nielsen and Mezmur 2008 *JAL* 171; ACERWC *General Comment on Article 31* paras 49-51.

⁴⁶ Chirwa 2002 *Int'l J Child Rts* 169.

Several specific responsibilities are listed in Article 31,⁴⁷ and most important for this discussion is Article 31(d) which holds that the child shall have the duty:

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

Article 31(d) consequently consists of two components, firstly the duty to preserve and strengthen African values and secondly, that this must take place in a spirit of tolerance, dialogue and consultation. While two components can be identified in the article, it is important to interpret them together and in a complementary manner. The two components therefore form a whole as the second component reinforces the first.⁴⁸

A proper reading and understanding of this provision involves that the preservation of African values should not be understood as referring to African values in a set and static form or in contradiction of other rights⁴⁹ but rather as the promotion of the child's positive interactions with other members of the community by employing a more flexible approach when interpreting African values.⁵⁰ The preservation and strengthening of African values in terms of this approach emphasises that the child should not only take but also give – reciprocity is emphasised. The child should be afforded benefits such as education and use the opportunities provided, but should do so in a spirit of reciprocity that is in line with African values, to counter notions of individualism and egocentrism. It has been argued that this approach will lead to the enhanced social cohesion that is necessary for society to be viable in the long run.⁵¹ The ACERWC has also confirmed the

⁴⁷ The responsibilities included in Art 31 are:
"(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
(b) to serve his national community by placing his physical and intellectual abilities at its service;
(c) to preserve and strengthen social and national solidarity;
(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
(e) to preserve and strengthen the independence and the integrity of his country;
(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity."

⁴⁸ Sloth-Nielsen and Mezmur 2008 *JAL* 184; ACERWC *General Comment on Article 31* para 77.

⁴⁹ Such as cultural and social practices deemed as harmful.

⁵⁰ Sloth-Nielsen and Mezmur 2008 *JAL* 183.

⁵¹ Sloth-Nielsen and Mezmur 2008 *JAL* 183.

close connection between the child's right to education in Article 11 and the responsibilities of the child in Article 31.⁵²

Considered to be a unique characteristic of the ACRWC in the context of children's rights, Article 31 also provides support for and strengthens a child-centred approach.⁵³ The result is that the child's position as an active participant in the realisation of their rights is confirmed.⁵⁴ Article 31 in general has been regarded by some as controversial, thereby garnering critique and opposition, whilst others have praised the inclusion of such a provision.⁵⁵ The incorporation of individual duties as part of the concept of African values is discussed in more detail below.⁵⁶

Lastly, Article 46 emphasises the importance of international and regional law and specifically refers to African values and traditions as a source of interpretation for the ACERWC.⁵⁷ In line with Article 46, it is submitted that the ACERWC should for example underscore the importance of African values when considering state party reports, and should determine whether state parties have complied with their obligations as set out in the ACRWC. The Concluding Observations provide an ideal opportunity for the ACERWC to comment on this specific issue.

A practical example would be to focus on whether a state party has complied with the aim of directing education to the preservation and strengthening of positive African morals, traditional values and cultures as set out in Article 11(2)(c). This is a clear instance of where the incorporation of African values can be measured. Education can therefore be seen as a vehicle for the promotion and protection of African values as it links to Articles 11, 31 and 46 of the ACRWC. Education thus serves as a valuable method of transferring and incorporating African values for the benefit of the child by embracing a context-sensitive approach for the interpretation of rights through a child-centred lens.⁵⁸

⁵² ACERWC *General Comment on Article 31* para 34.

⁵³ Mezmur 2008 *SAPL* 24, 25.

⁵⁴ See in general Mezmur 2008 *SAPL* 1-29.

⁵⁵ See in general Olowu 2002 *Int'l J Child Rts* 127-136; Chirwa 2002 *Int'l J Child Rts* -177; Lloyd 2002 *AHRLJ* 11-31; Lloyd 2002 *Int'l J Child Rts* 179-198.

⁵⁶ See section 4 below.

⁵⁷ Article 46 of the ACRWC states: "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 on 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."

⁵⁸ ACERWC *General Comment on Article 31* para 34.

As an expert that has worked extensively in the field of children's rights and the ACRWC, Sloth-Nielsen has confirmed that the *travaux préparatoires* of the ACRWC no longer exist.⁵⁹ With no clear documentation on the negotiating, drafting and preparation of the ACRWC available to provide guidance on the interpretation of African values in the ACRWC, a general understanding of the most prominent features of African values is set out below, which attempts to aid in developing a better understanding of the concept of African values.

4 Understanding African values

In a reading of the ACHPR and the ACRWC specific African features can be identified that contextualise and provide the necessary regionality to these instruments, that are cognisant of specific African needs and challenges. Two distinct features have however been highlighted in academic commentary as central to the understanding of African values. Firstly, the recognition of duties, and secondly, the importance of the group in traditional African culture (communitarianism).⁶⁰ While both these features have to some extent already been referred to in the context of the provisions of the ACHPR and the ACRWC, what follows is an analysis of these two features in order to establish a clearer understanding of African values. It is only once this has been completed that the significance of African values for the interpretation of children's rights can be ascertained.

4.1 Individual duties

Both the ACHPR and the ACRWC specifically recognise the duties/responsibilities of the individual.⁶¹ They are not the first human rights instruments to refer to the duties of the individual, however.⁶² The *Universal Declaration of Human Rights* (UDHR),⁶³ the *International Covenant on Civil and Political Rights* (ICCPR),⁶⁴ and the *International Covenant on*

⁵⁹ Johnson and Sloth-Nielsen 2020 *AHRLJ* 647; Mezmur 2020 *Int'l J Child Rts* 695.

⁶⁰ Heyns 1996 https://www.chr.up.ac.za/images/publications/centrepublishations/occasional_papers/; Sloth-Nielsen and Mezmur 2008 *JAL* 164.

⁶¹ Articles 27-29 of the ACHPR; Art 31 of the ACRWC; Chirwa 2002 *Int'l J Child Rts* 169.

⁶² Sloth-Nielsen and Mezmur 2008 *JAL* 160; ACERWC *General Comment on Article 31* para 3.

⁶³ Article 29(1) of the *Universal Declaration of Human Rights* (1948) states: "Everyone has duties to the community in which alone the free and full development of his personality is possible." Sloth-Nielsen and Mezmur 2008 *JAL* 160; ACERWC *General Comment on Article 31* para 3.

⁶⁴ The Preamble of the *International Covenant on Civil and Political Rights* (1966) (ICCPR) holds that: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the

Economic, Social and Cultural Rights (ICESCR)⁶⁵ all include general and brief references to the duties of the individual. Explicit duties are imposed on the individual, however, and are codified in terms of the ACHPR, which dedicates three articles specifically to duties⁶⁶ and a specific provision in the ACRWC providing for the responsibilities of the child.⁶⁷ The CRC, in contrast to the ACRWC, makes no express provision for the duties of the child and the duty bearers seem to refer only to the state and parents.⁶⁸ This more specific approach to imposing duties on the individual is consequently considered to be a trademark of the African human rights system.⁶⁹ An attempt is therefore made to balance cultural relativism with the universalism of human rights.⁷⁰

The notion regarding the incorporation of duties can be related to the concept of reciprocity. In the general sense, this is centred on the notion that for every right there is also a corresponding duty.⁷¹ Focusing on Article 31 of the ACRWC and the responsibilities imposed on the child, they should be viewed within the African value system.⁷² It has been suggested that the placement of Article 31 as the last substantive provision of the ACRWC is noteworthy.⁷³ In this regard Sloth-Nielsen and Mezmur⁷⁴ posit that:

It seems that the drafters did this consciously, to underline the point that responsibilities are complementary to rights, rather than undermining them. We should conclude that the drafters did not intend governments to make the enjoyment of human rights dependent on the fulfilment of duties, but rather saw duties as the balancing elements to reinforce rights.

This has since been confirmed by the ACERWC in the General Comment on Article 31, which provides that the placement of Article 31 is indeed

promotion and observance of the rights recognized in the present Covenant."; ACERWC *General Comment on Article 31* para 3.

⁶⁵ The Preamble of the *International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR) mirrors the: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."; ACERWC *General Comment on Article 31* para 3.

⁶⁶ See Arts 27-29 of the ACHPR; Sloth-Nielsen and Mezmur 2008 *JAL* 160; ACERWC *General Comment on Article 31* paras 4-5.

⁶⁷ Article 31 of the ACRWC; Sloth-Nielsen and Mezmur 2008 *JAL* 160.

⁶⁸ Sloth-Nielsen and Mezmur 2008 *JAL* 162.

⁶⁹ Sloth-Nielsen and Mezmur 2008 *JAL* 160.

⁷⁰ Sloth-Nielsen and Mezmur 2008 *JAL* 165.

⁷¹ Heyns 1996 https://www.chr.up.ac.za/images/publications/centrepublishations/occasional_papers/; Sloth-Nielsen and Mezmur 2008 *JAL* 159.

⁷² Sloth-Nielsen and Mezmur 2007 *AHRLJ* 331.

⁷³ Sloth-Nielsen and Mezmur 2008 *JAL* 187.

⁷⁴ Sloth-Nielsen and Mezmur 2008 *JAL* 187.

"careful and deliberate" by indicating the priority and emphasis. The rights of children are first set out and only then are responsibilities included.⁷⁵

The responsibilities in Article 31 of ACRWC, especially those incorporating African values, should therefore not be viewed as providing the opportunity to limit or violate the rights of the child.⁷⁶ Quite the opposite is true, as the incorporation of African values can lead to strengthening the rights of the child. Article 31, for example, reinforces child participation rights by providing children with the opportunity to be active participants in their own right.⁷⁷ Article 31 thus reinforces and complements the rights in the ACRWC to provide a holistic understanding of the child's rights.

4.2 Communitarianism

The idea of communitarianism is regarded as a traditional feature and value of African culture.⁷⁸ The ACHPR, for example, in its title already acknowledges the importance of communal and collective rights.⁷⁹ Communitarianism accordingly places emphasis on the importance of the group versus the individual. The African concept of human rights highlights that the needs of the individual must be balanced with the notion that the individual is also rooted in a community. The African concept of human rights (traditional as well as contemporary) thus accepts the importance of the individual whilst at the same time acknowledging the importance of the group.⁸⁰

The centrality of the family unit also forms part of the idea of communitarianism. In comparing the ACRWC to the CRC in this context, arguments have been put forward that the ACRWC underscores the importance of the family to a greater extent.⁸¹ Mezmur⁸² provides that the ACRWC has, for example:

informed the adoption of legislations that rely on non-resource intensive legal regimes such as existing community practices and structures that promote children's rights.

⁷⁵ ACERWC *General Comment on Article 31* para 13.

⁷⁶ Sloth-Nielsen and Mezmur 2008 *JAL* 187; ACERWC *General Comment on Article 31* para 32.

⁷⁷ Sloth-Nielsen and Mezmur 2008 *JAL* 188; Chirwa 2002 *Int'l J Child Rts* 169.

⁷⁸ Sloth-Nielsen and Mezmur 2008 *JAL* 164.

⁷⁹ ACERWC *General Comment on Article 31* para 5; Heyns 1996 https://www.chr.up.ac.za/images/publications/centrepublishings/occasional_papers/.

⁸⁰ Sloth-Nielsen and Mezmur 2008 *JAL* 164.

⁸¹ Sloth-Nielsen and Mezmur 2008 *JAL* 173; Mezmur 2020 *Int'l J Child Rts* 696, 697.

⁸² Mezmur 2020 *Int'l J Child Rts* 697.

The centrality of the family is made clear in Article 18 of the ACHPR, which recognises the family as "the natural unit and basis of society" and that the state must protect and care for its physical and moral health.⁸³ Also in Article 18 on the protection of family life, the ACRWC follows the same textual formulation as the ACHPR by identifying the family as the foundation of society.⁸⁴ It however places a duty on the state to protect and support the establishment and development of the family.⁸⁵ Both the ACHPR and the ACRWC emphasise the centrality of the family in serving as the guardian of moral and traditional values.⁸⁶

The education clause of the ACRWC serves as an excellent example of the inclusion of African values by underscoring the importance of community and family.⁸⁷ Article 11 not only directly incorporates African values,⁸⁸ but adds that education must be directed at fostering respect for human rights,⁸⁹ preparing the child to be a responsible member of society,⁹⁰ and promoting African Unity and Solidarity,⁹¹ further strengthening and indicating the significance of community and family, and avers that education plays a valuable role in entrenching these values.

Having already considered the inclusion of duties in both the ACHPR and the ACRWC in the context of African values, what becomes clear is that a strong connection can (and should) be made between the first and second distinct features. These duties and the importance of communitarianism are thus interlinked.

5 The significance of African values for the interpretation of children's rights

In the field of children's rights, the CRC provides a universalistic viewpoint of the recognition and protection of rights.⁹² The history and drafting of the CRC have indicated, however, that not many African states were

⁸³ Article 18(1) of the ACHPR.

⁸⁴ Article 18(1) of the ACRWC; Kaime 2005 *AHRLJ* 226.

⁸⁵ Article 18(1) of the ACRWC; Kaime 2005 *AHRLJ* 226.

⁸⁶ Article 18(2) of the ACHPR; Art 31(d) of the ACRWC.

⁸⁷ Article 11 of the ACRWC.

⁸⁸ Article 11(2)(c) of the ACRWC.

⁸⁹ Article 11(2)(b) of the ACRWC; ACERWC *General Comment on Article 31* paras 34-35.

⁹⁰ Article 11(2)(d) of the ACRWC; ACERWC *General Comment on Article 31* para 34.

⁹¹ Article 11(2)(f) of the ACRWC; ACERWC *General Comment on Article 31* para 34.

⁹² Kaime 2005 *AHRLJ* 222

consulted⁹³ and that a children's charter specifically recognising the needs of the child of Africa was necessary.⁹⁴ While the CRC and ACRWC should not be viewed as opposing instruments on the rights of the child, the regionality that the ACRWC provides for the contextualisation of the child's rights is invaluable.⁹⁵ Kaime⁹⁶ highlights the value of the ACRWC to the broader narrative on children's rights by stating that:

It has been argued that an approach which is sympathetic to these differences infuses cultural legitimacy and therefore efficacy to the whole enterprise of children's rights.

A significant contribution made by the inclusion of African values is that it contextualises the child's rights in the African community. This is in line with the belief that regional instruments are perfectly situated to deal with human rights challenges in their own context, while still safeguarding African values, morals and traditions.⁹⁷ The ACRWC is successful in this endeavour as it is not only reflective of the normative consensus and universalism provided by the CRC, but also integrates the African context in the children's rights discourse.⁹⁸ Signatories to the ACRWC therefore commit to a child-centred approach that is context-sensitive to the values, culture and traditions of the child and its community, and ensures that the needs of children remain central to the interpretation of their rights.

Considering the role of the ACERWC and the clarity provided by Article 46 of the ACRWC that African values should be a source of inspiration, the ACERWC should determine to what extent state parties have integrated African values in their periodic reports and domestic legal frameworks. This argument is also applicable to the African Commission on Human and Peoples' Rights, which has to protect and promote human and peoples' rights and provide interpretive guidance on the ACHPR.⁹⁹

⁹³ Kaime 2009 *African Journal of Legal Studies* 131; Oestreich 1998 *Global Governance* 184; Viljoen 1998 *CILSA* 200 provides the following statistics: "Only three African states participated for at least five of the nine years that the working group took to draft the final proposal. This is the lowest percentage of all continents, contrasting sharply with west European (61% of the continental potential) and even Latin American (29%) participation over a similar period."; Viljoen *International Human Rights Law* 133, 392.

⁹⁴ Olowu 2002 *Int'l J Child Rts* 128; Kaime 2009 *African Journal of Legal Studies* 131-132.

⁹⁵ Olowu 2002 *Int'l J Child Rts* 128; Viljoen *International Human Rights Law* 392.

⁹⁶ Kaime 2005 *AHRLJ* 222.

⁹⁷ Lloyd 2002 *Int'l J Child Rts* 183.

⁹⁸ Sloth-Nielsen and Mezmur 2008 *JAL* 187.

⁹⁹ Article 45 of the ACHPR.

Another consideration that indicates that African values could potentially result in a valuable contribution in the broader African context is in relation to intra-Africa learning.¹⁰⁰ Courts in Africa could look to the jurisprudence of African jurisdictions for guidance on how African values have been interpreted and applied in a specific jurisdiction to enable intra-Africa learning.¹⁰¹

The two aforementioned considerations can also be viewed as being interrelated. Mezmur¹⁰² notes that:

the African Committee should also adopt a standard practice of asking State Parties to indicate through the state reporting process examples of case law that invoke the provisions of the Charter in domestic courts.

Courts as well as the ACERWC should accordingly not shy away from African values, but rather apply them as means to strengthen children's rights, resulting in a richer and context-sensitive understanding of rights for the African child. For example, when courts have to interpret rights, not only the CRC should be consulted as an interpretative source. The ACRWC provides additional protection and recognition of children's rights that cater to the African child and unique African challenges.¹⁰³ South African courts have, for example, shown willingness to reference the provisions of the ACRWC in the interpretation of children's rights.¹⁰⁴ African values as enshrined in the ACRWC should therefore be a source of interpretation in the domestic context.

As noted above,¹⁰⁵ the child's right to education in the ACRWC can be used to measure the protection and promotion of African values. Moreover, the child's education should be used to facilitate the strengthening of African values in the community. While it is crucial to have an understanding of the interpretation and scope of African values for the rights of the child, this should not be the end of the road. It is therefore crucial that further research be undertaken that moves beyond the normative toward the practical

¹⁰⁰ Mezmur 2020 *Int'l J Child Rts* 699.

¹⁰¹ Mezmur 2020 *Int'l J Child Rts* 699.

¹⁰² Mezmur 2020 *Int'l J Child Rts* 699.

¹⁰³ Olowu 2002 *Int'l J Child Rts* 128; Kaime 2009 *African Journal of Legal Studies* 131-132.

¹⁰⁴ See for example *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 53 in relation to non-discrimination; and *S v M* 2008 3 SA 232 (CC) para 31 and *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 2 SACR 130 (CC) para 76 in relation to the principle of the child's best interests as provided for in the ACRWC.

¹⁰⁵ See section 3 above.

application of African values in the implementation and realisation of children's rights.

With this in mind, a few recommendations are made. Firstly, state parties should actively take steps to incorporate or include African values in their domestic legislation, regulations or policy documents that concern the rights of the child. Once again, using education as an example, state parties should look to the inclusion of African values, in both the general sense but also sensitive to the specific jurisdiction, in the national curriculum. This will provide legitimacy to the commitment to strengthening and preserving African values in a child-focused manner.

Concerning the reporting mechanism of the ACRWC,¹⁰⁶ both state parties and the ACERWC should underscore the inclusion of African values as underlying the ACRWC. Article 42(b) sets out that the ACERWC has the appropriate mandate to monitor the implementation of the Charter. This includes the promotion and protection of African values as recognised in the ACRWC.

As access to the *travaux préparatoires* of the ACRWC is not possible¹⁰⁷ and possible challenges to the interpretation and application of African values exist, it would be meaningful for the ACERWC to provide additional guidance for the sake of clarity. This could take the form of a General Comment dealing with the role of African values in the ACERWC and stipulating how these values should be practically applied and included by state parties. As such, the General Comment on Article 31 has provided significant guidance and valuable insight.¹⁰⁸ It is recommended, however, that a General Comment dealing with African values exclusively in the broader sense and not just concerning responsibilities in the ACRWC would result in a clearer understanding. This is in line with the mandate of the ACERWC, as the Committee should "formulate and lay down principles and rules" that protect the rights and welfare of children.¹⁰⁹ Additionally, Article 42(c) stipulates that the Committee can interpret the provision of the Charter. This supplementary guidance by the Committee would provide a strong normative framework that state parties could use to ensure that they meet the obligations set out in the ACRWC, specifically concerning African values.

¹⁰⁶ See in general Art 43 of the ACRWC.

¹⁰⁷ Johnson and Sloth-Nielsen 2020 *AHRLJ* 647; Mezmur 2020 *Int'l J Child Rts* 695.

¹⁰⁸ See in general ACERWC *General Comment on Article 31*.

¹⁰⁹ Article 42(a)(ii) of the ACRWC.

6 Conclusion

The concept of African values has been critiqued by academic commentators for not being clearly defined, which could lead to concerns in the interpretation and application thereof. Additionally, arguments have been made that its inclusion in the ACRWC results in an undue burden on the child by imposing responsibilities on the child or that it results in a limitation of the child's rights. The ACERWC has since made great strides by providing clarity in the General Comment on Article 31.¹¹⁰ This article has highlighted that African values can make a valuable contribution to the contextualisation of children's rights in the African context. With the importance of communitarianism and duties recognised as the two distinct features of African values, these features in effect serve to strengthen the child's rights specifically as seen through an African lens.

The clear inclusion of African values in both the ACHPR and the ACRWC sends an important message, namely that African values should be afforded a prominent place in the children's rights discourse.¹¹¹ In staying true to Article 31(d) of the ACRWC, it opens the door to a context-sensitive approach in "the spirit of tolerance, dialogue and consultation". This is an approach that does not isolate children's rights from African values or *vice versa* but rather aims to integrate African values in a way that is respectful of the reality that every child on the African continent is the bearer of rights.

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¹¹¹ Kaime 2009 *African Journal of Legal Studies* 135.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACERWC	African Committee of Experts on the Rights and Welfare of the Child

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
JAL	Journal of African Law
CILSA	Comparative and International Law Journal of Southern Africa
CRC	Convention on the Rights of the Child
Int'l J Child Rts	International Journal of Children's Rights
SAPL	Southern African Public Law
Stan J Int'l L	Stanford Journal of International Law
UDHR	Universal Declaration of Human Rights
Va J Int'l L	Virginia Journal of International Law