

## FEATURE

# Towards the Realisation of SDG 16.3 on Access to Justice: Contextualising the Role of the ACERWC

Robert Doya Nanima

## Introduction

*The 2019 Africa-Asia High-Level Political Forum (HLPF) in Johannesburg, South Africa, reflected on the status of, and challenges to, access to justice. The participants at the Forum comprised various stakeholders such as governments, academia, the judiciary, practitioners and civil society organisations. The Forum highlighted the need to aid the marginalised population, including the African child, by improving access to justice in our communities. The importance of ensuring 'access to justice for all' in achieving sustainable development is highlighted in Goal 16 of the Sustainable Development Goals (SDGs).*

This article evaluates the role that the African Committee of Experts on the Rights and Welfare of the Child (the Committee, or ACERWC) plays in the African human rights system in regard to the achievement of SDG 16.3. In particular, it provides a contextual evaluation of the normative and jurisprudential framework of the ACERWC, along with various recommendations.

The SDGs were adopted in 2015, following the expiry of the eight Millennium Development Goals (UNHCR 2017). They are a set of 17 global goals adopted by the United Nations (UN) General Assembly in 2015, to be achieved by 2030, and clustered into 169 targets and 232 indicators (UNHCR 2017). This contribution interrogates SDG 16 on the promotion of 'peaceful and inclusive societies for sustainable development', the provision of 'access to justice for all' and building 'effective, accountable and inclusive institutions at all levels'. While this SDG has 10 indicators, the emphasis here is on target 16.3, which relates to the promotion of the rule of law at both national and international levels, and the need to ensure equal access to justice for all.

## An overview of SDG 16.3

From a theoretical perspective, SDG 16.3 targets the promotion of the rule of law, at both national and international levels, and the need to ensure equal access to justice for all. Two indicators inform this target (UNHCR 2017). These are, first, the proportion of victims of violence in the previous 12 months who reported their victimisation to competent authorities or other officially recognised conflict-resolution mechanisms, and secondly, the number of detainees who have not been sentenced, as a proportion of the overall prison population.

To engage with the first indicator under SDG 16.3, states should report on the number of victims who have either reported or not reported incidents. This has been identified as a challenge in some states such as Sierra Leone, Liberia and Thailand (Smits, Conolly & Sluijs 2017). For instance, in Sierra Leone, it was argued that different rates showed either a lack of trust in authorities, or cultural differences, at various local governance

levels (Smits, Conolly & Sluijs 2017). Furthermore, the National Statistics Offices did not have the necessary technological, financial and human resource capacities to collect and analyse the data.

There is also a need for competent authorities or other officially recognised conflict-resolution mechanisms to which to submit reports. Some states have identified a single or systematic data gathering and reporting mechanism (Sa-ardyen 2016). Concerning the second indicator, states need to specify the proportion of detainees who have not been sentenced in relation to the overall prison populations; this could be done through the establishment of clear benchmarks concerning the lengths of detention and the protection of rights of the detainees (Sa-ardyen 2016).



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From a practical perspective, various steps have been taken by stakeholders to aid the realisation of SDG 16.3. This has been through workshops taking stock of the Voluntary National Review(s) (VNR) and steps by stakeholders, such as the judiciary, the police, legal aid, prosecution and civil society organisations (DOI 2019) in the justice and law and order sectors. The most recent of these in Africa was the HLFP workshop for Africa and Asia, which took place in Johannesburg from 27-29 March 2019 (DOI 2019).

Various matters were identified as priorities for action. These included the positioning of the judiciary as an instructive institution concerning access to justice (DOI 2019). The National Prosecuting Authority, the Attorney-General's Office, the police, and the legal aid office should take note and make an effort to implement this. Poverty and its eradication were identified as key factors that affect access to justice.

Some of the challenges that were identified included an adversarial judicial system that fails to offer solutions to the parties concerned, as well as the lack of practices to reflect the constitutional grounding of access to justice, the technicalities in the judicial process and the lack of human resources to cater for problems of access to justice (DOI 2019). One key dimension missing from the engagement with SDG 16.3 is the position of the child as a crucial agent in the SDG Agenda. In view of the identified role of the Committee in the SDG Agenda within the Agenda 2063 and Agenda 2040 frameworks, the steps towards the improvement of the person of the child in this context need to be unpacked.

## **The role of the ACERWC in the SDG Agenda**

The Committee was established by the African Charter on the Rights and Welfare of the Child (the Charter or ACRWC), with the mandate of promoting and protecting the rights and welfare of the child. It is expected to 'collect and document information, commission inter-disciplinary assessment ... organize meetings ... and give its views and make recommendations to Governments' (article 42(a)(i), ACRWC). It may also 'formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa (article 42(a)(ii), ACRCW). Its other function is to consider communications from individuals and State Parties on alleged human rights violations and to undertake investigative missions. The question is how the mandate of the Committee relates to the SDG Agenda.

The African Union has adopted a 50-year plan, called 'Agenda 2063', to transform Africa into a global powerhouse of the future, to spur economic growth, and to improve the standard of living for all persons on the continent (AU 2013). Agenda 2063 aims to bring about inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under pan-Africanism and the African Renaissance (AU 2013). Agenda 2063 identifies seven priority areas; priority area 6 hinges on the mandate

of the Committee (DeGhetto, Gray & Kiggundu 2016). This priority area speaks to an Africa whose development is people-driven, relying on the potential of the African people, especially its women and youth, and which cares for children (NEPAD 2019). Although Agenda 2063 clearly identifies the efficacy of the Committee in assisting the realisation of SDG 4 and 5, there is a need to interrogate whether the Committee has a role to play concerning SDG 16.3.

Following the adoption of Agenda 2063, the Committee adopted Agenda 2040 as a result of the conclusions of a High-Level Conference held in Addis Ababa on 20-21 November 2015 (ACERWC 2016). The Committee has developed 10 aspirations; access to justice is embedded in aspiration 8, which states that children have to benefit from a child-sensitive criminal justice system.

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## The Charter's normative and jurisprudential framework

For the Committee to carry out any activities, a normative mandate has to be provided for in the Charter. This normative mandate is provided for under article 42, which includes the promotion and protection of the

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rights in the Charter, monitoring the implementation of the Charter, and interpretation of the provisions therein. It can be argued that the SDGs are not explicitly provided for in the Charter. (It should be recalled that the SDG Agenda started in 2015, 25 years after the adoption of the Charter.) However, the Charter, under article 46, allows the Committee to draw inspiration from other sources of international and regional human rights law. As such, any inspiration that promotes the child-rights agenda may be a source of inspiration for subsequent application by the Committee.

An interrogation of the normative and jurisprudential framework is key to understanding the fusion between the work of the Committee and the SDGs. The link between SDG 16.3 and the African Children's Charter has to be evident in the normative, jurisprudential and other activities of the ACERWC. This section interrogates the normative and jurisprudential framework of the ACERWC, on one hand, and the target and indicators of SDG 16.3, on the other.

**“...that the child shall be informed of the nature of charges in a language he or she understands;**

The Charter places an obligation on State Parties to recognise the rights and freedoms and duties enshrined therein and take steps to realise them. This provision speaks to the general realisation of SDG 16 that requires State Parties to develop effective, accountable and transparent institutions at all levels. Concerning SDG 16.3, several articles in the African Children's Charter provide for it. To this end, article 17(1) of the ACRWC provides that every child who has been accused or found guilty of a criminal offence shall be accorded special treatment 'in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'.

States are also required to promote the rule of law at national and international levels, and ensure equal justice for all. This is applies before and during a trial, and when sentencing takes place. Concerning the pre-trial

and the post-trial process, article 17(2)(a) requires that State Parties ensure that no child who is detained, imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment, or punishment. Also, article 17(2)(d) requires that states ensure that children are separated from adults in their place of detention or imprisonment. Article 17(4) requires State Parties to prescribe a minimum age to guide the presumption of criminal responsibility.

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With regard to the course of the trial, article 17(2)(d) of the Charter prohibits the attendance of the press and public from the trial. Various guarantees are provided for in article 17(2)(c), such as the presumption of innocence until proof of guilt; that the child shall be informed of the nature of charges in a language he or she understands; and the provision of appropriate legal assistance in the preparation and presentation of his or her defence.

Another requirement is the obligation to have the matter determined as speedily as possible by an impartial tribunal; where the accused is found guilty, he or she is entitled to an appeal to a higher tribunal. Concerning sentencing, article 5(3) prescribes that the death sentence shall not be pronounced for crimes committed by children. In addition to the post-trial guarantees reiterated under the pre-trial discussion, article 17(3) of the Charter underscores the use of reformation, reintegration into the family, and social rehabilitation for a child in conflict with the law.

Concerning jurisprudential developments, this contribution evaluates some of the concluding observations on the state reports to the Committee. This is because there are no General Comments that deal with access to justice for children in conflict with the law. An evaluation of decisions that engage the thematic aspects of SDG 16.3 is instructive in getting the correct picture. The Committee has handed down 10 decisions since its inception (ACERWC 2019). Six of these decisions were

decided from 2015 to date, a period of four years following the adoption of the SDG Agenda. However, none of these decisions refer to access to justice. This is largely due to the nature of the communications that have been brought to the Committee, in that they do not present a child who is or has been in conflict with the law, and has been through the pre-trial, trial or the post-trial period (ACERWC 2019).

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Despite this challenge, the Committee’s recommendations in *MRGI and another v Mauritania (2018)* and *IHR-DA v Cameroon (2018)* are instructive. In both cases, the Committee reiterates the principles of the best interests of the child and due diligence as components that inform the protection of the rights of a child. In Mauritania, the Committee uses the best-interests principle as a gap-filling tool. To this end, the position of the victim is an indication of the state’s failure to comply with the principle, and the need is for the Committee to advise on the desired position. In the two decisions (*Mauritania*, paras 47-58; *Cameroon*, para 46-57), the Committee incorporates the due diligence principle for State Parties. The state is assessed on how it has upheld its obligations concerning children generally, and the steps it has taken to protect the rights of the child or children who are before the Committee seeking redress. As such, the state has to show the concrete steps that have been taken to uphold the rights of the victim, rather than abstract steps that are based on general attempts to uphold its obligations.

Although these cases did not deal with access to justice of a child in conflict with the law, the two principles indicate that a higher standard is expected of State Parties concerning the protection of the child. This leads to the question of whether they can be used to add value to access to justice regarding a child in conflict

with the law. This question can be interrogated through the evaluation of other activities of the Committee.

The Committee has considered 55 periodic reports since its inception, 11 of which have been considered between 2015 and the present (ACERWC 2019). A search on the Committee’s website indicates that the two concluding observations of Angola and Cote d’Ivoire are not accessible, and two others are in French. Therefore this contribution evaluates the seven concluding observations on Algeria, Lesotho, Zimbabwe, Namibia, Madagascar, Gabon and Sierra Leone (ACERWC 2019). The contribution evaluates selected sections of four states, as discussed below.

The concluding observations and recommendations by the Committee on the report by Algeria do not engage the direct use of the SDGs. A close reading, however, implies three recommendations in relation to SDG 16.3. First, in paragraph 37, the Committee recommends that the State Party provides mechanisms and structures outside the prison to take care of minors in conflict with the law, and, where detention is inevitable, that minors are detained separately from adults in all correction facilities in the country. In addition, the Committee recommends that Algeria establish child-friendly courts within the juvenile justice system. This is reiterated in paragraphs 46 and 47 of the ACERWC’s concluding observations on the report of Gabon, paragraphs 42 and 44 of its concluding observations on Madagascar (ACERWC 2018), and paragraph 49 of its recommendation and concluding observations on Lesotho.

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The point of departure in the observations on Lesotho is that the state is required to apply non-custodial sentencing and train judges, prosecutors and police in the rehabilitation and reintegration of juvenile offenders (ACERWC 2018). This shows that the monitoring role

of the Committee has influence in ensuring that the goals of SDGs are realised. In addition, the Committee recommends a shift from the presumption of lack of criminal capacity for children between 10 and 14 years to compliance with the international standard of the age of 12 (ACERWC 2018).

With regard to Madagascar, the Committee reiterates that pre-trial guarantees do not relate to actual detention, but rather to the need to avoid the subjection of homeless children to arbitrary justice (ACERWC 2018). This shows that the indicators that speak to SDG 16.3 may be limited in scope and that some of these recommendations, when engaged with by State Parties, do aid the realisation of the SDGs.

The Committee on the Rights of the Child has given some insight on the SDG Agenda. In its concluding observations, it has called on a State Party to ensure the meaningful participation of children in the design and implementation of policies and programmes that are geared towards achieving the SDGs (CRC 2020; CRC 2020b). Concerning SDG 16, it is worth noting that most of the reflections by the Committee in these recent concluding observations have been on the need for State Parties to deal with corporal punishment under SDG 16.2 (CRC 2020; CRC 2020b).

## Conclusion and recommendations

The Committee plays a key role in the realisation of SDG 16.3 regarding children. Various provisions in the Charter that speak to the pre-trial, trial and post-trial guarantees of a child in conflict with the law make use of SDG 16.3 indicators. Some of the limits on the indicators can be complemented by the monitoring and implementation of guarantees by the Committee. There is a need for synergy between the activities of the HLPF and the Committee for the sake of realising SDG 16.3.

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