

# Child-friendly Laws in Africa

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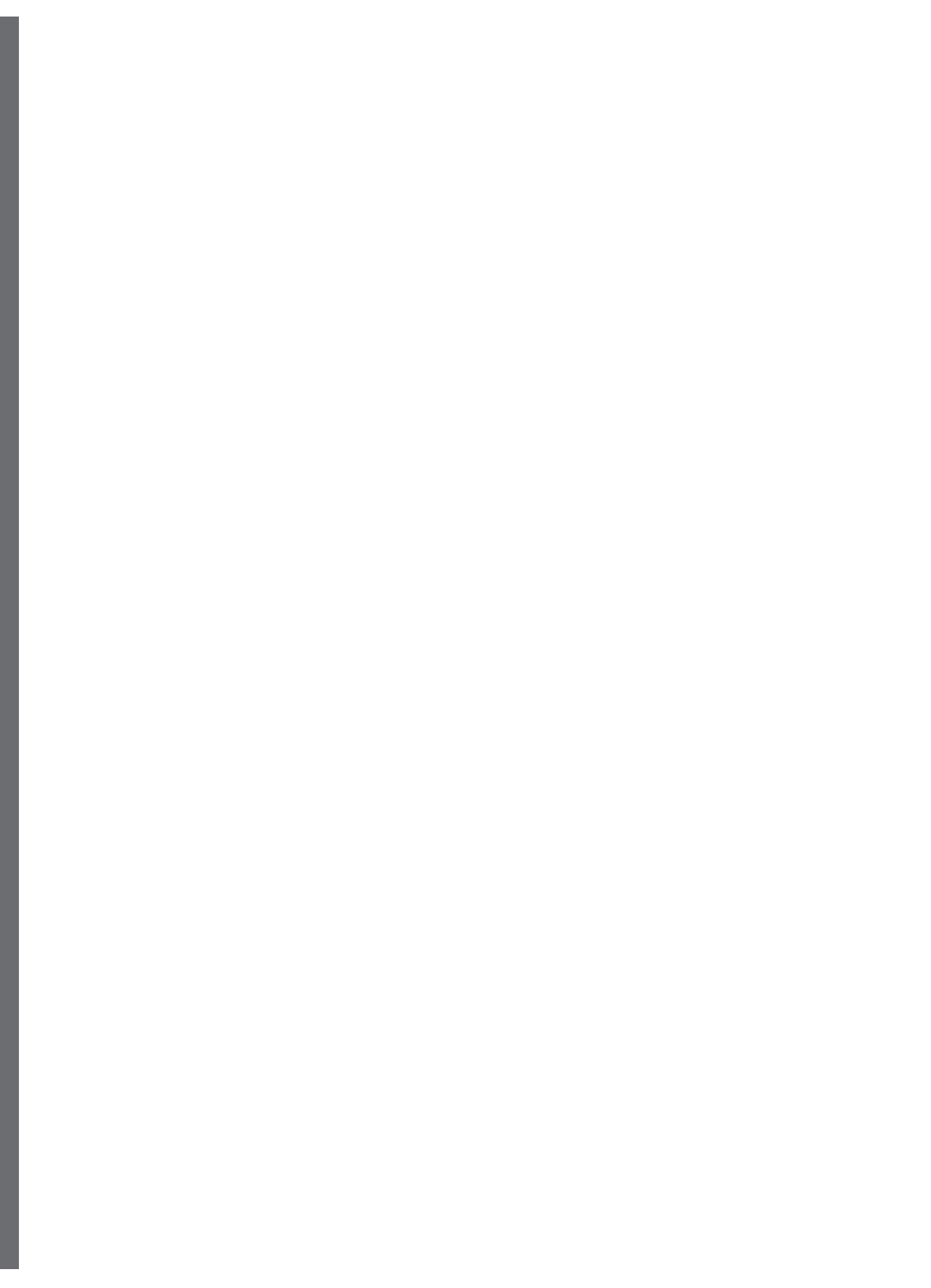
UNIVERSITY OF THE WESTERN CAPE





## SOME COMMON ABBREVIATIONS AND ACRONYMS USED IN THIS DOCUMENT

ACRWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Form of Discrimination Against Women
CPU	Child Protection Unit
CRC	United Nations Convention on the Rights of the Child
ECD	Early Childhood Development
EFA	Education for All
FGC	Family Group Conference
FGM	Female Genital Mutilation
FPE	Free Primary Education
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IOM	International Organization for Migration
IPEC	International Programme on the Elimination of Child Labour
MDGs	Millennium Development Goals
OHCHR	Office of the High Commissioner for Human Rights
OVC	Orphaned and Vulnerable Children
PEP	Post-Exposure Prophylaxis
PSWO	Probation and Social Welfare Officer
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
TIP	Trafficking in Persons
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNAIDS	The joint United Nations programme on HIV/AIDS
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNODC	United Nations Office for Drugs and Crime
US	United States
USAID	United States Agency for International Development
VOM	Victim-Offender Mediation



## FOREWORD

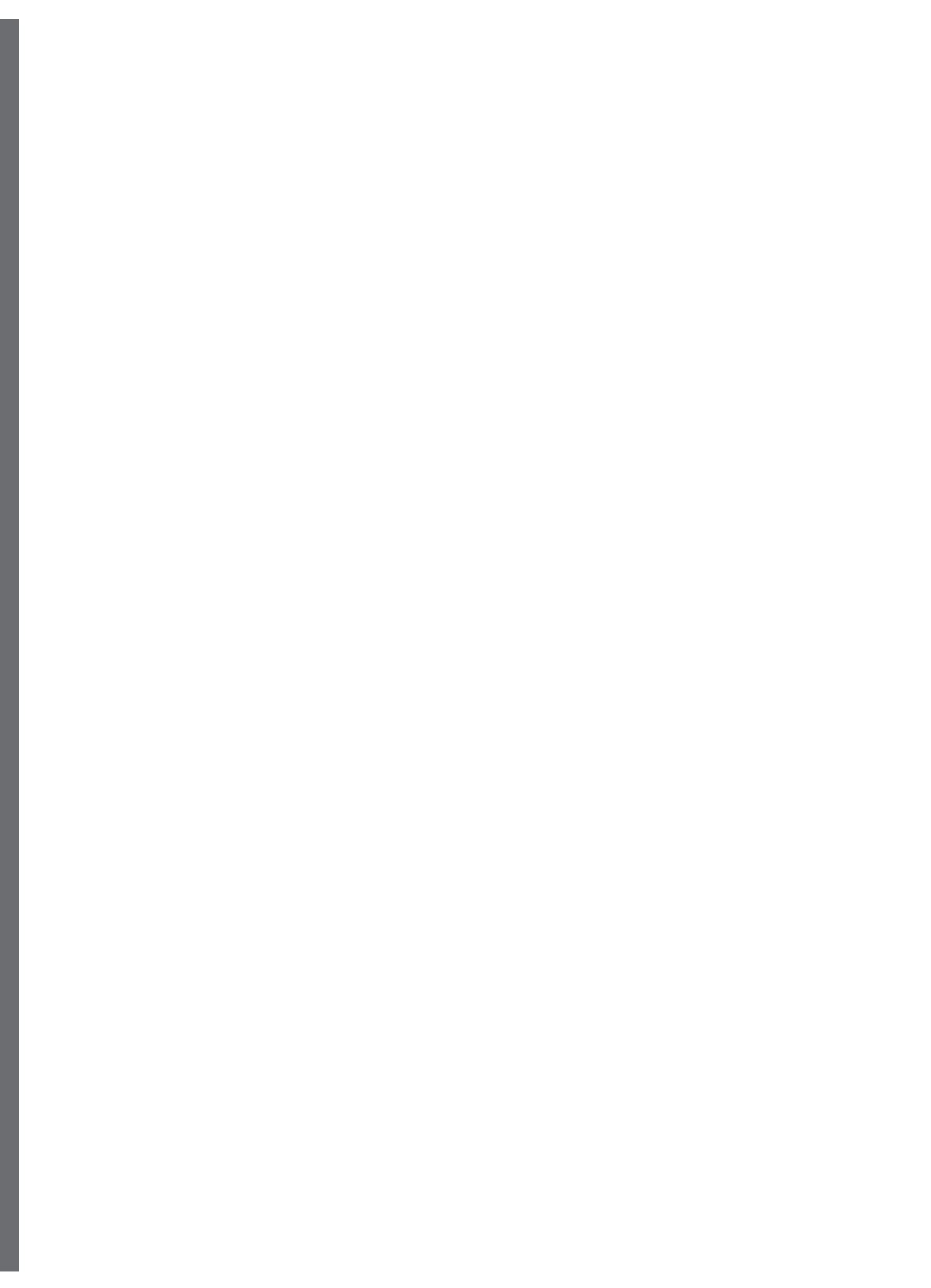
It is a great privilege and source of joy for all of us at The African Child Policy Forum (ACPF) to announce the publication of our maiden report *The African Report on Child Wellbeing 2008: How child-friendly are African governments?* This report is a result of collaborative efforts of many individuals and partner organisations. It has been enriched by inputs from partners and informed by several background papers. This document is one such paper. We hope that this background paper, along with the others, will stimulate debate, inform discussions and promote action for the benefit of children in Africa.

**Assefa Bequele, PhD**  
**Executive Director**  
**The African Child**  
**Policy Forum**

## ACKNOWLEDGEMENTS

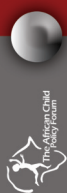
The African Child Policy Forum would like to take the opportunity to thank Mark Nunn for copy-editing this report.







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## EXECUTIVE SUMMARY

At the heart of this report is the concept of measurement of the child-friendliness of laws and policies. These days, in development theory and programme implementation, such measurement frequently involves the development of indicators as tools to guide compliance, progress or delivery. Where possible, for practical and logical reasons, this report builds on existing indicators, or best practices that have been identified by others. However, in addition, a non-finite series of guiding themes were developed for the purposes of this report in order to guide assessment and selection of promising examples/practices for description, and these depart from the conventional. The authors believe that these themes provide rationale and justification for citing specific examples as good, replicable or promising practices.

This report has identified eight main areas for the discussion of indicators of good practice relating to children's rights in Africa. These are as follows:

1. The Africanisation of child laws
2. Child protection
3. HIV/AIDS
4. The right to education
5. Consultative processes that involve children
6. Models of dispute resolution affecting children
7. Specialised services for children
8. Coordinating and monitoring mechanisms of the implementation of children's rights at the domestic level.

In selecting these themes, the authors were confronted with a plethora of

potential topics. For instance, the heading 'child protection' throws up such diverse and complex issues as assistance to child victims, sexual abuse of children, violence against children in public and private settings, displaced, refugee and migrant children, trafficking, child soldiers, and so on – any one of which could, on its own, form the substance of a dedicated paper of equivalent size.

The authors have been deliberately selective and focussed on areas of legal endeavour which are:

1. Showing promising signs of development for the African continent – such as implementation of the right to education, a key deliverable for the Millennium Development Goals
2. Raising particular concerns in the African context – such as HIV/AIDS, the effects of which are especially deleterious for sub-Saharan Africa.

Similarly, the choice of child labour can be justified by the fact that the ILO/IPEC programmes to implement ILO Convention 182 on the worst forms of child labour have kicked in since the turn of the millennium. As will be shown, there are also promising regional developments in the fight against trafficking of children, which can be adduced to illustrate Governments' commitments to children.

The 'Africanisation of child law' section of the document shows that African states are awakening to the need to implement child rights in ways that are suited to the African context. Innovative legal provisions

and mechanisms are being adopted (sometimes emphasising the peculiar provisions of the African Children's Charter) that seek to give an African or local flavour to legal provisions enshrining child rights, or to alter certain damaging cultural or religious rules, practices or beliefs. Key among these are provisions on child and parental responsibilities that capture the prevalent African conception of the individual, not as an island, but as a member of society enmeshed in a complex web of reciprocal rights and obligations.

The 'child protection' section highlights the critical issues of child trafficking and child labour. Social security is also discussed, to the extent that it relates to child abuse and neglect. It is clear, and often stated, that endemic poverty lies at the heart of children's vulnerability to becoming marginalised, excluded and liable to serious rights violations. The experience of South Africa in the progressive rolling out of their Child Support Grant is highlighted as an indication of implementation of children's rights to social assistance and an adequate standard of living. This in turn helps address the protection and vulnerability of children.

The HIV/AIDS pandemic has brought with it numerous challenges for children's rights, especially in sub-Saharan Africa, where prevalence rates are extremely concerning. As the UN Convention on the Rights of the Child (CRC) Committee recognised in its General Comment No 3 (*HIV/AIDS and the rights of the child*), many of these challenges lie at the level of policy and practice, especially as regards health

services delivery and prevention campaigns. There are issues of legal import surrounding HIV/AIDS, and this report has endeavoured to highlight promising examples of law-making that addresses the legal aspects of prevention, treatment, child-headed households, inheritance, vital registration, alternative care, and related issues.

Education is a fundamental human right. It is also an enabling right that permits the exercise of other fundamental rights. Therefore, the value of education for Africa's children's development cannot be overemphasised. Even though the right to education – and particularly the right to free and compulsory primary education – is part of international law, confusion abounds both in theory and practice about what constitutes 'free' primary education. The discussion highlights good examples of law and practice in providing free primary education. Good practice in addressing the needs of vulnerable children (rural children, working children, children with disabilities, girls from disadvantaged backgrounds, and so on) also features in this report: the promotion and realization of the right to free and compulsory primary education needs to be supplemented by the realization of other rights of the child. Issues of sexual violence, corporal punishment, early marriage, birth registration and so on are therefore also examined.

The CRC is widely considered to have revolutionized child rights, partly because of its recognition of the principle of child participation. Although African traditions tend to follow the notion that children

## EXECUTIVE SUMMARY

require protection, and therefore allow for limited room for child participation in the decisions that affect them, this report shows that remarkable changes are underway. A number of countries now recognise the principle of child participation, and examples of good practice are highlighted in this report.

Children may be the subject of disputes, either as perpetrators of conduct, whether criminal or civil, leading to those disputes; or as victims. The need to develop child-friendly mechanisms to deal with children in these scenarios is not only morally compelling, but has a legal basis. Accordingly, for instance, a number of countries in Africa are responding to this need by establishing children's courts, as discussed in Section 7. There are a number of very good examples of how community-based structures can be used to resolve civil and criminal disputes involving or affecting children. Diversion, the process through which child offenders are handled outside the formal justice system and redirected to the community for the purposes of their rehabilitation, reformation and reintegration, is becoming one important feature of African child law reform efforts. Countries that have adopted progressive diversion processes are detailed in this report.

According to the CRC, protection measures should include effective procedures for the establishment of social programmes to provide necessary support for the child, and for those who have the care of the child. This includes children who have been

deprived of their family environment, and those who are victims of abuse and neglect and in need of alternative care. Other circumstances where protection may be necessary include when the child is going through the criminal justice system, either as a perpetrator or as a victim of crime. The report underscores issues pertaining to specialised services for children in conflict with the law, specialised police units, probation and social welfare officers, and services to child victims and witnesses. It also highlights promising and good practice indicators from a number of African countries.

The last section of the report discusses the obligation of state parties to the CRC and the African Children's Charter to ensure the coordination of the planning and implementation of children's rights. Independent monitoring of implementation is also an important part of promoting and protecting children's rights, and hence is crucial to state parties' efforts to meet their obligations. By using General Comment No 2 of the CRC Committee as a guide, the experiences of several countries are emphasised in assessing good practices in independent monitoring of the implementation of children's rights.

## I. INTRODUCTION

What is child-friendly law and policy? How does one go about assessing legal provisions that better promote the rights of the child? By what criteria should this determination be made? Does the answer not differ in different contexts, in different societies or cultural communities? Are there standard indicators at the international level that can assist in formulating a regional baseline of good or promising practice? What indicators can be developed that help assess the quality of the legal frameworks that address children's rights? What is the desirable balance between state and community, between non-state actors and the individual, with respect to areas of law and policy concerning children?

These were some of the questions confronting the authors contributing to this study, as they determined the framework or common matrix for examples of child-friendly laws in the African context.

At the heart of this report is the concept of 'measurement' of the child-friendliness of laws and policies. These days, in development theory and programme implementation, such measurement frequently involves the development of indicators as tools to guide compliance, progress or delivery. However, indicators usually presuppose fixed targets, quantifiable measurement standards and accountable methods of assessment of achievement<sup>1</sup> – all unorthodox notions in conventional legal analysis.<sup>2</sup>

Where possible, for practical and logical reasons, this report builds on existing indicators, or best practices that have been identified by others. However, in addition, a non-finite series of guiding themes were developed for the purposes of this report in order to guide assessment and selection of promising examples/practices for description; and these depart from the conventional. The authors believe that these themes provide rationale and justification for citing specific examples as good, replicable or promising practices. These key indicators, or factors illustrating good practice, are set out more fully below.

At the general level, two obvious indicators of child-friendliness in relation to the legal sphere come instantly to mind.

- Firstly, whether or not the necessary legal provisions comply fully with the international child rights agenda, as established by (for instance) the CRC, the African Charter on the Rights and Welfare of the Child (ACRWC or the 'African Children's Charter'), the ILO Conventions, the Hague Conventions, and so forth.
- This is, however, arguably an uninformative indicator. To take one example of a country whose laws could at one level be said to be fully compliant with the CRC, one could refer to Kenya, whose Children's Act of 2001 contains not only reference to the CRC, but also requires the treaty to be

<sup>1</sup> For a good example, see the UNICEF juvenile justice indicators (2005).

<sup>2</sup> In fact, legal scholars usually proceed from the opposite side of the spectrum, taking 'what is,' and proposing critique, elaboration or improvement.

## INTRODUCTION

used as an aid to interpretation of the domestic provisions, and to fill in any gaps in provision that may emerge. However it is impossible to conclude on the basis of this alone that Kenya stands at the forefront of children's rights in Africa – as that country would itself concede.<sup>3</sup> The authors therefore thought that something more than mere textual analysis of black letter law was required, and the 'indicators' should be qualitative, rather than directed towards ticking off the presence or otherwise of certain factors of national law. In other words, the 'indicators' for good practice needed to illuminate as much effectiveness (having the outcomes intended) and efficiency (using resources to best effect) as possible.<sup>4</sup>

- Secondly, even where applicable laws are fully congruent with all requirements in the international sphere, the sceptic would nevertheless like to know that child-friendly laws and policies translate into gains for children on the ground. Thus the existence of the proverbial 'words on paper' is not the only criterion, and the extent to which they are implemented, or can feasibly be implemented, is of as great a concern.
- The 'checklist' approach to ascertaining whether given provisions of the CRC or the ACRWC are catered for neglects the whole arena of implementation

and impact. Hence, formal compliance with international law standards, whilst an important consideration, was not the primary tool used by his report to measure child-friendliness in some theme areas selected. Furthermore, the need to avoid 'afro-pessimism' dictated that the overall approach to the assessment of child-friendliness in relation to law and policy should be forward-looking and standard-setting, rather than bogged down in problems, impediments, woes or troubles.

So what criteria informed the selection of the indicators of good practice?

Answering this question first requires a definition of 'good practice'. In a recent report to the ILO/IPEC programme towards the elimination of child labour, good practice was described as:

...actions or methodologies which are successful, innovative, are transferable to other areas or domains and are sustainable. They lead to actual change, which is measurable and can affect the policy environment, or influence programme delivery, or create a more conducive or enabling environment for change. Replicability is a key aspect of identification of good practice, as is institutionalisation of the initiative in everyday practice...<sup>5</sup>

<sup>3</sup> Further law reform to extend, elaborate and particularize aspects of the Children Act is now underway. This was noted by the Secretary for Children's Affairs at the recent 1st International Conference on Child Sexual Abuse, held in Nairobi Kenya, 24-26 November 2007. This illustrates the point that the assessment of child-friendly laws and policies is more complex than simple measurement of provisions contained in international law.

<sup>4</sup> See generally A Dawes *et al* (eds.) *Monitoring child well-being: A South African rights based approach* (2007, HSRC Press).

<sup>5</sup> J Sloth-Nielsen. *Report on the implementation of the ILO/TECL project on Children used by Adults to Commit Offences (CUBAC) as a Worst Form of Child Labour (2004 – 2007): Good Practices and Lessons Learnt*. Submitted to the ILO/TECL office, Pretoria August 2007, copy on file with author.

Another indicator of a good practice is the breaking of new ground,<sup>6</sup> making good practice 'innovative and able to be applied to other initiatives or contexts.'<sup>7</sup> For instance, South Africa's comprehensive, detailed and innovative Children's Act 38 of 2005, which was more than a decade in development and the remaining provisions of which have only very recently been passed into law, has served as a model for other law reform initiatives. It attempts to grapple with novel legal provisions for dealing with HIV/AIDS and the protection of children, an issue of particular concern at the sub-regional level and one on which little in the way of international precedent exists. Hence, themes identified as successful, transferable, replicable and cost-effective underpin the criteria identified to pinpoint child-friendly laws and policies in the African context.

This report has identified eight main areas for the discussion of indicators of good practice relating to children's rights.

1. First, since we know that resource constraints – both human and financial – are at root of some of the major implementation challenges as far as potentially beneficial laws and policies are concerned, it is important that indicators relate to **the innovative use of legal provisions, structures and existing communal strengths to harness what is already available**, as benchmarks of progress in the African

context. Furthermore, legal regimes and institutions that adopt non-resource-intensive legal regimes, but that nevertheless have the capacity to uphold children's rights, are worthy of promotion. Plentiful examples of non-resource-intensive community structures and approaches involving grass roots communities, highlighted further in this report, underscore this point.

2. A second measure of child-friendliness relates to laws and policies that **build human capacity and foster special expertise** in relation to children's well-being and development. In this regard, what is preferable for long-term sustainability is the building of local skills and programmes, policies and laws that further that goal. In particular, specialised services for children, via, for instance, diversion programmes tailored to individual needs and local contexts, constitute an apposite example. As pointed out later in the document, this is an area in which significant skills transfer has already taken place on a regional basis.<sup>8</sup> Similarly, programmes to transfer skills related to providing assistance to child witnesses, especially those involved in trials concerning sexual offences, are mushrooming in the southern and Eastern African regions, evidence again of long-term capacity building and intensification of expertise.

<sup>6</sup> <<http://www.cmscalendar.com/glossary.html?term=BestPractices>> (accessed 26<sup>th</sup> June 2007).

<sup>7</sup> J Sloth-Nielsen (note 6 above).

<sup>8</sup> See J Sloth-Nielsen and J Gallinetti, *Child Justice in Africa: A Guide to Good Practice* (2004, Community Law Centre, University of the Western Cape).





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3. Thirdly, an indicator of increasing relevance relates to the **comprehensiveness of legislative endeavours to protect children**, or to provide for their rights. This is because of the growing amount of literature on specialised areas of concern within the general child rights arena, often underpinned by new international instruments to lay down standards for legislators, policy makers and implementers. Two examples illustrate this point. Firstly, the Palermo Protocol (the UN Protocol to prevent, suppress, and punish trafficking in persons, especially women and children, which supplements the UN Convention against Transnational Organized Crimes (2000):<sup>9</sup> this has specific requirements concerning legislative action to protect child victims of trafficking. Secondly, the ILO Convention 182 concerning the elimination of the worst forms of child labour. Gallinetti<sup>10</sup> argues that the legislative measures required to give effect to the dictates of this Convention are complex, and that it can be inferred that domestication may proceed beyond the usual approaches found in child care and protection legislation. Hence, although the focus of much of the material contained in this report is on dedicated children's law, some reference is made to sexual offences laws, trafficking laws, education laws and other legislation not limited in application to children alone.
4. Next, due to the complexity of issues surrounding the prevalence of **HIV/AIDS** among African children, and the particular impact that HIV has on children's vulnerability, an attempt was made to identify laws and policies which can address the causes, consequences and effects of the HIV pandemic. A dedicated section, part 4, deals with the impact that HIV/AIDS is having on the fulfilment of a myriad of children's rights, particularly in sub-Saharan Africa.
5. Education is a fundamental human right. It is a key area for children's individual development and the development of nations. However, in spite of progress at the continental level in terms of providing education to children, the commitment in international law to **making primary education free for all** remains a challenge. This report addresses education as a theme in its own right (in part 5).
6. As Africa is a continent in the midst of rapid but uneven urbanisation, its tendency is to look to models and institutions that can serve those centres or towns where greater numbers of children can benefit. This consideration has informed potential legislation around South Africa's one-stop child justice centres, such as the pilots at Mangaung in the Free State Province and Nerina in Port Elizabeth. This model

<sup>9</sup> Ratified by a significant cohort of African countries, including Benin (2004), Botswana (2002), Burkina Faso (2002), Cameroon (2006), Cape Verde (2004), Central African Republic, (2006), Democratic Republic of the Congo (2005), Djibouti (2005), Egypt (2004), Equatorial Guinea (2003), Gambia (2003), Guinea (2004), Guinea-Bissau (2004), Kenya (2005), Lesotho (2003), Liberia (2004), Libya (2004), Madagascar (2005), Malawi (2005), Mali (2002), Mauritania (2005), Mauritius (2003), Mozambique (2006), Namibia (2002), Nigeria (2001), Niger (2004), Rwanda (2003), Sao Tome et Principe (2006), Senegal (2003), Seychelles (2004), South Africa (2004), Tunisia (2003), Tanzania (2006), and Zambia (2005).

<sup>10</sup> J Gallinetti, *An assessment of the significance of the International Labour Organization's Convention 182 in South Africa with specific reference to the instrumental use of children in the omission of offences* (LLD dissertation submitted at the University of the Western Cape, November 2007).

allows several magisterial districts to be served by one centre, so as to be cost-effective. At the same time, the reality that most children still grow up in rural areas has led to the identification of **laws and policies that adequately serve urban as well as rural populations** as a factor in best practice.

7. The authors believe that laws and policies that inherently exhibit an African approach to children's rights must be highlighted, especially insofar as these reflect the cultural and religious diversity of the continent. Therefore they have identified and addressed models of good practice under the heading *Africanisation of child law* in the first section. The recurring references in this report to the African Children's Charter, as a reflection of the African fingerprint in relation to children's rights, contribute towards this theme.
8. Finally, a theme which accords with the advice of the CRC Committee, to be found both in General Comments and in specific concluding observations, relates to the need for creative strategies for **implementation of laws**, and for **co-ordination and monitoring** examples to oversee this. The final theme of this report (section 9) devotes a substantial discussion to models for coordinating and monitoring the planning and implementation of children's rights.

Some of the limitations of this report should be mentioned. A central element of the brief for the preparation of this report was the need to reflect Africa in its

entirety – West, North, East, Central and Southern Africa – a task made difficult by the plethora of languages in which formal law is recorded on the continent, including English, Portuguese, French and Arabic, but also muddled by the different baseline legal approaches that civil law, common law, Islamic law and customary law traditions demand. This report, whilst informed by much prior regional comparative work, including field work, seminars and training, and research, was also of necessity largely text-based, which imposes a limitation as far as the grass roots implementation of laws and policies is concerned in respect of some researched examples where the authors had no direct experience. The need to accommodate a wide range of children's rights within the specified page limit of the report has also required focussing on key areas of African interest, to the exclusion of some CRC and ACRWC rights.

In selecting these themes, the authors were confronted with a plethora of potential topics. For instance, the heading 'child protection' throws up such diverse and complex issues as assistance to child victims, sexual abuse of children, violence against children in public and private settings, displaced, refugee and migrant children, trafficking, child soldiers, and so on – any one of which could, on its own, form the substance of a dedicated paper of equivalent size. The authors have been deliberately selective, and have focused on areas of legal endeavour which are:

1. Showing promising signs of development for the African continent – such as implementation of the right to education,



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- a key deliverable for the millennium development goals.
2. Raising particular concerns in the African context – such as HIV/AIDS, the effects of which are especially deleterious for sub-Saharan Africa.

Similarly, the choice of child labour can be justified by the fact that the ILO/ IPEC programmes to implement ILO Convention 182 on the worst forms of child labour have kicked in since the turn of the millennium. As will be shown, there are also promising regional developments in the fight against trafficking of children, which can be adduced to illustrate governments' commitments to children.

In conclusion, the report demonstrates an emerging commitment to children by many African governments. Whilst law reform efforts are often slow or halting, legislative enactments to define, elaborate, and regulate protection to children constitute the bricks and mortar of implementation in a rights-based approach. In this endeavour, there are promising and innovative experiences to share that are emanating from African governments.

inconsistent with the more recent concept of "human rights". However, to dismiss such customs and beliefs out of hand is not easy: they are often defended with reference to the right to participate in the cultural activities of the communities to which one belongs. Furthermore, an approach to human rights that demands a one-sided change from African communities is often received with deep suspicion by Africans, principally because of the continent's history of colonialism, apartheid, subjugation and oppression by both internal and external forces. To qualify as a good practice indicator, laws and policies must be carefully crafted to ensure that they are sufficiently responsive to the needs and socio-economic and cultural circumstances of the people to whom they apply.

This section therefore focuses on the extent to which African child laws are adapted to suit the circumstances in which they apply. It examines the extent to which these laws are culturally and socially sensitive, and how well they incorporate African perspectives and values concerning childhood and child welfare. Special focus is given to highlighting trends and good practices.

## 2 AFRICANISATION OF CHILD LAW

### 2.1 INTRODUCTION

The relationship between African customs, practices, thought and religious beliefs and children's rights has raised perennial problems for many years – particularly because some customs and beliefs are

### 2.2 CHILD AND PARENTAL RESPONSIBILITIES

Individual responsibilities towards the family, society and state constitute a defining feature of the African regional instruments on human rights. The notion of individual duties underpins African conceptions of human rights, which tend to regard

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rights as inseparably wedded to duties.<sup>11</sup> The basis of the right/duty dialectic lies in the African notion that an individual forms an integral part of the community in which he or she resides.<sup>12</sup> Both the African Charter on Human and Peoples' Rights and the African Children's Charter include a catalogue of individual duties, and the responsibilities of the child.<sup>13</sup> These instruments represent an attempt at balancing cultural relativism with universalism in human rights.<sup>14</sup>

Recent legislation on children's rights adopted by African states establishes a trend towards including the obligations of both children and their parents. Countries that manifest this trend include South Africa,<sup>15</sup> Uganda,<sup>16</sup> Kenya,<sup>17</sup> Eritrea,<sup>18</sup> Ghana,<sup>19</sup> Burkina Faso,<sup>20</sup> Burundi,<sup>21</sup> Chad<sup>22</sup> and Senegal.<sup>23</sup> The laws of Uganda, Ghana, Burundi, Chad and Senegal do not specifically mention the duties of the child, although they explicitly spell out the duties of parents. South Africa places more emphasis on the duties of parents than on

the responsibilities of the child. By contrast, Kenya is more balanced. The Kenyan Children's Act 2001 recognises almost the same responsibilities of the child as those set out in the African Children's Charter (article 31), including the duties to work for the cohesion of the family; to respect parents, superiors and elders at all times, and assist them in case of need; to serve the national community by placing physical and intellectual abilities at its service; to preserve and strengthen social and national solidarity; and to preserve positive cultural values of the community in all relations with other members of that community.<sup>24</sup> Burkina Faso<sup>25</sup> and the DRC<sup>26</sup> follow the same trend, emphasizing the duty to respect and assist parents.

Both the South African Children's Act and the Kenyan Children's Act provide that child responsibilities should be proportionate to the child's age and ability,<sup>27</sup> just like article 31 of the African Children's Charter. This provision operates as an important rider to individual duties, which

<sup>11</sup> See F M Deng, *A cultural approach to human rights among the Dinka*, in A An-Nai'im and F M Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990, Brookings Institution), 266; B Ibhawoh, *Cultural relativism and human rights: reconsidering the Africanist discourse* (2001) 19(1) *Netherlands Quarterly of Human Rights* 53–54.

<sup>12</sup> J Mbiti, *African religions and philosophy* (1970, Praeger) 141.

<sup>13</sup> See articles 27–29 of the African Charter, and article 31 of the ACRWC.

<sup>14</sup> J Sloth-Nielsen and B Mezmur, *A dutiful child: The implications of article 31 of the African Children's Charter* (unpublished) 7-9.

<sup>15</sup> See section 16 of the Children's Act 38 of 2005, which provides for the responsibility of the child; and sections 18–21 of the same Act, which make provision for parental responsibilities.

<sup>16</sup> Section 5 of the Children's Act, Cap 59 of the Laws of Uganda, provides for the duty of parents.

<sup>17</sup> Section 21 of the Kenyan Children Act 2001 provides for duties and responsibilities of the child, while section 23 of the same Act provides for duties of parents in relation to their children.

<sup>18</sup> M B Hagos, *Harmonisation of national and international laws to protect children's rights: The Eritrea case study* (African Child Policy Forum, 2006) 69.

<sup>19</sup> Section 6 of the Ghanaian Children's Act 1998 provides for parental duties.

<sup>20</sup> Section 23(3) of the 1997 Constitution (Law No. 002/97/ADP).

<sup>21</sup> Section 30(2) of the 2005 Constitution.

<sup>22</sup> Section 38(1) of the 1996 Constitution.

<sup>23</sup> Section 20 of the 2001 Constitution. See also section 155 of the Family Code <<http://www.justice.gov.sn/droitp/CODE%20FAMILLE.PDF>> (accessed 21 November 2007)

<sup>24</sup> See section 21.

<sup>25</sup> Section 23(3) of the 1997 Constitution (Law No. 002/97/ADP).

<sup>26</sup> Section 40(4) of the 2006 Constitution. See, too, J Sloth-Nielsen *Strengthening the Promotion, Protection and Fulfilment of Children's Rights in African Context*, in A Alen et al., *The UN Children's Rights Convention: Theory Meets Practice* (2007, Intersentia Antwerpen-Oxford).

<sup>27</sup> See section 16 of the South African Children's Act and proviso to section 21 of the Kenyan Children's Act.



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are often misinterpreted as providing an entry point for limitations to children's rights: that children may be subjected to harsh labour at the insistence of parents or families. Furthermore, the Kenyan Children's Act, presumably alive to the danger of possible abuses of child responsibilities, omits to provide for the sanctions for any child who neglects these duties, though it does expressly create the offence for parents who treat children cruelly or neglect them.<sup>28</sup> Other countries that provide for criminal liability and punishment for neglecting parental duties include Eritrea<sup>29</sup> and Madagascar.<sup>30</sup>

Legislation from Kenya (s 23–24), Eritrea (articles 204–205, 265–274 of the Transitional Civil Code of Eritrea, South Africa (Chapter 3, ss 18–41), Ghana (s 6) and, to some extent, Uganda's 5–6) spell out in detail the specific duties of parents. These include the general duty to care for and maintain the child, including the duty to give the child education and guidance, immunisation, adequate food, clothing, shelter and medical attention; the duty to maintain contact with the child; the duty to act as a guardian of the child; and the duty to protect children from neglect,

abuse and discrimination. The DRC Constitution and that of Southern Sudan set even higher standards for children's protection, as they address violence both inside and outside the home.<sup>31</sup>

What is perhaps problematic in the manner in which these laws enshrine parental duties is that the relationship between state duties and those of parents in relation to children is not well defined. It is therefore very difficult to determine when the state's duties arise in relation to the socio-economic rights of children.

The African Children's Charter deals better with this problem. It states clearly, after indicating that parents have the primary responsibility for the upbringing and development of the child, that the state has the duty to assist parents in this regard. Nevertheless, it is not entirely correct that states always bear a secondary responsibility in relation to children or the secondary duty of assistance to parents.<sup>32</sup> The straitjacket allocation of primary and secondary duties between the state and parents respectively has the effect of watering down the significance of children's socio-economic rights, since the state's

<sup>28</sup> See section 127.

<sup>29</sup> Hagos ( note 19 above) 69.

<sup>30</sup> L Lalabarivivino and the Madagascar Ministry of Justice, *Harmonisation of national and international laws to protect children's rights: The Madagascar Case study* (African Child Policy Forum, 2006), 16.

<sup>31</sup> See section 41(5) and (6) of the 2006 DRC Constitution.

<sup>32</sup> This kind of thought influenced the decision of the South African Constitutional Court in *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC), which dealt with the issue of whether the state could be ordered to provide shelter to a group of people who were living in intolerable conditions without basic shelter, by virtue either of section 26 (protecting the general right of everyone to housing) or section 28(1)(c) (protection of the child's right to basic shelter) of the South African Constitution. Regarding the latter, the Constitutional Court took the view that section 28(1)(c) imposed a primary duty on parents to take care of their children; thus, parents had the primary duty to provide shelter to their children. The state incurred a primary obligation only where children were removed from their parents, or lacked parental care. The decision effectively absolved the State of responsibilities towards fulfilling children's socio-economic rights. The sweeping effect of this decision was, however, mitigated to some extent in *Minister of Health and Others v Treatment Action Campaign, 2002 (10) BCLR 1033 (CC)*, where it was held that the state incurs 'the primary obligation to provide basic shelter rests on those parents who can afford to pay.'

obligations in relation to children are to a large extent conceptualized as indirect and exercisable through the agency of parents.<sup>33</sup> This approach has fomented a misconception that state responses aimed at addressing children's socio-economic rights have to be channelled through adults, thus ignoring child-specific and child-focussed measures. It is therefore important for legislation to clarify the relationship between parental duties and state obligations in relation to the socio-economic rights of the child.

### 2.3 CUSTODY AND PARENTAL RESPONSIBILITIES

From a child rights perspective, the question of custody raises complex problems in Africa. In a number of cases, custody and parental responsibilities are largely determined by inflexible, predetermined rules of African customary law. In patrilineal societies, children automatically belong to the male side of the family, while in matrilineal societies the female side of the family has automatic rights and responsibilities in respect of the children. The range of persons who may be entitled to custody and who have parental responsibilities over children are not limited to the husband and wife. The African extended family is larger than the nuclear family. Thus, various members within the extended family may assert a claim to a child or be obligated to take care of the child.

These rules of African customary law have been under severe pressure from human rights advocates, especially gender activists, who have highlighted the problem of systemic inequalities between women and men within the African family, which place women at a disadvantage regarding their rights to children. Some commentators have also argued that, due to changing socio-economic circumstances, the idea of the extended family has been under so much strain that the social bonds that once held it together have increasingly lost their adhesive powers. At the same time, rising numbers of orphans and destitute children, caused largely by HIV/AIDS, have underscored the significance of family solidarity.<sup>34</sup> The challenge for law and policy makers has therefore been to strike the right balance between ensuring equality between men and women within the African family without undermining the traditional family structure and the intricate web of social rights and obligations to which it gives rise.

The question of custody and parental responsibilities sharply raises this challenge. The tendency in Africa has been to deal with this question in legislation protecting women's rights. For example, the proposed Marriage, Divorce and Family Relations Bill of Malawi, provides that '[a] spouse may severally, or jointly with the other, exercise responsibility towards the upbringing, nurture and maintenance of the children of the marriage,'<sup>35</sup> and that '[both] spouses

<sup>33</sup> DM Chirwa *Combating child poverty: The role of economic, social and cultural rights*, in J Sloth-Nielsen (ed) *Essays on children's rights in Africa* (London: Ashgate Publishers, forthcoming).

<sup>34</sup> See for instance Save the Children Sweden, *Children's rights in Kenya – an analysis based on the CRC reports (2006)*, 18, noting that 'the transformation from extended to nuclear family, from rural to urban living, from traditional to modern life is considered to have had a negative impact on the situation of children.'

<sup>35</sup> Section 49(5).



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have the right to mutual custody of the children of the marriage during its subsistence.<sup>36</sup>

There is also movement towards specifying the rules of custody in child-specific legislation. The South African and Kenyan Acts have particularly interesting and unique provisions in this regard: both clearly delineate who has parental responsibility. For example, section 24 of the Kenyan Children's Act provides that:

1. Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.
2. Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

Likewise, the South African Children's Act provides that the biological father of a

child has full parental responsibilities and rights in respect of the child if he is married to the child's mother, or if he was married to the child's mother at the time of the child's conception or birth or any time between the child's conception and birth.<sup>37</sup> It also states that the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.<sup>38</sup>

These provisions have the effect of promoting greater equality between parents in respect of the rights and responsibilities they have towards their children. Effectively, they alter African customary law rules on custody and parental responsibilities, which previously tended to be pegged on the patrilineal or matrilineal tree.<sup>39</sup>

However, many of these Acts do not expressly deal with the question of whether or not other members of the family (other than the husband and wife) have any rights and responsibilities in relation to children.<sup>40</sup> This may be a significant oversight, given that most Africans still live in circumstances where the extended family structure is still in place. The Ugandan Children's Act, in contrast, provides that where the natural parents of a child are deceased, 'parental responsibility may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or to a

<sup>36</sup> Section 49(6). In contrast to this, in Mali, for instance, the law clearly states that even in case of mutual custody of children, the father remains the chief and first responsible person of the family. See Section 86 of the Parenthood Code of 31 July 1973 <[http://www.legismali.com/index.php?option=com\\_content&task=view&id=171&Itemid=72](http://www.legismali.com/index.php?option=com_content&task=view&id=171&Itemid=72)> (accessed 21 November 2007).

<sup>37</sup> See section 20.

<sup>38</sup> Section 19(1).

<sup>39</sup> Here, it is important to take note of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2005).

<sup>40</sup> The South African Children's Act 38 of 2005 stands out in this regard, as the concept of parental responsibilities is expressly widely applicable to 'anyone having an interest in the care, well-being and development of a child,' which obviously includes members of the extended family.

foster parent.<sup>41</sup> Nevertheless, duties of family members in an extended family do not crystallise only after the death of spouses. The Ghanaian Children's Act is therefore notable in that it leaves room for other members of the family to apply for custody of a child, which also affords the spouses equal opportunity to contest for custody.<sup>42</sup> It provides that '[a] parent, a family member or any person who is raising a child may apply to a Family Tribunal for custody of a child.'<sup>43</sup> It further provides that '[a] parent, a family member or any person who has been caring for a child may apply to a Family Tribunal for periodic access to the child.'<sup>44</sup> Similar provisions can be found in the proposed Child (Care, Protection and Justice) Bill of Malawi.<sup>45</sup>

Equally notable are provisions on parental responsibilities for child maintenance in Eritrea. The Eritrean Transitional Civil Code codifies the duty to maintain that applies primarily to parents and extends to 'ascendants, brothers and sisters of full and half blood, descendants by affinity and ascendants by affinity.'<sup>46</sup>

### 2.4 CHILDREN BORN OUT OF WEDLOCK AND AFRICAN CUSTOMARY LAW

As regards children born outside of wedlock, the Kenyan Children's Act

includes provisions which are incongruent with many African customs, even though these customs on this aspect may appear to be consistent with children's rights. Section 24(3) provides:

Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—

- (a) the mother shall have parental responsibility at the first instance;
- (b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.

Section 25 lays down a number of guidelines for determining whether a father of a child borne out of wedlock may assume and discharge parental responsibilities. These guidelines include assessment on the basis of whether or not the mother and father have lived under the same roof for a minimum of six months.

These provisions, which were upheld recently by the Kenyan Constitutional Court, have been widely criticised in Kenya on the grounds that they are discriminatory against unmarried women and undermine the accepted principle that parents, irrespective of their marital status, have

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<sup>41</sup> Section 6(2).

<sup>42</sup> This Act actually leans slightly towards the mother of the child on the question of custody. Section 99(3) provides that the 'child justice court shall consider the best interests of the child and the importance of the child, on account of age, being with his mother when making an order for custody or access'.

<sup>43</sup> Section 43.

<sup>44</sup> Section 44.

<sup>45</sup> Section 99.

<sup>46</sup> Hagos (note 18 above) 73.





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shared responsibility to care for their children.<sup>47</sup> Significantly, the provisions seem to afford inferior protection to children in comparison with the safeguards available under African customary law, where in certain communities children born out of wedlock (especially in patrilineal societies) have the obligation to pay damages to the family of the mother of the child.<sup>48</sup> An unmarried biological father acquires full parental responsibilities and rights if he pays such damages.<sup>49</sup> This customary practice is in keeping with the right of the child to know and be cared for by his or her parents.

The South African Children's Act is more advanced, in that it contemplates the fact that a biological father of a child born out of wedlock may have full parental responsibilities provided that he was living with the mother of the child in a permanent life-partnership at the time of the child's birth, or (regardless of whether he has lived with the mother or not) that he consented to being identified as the father, or that he contributed or attempted to contribute towards the maintenance or upbringing of the child for a reasonable period.<sup>50</sup>

It is the proposed Marriage, Divorce and Family Relations Bill of Malawi, however, that reflects the position of customary law most accurately and in a manner that is favourable to the child – and hence, that

could be labelled as a promising practice. The Bill provides that:

Where a woman is pregnant and the alleged father does not dispute responsibility for the pregnancy or is adjudged by the court to be responsible for pregnancy, he shall be liable to maintain the woman during the period of the pregnancy and to pay for or reimburse the attendant costs of delivery and the court may make an order for enforcement as may be deemed appropriate.<sup>51</sup>

The Bill also provides that where the alleged father is a minor, such liability will lie against his parent or guardian, until he ceases to be a minor.<sup>52</sup> This, too, reflects customary law practice in Malawi. In addition, the proposed Child (Care, Protection and Justice) Bill of Malawi of 2006 provides for rules that do not give much room to fathers of children born outside of wedlock regarding whether they should accept parentage or not: this Bill provides that where parents are not known or where parentage is disputed, the child or its parent or guardian, a probation officer, a social worker or any other interested person may apply to a child justice court for an order to determine the parentage of the child.<sup>53</sup> Such an application can be made before the child is born, within 18 years after birth, or with special leave of the court

<sup>47</sup> See H Nduta, *Ghost dad* <<http://www.boloji.com/wfs5/wfs858.htm>> (accessed 1 November 2007).

<sup>48</sup> L. Mwambene *Reconciling African customary law with women's rights in Malawi: The Proposed Marriage, Divorce and Family Relations Bill* (2007) 1(1), *Malawi Law Journal* 119.

<sup>49</sup> J.C. Becker *Seymour's customary law in Southern Africa* (1989, Juta) 234.

<sup>50</sup> See section 21.

<sup>51</sup> Section 97(1) of the Bill.

<sup>52</sup> Section 97(3) of the Bill.

<sup>53</sup> Section 96.

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after the child has attained the age of 18 years. The rules on evidence of parentage are tilted against the father. The court is entitled to consider such factors as the performance of a customary ceremony by the purported father of the child; the refusal by the purported father to submit to medical test; and public knowledge of parentage.<sup>54</sup>

Although not as elaborate, the Ghanaian Children's Act 1998 is also noteworthy. It expressly provides for the right of children to grow up with their parents. Thus:

'No person shall deny a child the right to live with his parents and family and grow up in a caring and peaceful environment unless it is proved in a court that living with his parents would lead to significant harm to the child, or subject the child to serious abuse, or not be in the interest of the child.'<sup>55</sup>

Furthermore, the Act categorically prohibits parents from depriving a child of his or her welfare whether 'the parents of the child are married or not at the time of the child's birth', or whether 'the parents of the child continue to live together or not.'<sup>56</sup> These provisions can be interpreted in a manner that ensures that fathers of children born out of wedlock

do not escape from their responsibilities in relation to those children, and thus ensure the rights of such children to know, and be raised by, their parents.

### 2.5 HARMFUL CULTURAL PRACTICES

There is an emerging trend towards legislation prohibiting social and customary practices that are harmful to the child's health or well-being.<sup>57</sup> For example, the South African Children's<sup>58</sup> Act prohibits genital mutilation (FGM) or the circumcision of female children, forced marriage, and virginity testing of children under the age of 16. The Ghanaian Act provides that no person shall force a child to be betrothed, to be subjected to a dowry transaction, or to be married.<sup>59</sup> Furthermore, it sets the minimum age of marriage at 18 years.<sup>60</sup> The legal age of marriage is 18 in Morocco and 19 in Algeria.<sup>61</sup> Similar explicit prohibitions can also be found in Nigeria's Child Rights Act 2003. In particular, section 21 of this Act creates a penalty of a fine of five hundred thousand Naira<sup>62</sup> or five years imprisonment, or both, for those who violate the prohibition of child marriages. The National Policy and Plan of Action on the Elimination of FGM in Nigeria adopted in 2002 considers female genital mutilation as a prototype of violence against the girl child,

<sup>54</sup> Section 97(1) of the proposed Child (Care, Protection and Justice) Bill of Malawi, 2006.

<sup>55</sup> Section 5.

<sup>56</sup> Section 6(1).

<sup>57</sup> See, for instance, section 7 of the Ugandan Children's Act; section 12(1) of the South African Children's Act.

<sup>58</sup> Section 12(2) and (3).

<sup>59</sup> Section 14(1).

<sup>60</sup> Section 18(2).

<sup>61</sup> International Bureau for Children's Rights, *Making children's rights work in North Africa: Country profiles on Algeria, Egypt, Libya, Morocco and Tunisia* (2007) 177.

<sup>62</sup> This was equivalent at time of writing to approximately USD 4,000



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and a violation of the child's right to life, health and human dignity. Benin, which has a similar law prohibiting FGM, goes further and imposes a fine of three million CFA francs<sup>63</sup> and a prison term of three to five years when FGM is practiced on minors.<sup>64</sup> When the practice leads to the death of the victim, the penalty is five to twenty years imprisonment and a fine of three to six million CFA francs.<sup>65</sup> These legislative and policy provisions constitute an important step towards eradicating such practices, especially because a legislative prohibition carries more weight and legitimacy than a court-imposed prohibition.

However, few countries have laws that expressly encourage positive customary practices. The Ghanaian Children's Act is one of the exceptions in this regard. It expressly provides that '[no] person shall deprive a child the right to participate in sports, or in *positive* cultural and artistic activities or other leisure activities.'<sup>66</sup> A similar provision is found in section 4 of the Schedule I to the Ugandan Children's Act. The Kenyan Children's Act is also distinctive in this respect, as it expressly requires the Children's Court, when considering making any order under the Act, to take into account 'the customs and practices of the community to which the child belongs.'<sup>67</sup> These provisions underscore the fact that a lot of good elements are

contained in African customary laws, beliefs and practices, which can be harnessed to advance the protection of children's rights. Thus, these provisions could be highlighted as good practice because they leave room for the nurturing and facilitating of child-rights-friendly customary laws and practices.

### 2.6 AFRICANISED DISPUTE RESOLUTION MECHANISMS<sup>68</sup>

One of the key challenges to realising children's rights has been the lack of impact on the communities of legal reforms. The majority of Africans are not governed by formal laws and dispute resolution mechanisms, and the consequent plurality of legal systems has had the effect of insulating customary practices from international and constitutional human rights standards and, conversely, has resulted in the adoption of domestic legal measures and policies that ignore the cultural and local contexts in which they apply. At the centre of this problem is the lack of involvement of the local people in the adoption and implementation of legislation and policies that affect them.

There are a few promising examples of new legislation in African countries that

<sup>63</sup> This was equivalent at time of writing to approximately USD 7,000.

<sup>64</sup> Section 5 of Act No. 2003-03 on the prohibition of FGM in Benin in <<http://www.assembleebenin.org/lois/IMG/pdf/2003-03.pdf>> (accessed 21 November 2007).

<sup>65</sup> Section 6 of the Law No. 2003-03. As to the fine, it would vary between USD 7,000 and USD 13,000.

<sup>66</sup> Section 9.

<sup>67</sup> Section 76(3)(g).

<sup>68</sup> For a general and detailed exposure of dispute resolution mechanisms, see section 7 below.

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attempt to involve local communities in the implementation of legislation on children's rights, as well as incorporating African conceptions of justice. The Ugandan Children Act, for example, makes provision for village executive committee courts with both civil<sup>69</sup> and criminal jurisdiction.<sup>70</sup> Even in criminal proceedings, a village executive committee is empowered to make orders, notwithstanding the penalty prescribed in the Penal Code, for reconciliation, compensation, restitution, apology and caution.<sup>71</sup> The Lesotho Children's Protection and Welfare Bill (2004), is similarly innovative. It creates village child justice committees (a form of local courts) with powers to convene and facilitate family group conferences and victim offender mediation.<sup>72</sup> Similar to the Ugandan and Lesotho village committees, but with lesser powers, are the Ghanaian Child Panels. As many of these can be established in each district as the District Assembly considers necessary.<sup>73</sup> The South African Children's Act is another good example of an attempt to incorporate African conceptions of justice in dispute resolution and to involve local communities in dispute resolution mechanisms. Section 49(2)(a) of the South African Children's Act provides that in *any matter* concerning a child, 'an approach which is conducive to conciliation and problem-solving should be followed, and a

confrontational approach should be avoided.' The children's court also provides for referrals to lay forum hearings and family group conferences. These locally developed responses to communal resolution of conflict involving the youth in trouble with the law and children in need of care is indeed constitute an interesting adjunct to contemporary restorative justice initiatives.

These provisions, especially those in the Ghanaian and Ugandan Acts and the Lesotho Children's Protection and Welfare Bill, are critical to the effectiveness of child legislation. They codify an African model of dispute resolution founded on the twin pillars of reconciliation and non-confrontation.<sup>74</sup> By involving local communities and traditional authorities in the implementation of child legislation, communities may acquire a sense of ownership of the procedures and processes involved; also, they are empowered to contribute to solutions to problems facing their own children. Through these mechanisms, communities have a greater chance of understanding the rights of the child and appreciating the circumstances where their own practices are at odds – or in accord – with these rights. Those involved in child justice and welfare also have an opportunity of gaining a better understanding of the specific socio-economic and cultural

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<sup>69</sup> According to section 92(1), all causes of a civil nature concerning children shall be dealt with by a village executive committee where the child resides, or where the cause of action arose.

<sup>70</sup> Section 92(2) and (3).

<sup>71</sup> Section 92(4) of the Ugandan Children Act.

<sup>72</sup> Section 125 of the Lesotho Children's Protection and Welfare Bill.

<sup>73</sup> Section 27 of the Ghanaian Children's Act.

<sup>74</sup> GH Boehringer *Aspects of penal policy in Africa with special reference to Tanzania* (1971), 15 *Journal of African Law* 182; DNN Nsereko *Compensating the victims of crime in Botswana* (1998), 33 *Journal of African Law* 157.

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circumstances in which child legislation is implemented, and the challenges and opportunities involved.

In conclusion, the upshot of this discussion is that African states are awakening to the need to implement child rights in ways suitable to the African context. Innovative legal provisions and mechanisms are being adopted that seek to give an African or local flavour to various legal provisions enshrining child rights, or to alter certain cultural or religious rules, practices or beliefs. Key among these are provisions on child and parental responsibilities that capture the African thinking that an individual is not an island, but a member of society enmeshed in a complex web of reciprocal rights and obligations.

Many countries have still failed to pass legislation that fully captures the dynamics of the African extended family, especially in the context of parental responsibilities and matters of custody of children. Encouraging examples have been cited from Ghana and Eritrea, which demonstrate how rules governing these important issues can be couched. The position of children born out of wedlock remains precarious in many African countries. However, as we have seen, Ghana and Malawi provide examples of best practices concerning the right of the child to know and be raised by his or her parents.

Particularly notable also, when considering the question of Africanisation, are dispute

resolution mechanisms and principles concerning child rights issues. Countries such as South Africa, Uganda and Ghana have imaginatively blended the notions of conciliation, reparation and non-confrontational dispute resolution mechanisms concerning child rights matters, at the same time allowing for the participation of local or traditional authorities and communities.

### 3. INNOVATION IN CHILD PROTECTION PROVISIONS

#### 3.1 INTRODUCTION

This section of the paper highlights the critical issues of child trafficking and child labour. Social security, to the extent that it relates to child abuse and neglect, is also given substantial discussion.

#### 3.2 TRAFFICKING

Whilst trafficking is a phenomenon that has the attention of the both the CRC (in article 35) and the African Children's Charter (in article 29), it is the concentration of effort to define, prohibit and prevent trafficking contained in the Palermo Protocol<sup>75</sup> that has resulted in sustained and focussed efforts to combat and prevent trafficking of children in recent times. Largely, in our view, spearheaded by INGOs such as the United Nations Office for Drugs and Crime (UNODC), the International Organization for Migration (IOM), Terre des Hommes, IPEC, and

<sup>75</sup> The Optional Protocol to the UN Convention on Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, particularly Women and Children (2000).

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others, considerable advances have been and are being made in this regard, at both legislative and policy levels. The ILO reports as follows:

'Resource mobilization in this area has been very successful in recent years. As of 2005, seven donor countries are collaborating with the ILO to implement projects to combat trafficking of children. Some US\$ 52.1 million has been raised, more than two thirds of this in 2003/4.

...In 2005 the ILO established a task force on trafficking and now, across the ILO, there are 28 anti-trafficking projects, 17 of which are managed by IPEC.<sup>76</sup>

The African continent is a prime beneficiary of these developments.

At the subregional level, significant efforts are currently underway in the form of legislative reviews, involving the Southern Africa Network against Trafficking and Abuse of children, a consortium including Malawi, Zimbabwe, Zambia, Mozambique and South Africa. South Africa's recent Children's Act contains a chapter on trafficking, definitions relevant to the practice, and regulations underscoring the implementation issues – although it must be pointed out that this section of the Act

will be repealed once comprehensive anti-trafficking legislation targeting all forms of trafficking and all victims, not only children, is finalised in Parliament.<sup>77</sup> Lesotho does not have a law that specifically addresses the problem of trafficking in human beings,<sup>78</sup> but the on-going legal reform process is significant. Part seven of the Children's Protection and Welfare Bill of 2004 devotes provisions to trafficking and abduction of children and the Bill adopts the Palermo Protocol definition of child trafficking.<sup>79</sup> The Bill regards child trafficking as a criminal offence whose perpetrators, if convicted, may be sentenced to imprisonment of not less than 20 years.<sup>80</sup>

SANTAC reports that the Mozambican Ministry of Justice, in collaboration with a national child rights network Rede Came, has already facilitated the drafting of anti-human trafficking legislation, which at time of writing is pending enactment by Parliament.<sup>81</sup> Malawi has been hailed by the US Department of State as a country whose government has made significant progress in furthering its anti-trafficking law enforcement efforts in recent years.<sup>82</sup> Malawi's constitution prohibits slavery, servitude, and any form of forced or bonded labour, and is backed by its penal code that criminalises abduction; procurement of a person for prostitution or brothel work;

<sup>76</sup> *The End of Child Labour: Within Reach*, International Labour Organization, (Geneva 2006) 41.

<sup>77</sup> A dedicated project of the South African Law Commission on trafficking was established in 2003, and is finalising its work on draft legislation and a Report, due for completion in 2008.

<sup>78</sup> UNESCO, Lesotho Study, *Human Trafficking, especially of women and children in Lesotho: Root Causes and Policy Recommendations*, UNESCO Poverty Paper Policy Series (2005).

<sup>79</sup> UNESCO (note 80 above) 26.

<sup>80</sup> *Ibid.*

<sup>81</sup> M Chichava and M Kiremire A situational analysis of the abuse and trafficking of children in southern Africa (draft, copy on file with the author dated March 2007).

<sup>82</sup> A Munthali, P Mvula and G Mandere, *Child Protection in Malawi: a review of literature*, (2006) 26.



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procurement and defilement involving threats, fraud or drugs; involuntary detention for sexual purposes; living off the proceeds of prostitution; or operating a brothel.<sup>83</sup> In 2006, the Malawian Law Commission submitted a draft law to the Ministry of Justice<sup>84</sup> that specifically criminalises child trafficking. In addition, the government has embarked on specialized training for judges on the issue of child trafficking; in 2005, border patrol and police officials throughout the country received anti-trafficking training from government and NGOs, and the government has also opened a drop-in centre to provide counselling, medical care, legal assistance, shelter, food and vocational training to victims of trafficking and sexual violence.<sup>85</sup>

In Zambia, the Ministry of Home Affairs has put together a task force on human trafficking, while, according to SANTAC, the Parliamentary Select Committee on Human Rights, Gender, and Health is actively working on a draft bill on sex crimes and human trafficking.

Further afield, it has been noted that there is a high awareness of the trafficking phenomenon in West Africa due to international attention paid to slave ships carrying child labourers to markets and

plantations in the region.<sup>86</sup> Some examples of trafficking in the region include:

- Between 10,000 and 15,000 West African children working on cocoa plantations in the Ivory Coast, sold by middlemen to farm owners
- 3,000 Beninese children trafficked within the region between 1995 and 1999
- Approximately 25,000 foreign children working in markets and on farms in Gabon, of which 7,000 are likely to have been trafficked.<sup>87</sup>
- In Senegal, where the main victims of human trafficking are women and children trafficked for prostitution, sex tourism, domestic labour, or organised begging, recent reports state that a minimum of about 142,000 children have been trafficked for exploitative domestic labour and forced begging.<sup>88</sup>

However, there have been promising developments to combat child trafficking from a legal and policy perspective. Burkina Faso's law prohibits child trafficking,<sup>89</sup> and in December 2005, Cameroon enacted a statute that prohibited child trafficking. As far as Cote D'Ivoire is concerned, despite the fact that a law to prohibit trafficking, drafted in 2002 still awaits adoption, in 2005 the National Committee for the Fight against Trafficking and Child Exploitation

<sup>83</sup> Ibid.

<sup>84</sup> US TIP Report, pp. 171 –172, quoted in *Trafficking of children in Africa: an overview of research, international obligations and existing legal provisions* (J Gallinetti and D Kassan, in J Sloth Nielsen (ed), *Essays on children's rights in Africa*, London: (Ashgate publishers, forthcoming).

<sup>85</sup> Ibid.

<sup>86</sup> K Fitzgibbon, *Modern-Day Slavery? The scope of trafficking in persons in Africa*, *African Security Review*, Vol. 12 No. 1 (2003) 82.

<sup>87</sup> Fitzgibbon (note 86 above) 83.

<sup>88</sup> B Moens et al, *Study on the Practice of Trafficking in Persons in Senegal* (September 2004, USAID).

<sup>89</sup> Gallinetti and Kassan (note 86 above).

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has taken the lead in drafting the regional multi-lateral anti-trafficking agreement in partnership with 8 other countries (as referred to below).<sup>90</sup>

Since 2004, Gabonese law has prohibited child trafficking for labour exploitation. Child trafficking is also prohibited under Malian law, which provides a sanction of up to 20 years imprisonment for traffickers. In addition, in 2005, Mali entered various multi-lateral and bi-lateral anti-trafficking agreements.<sup>91</sup> Nigeria has a federal law prohibiting trafficking that was amended in 2005 to allow for forfeiture and seizure of trafficker's assets, and a comprehensive new trafficking act came into force on 5 April 2006 in Benin, focussing on the country both as a country of origin and of destination for trafficked children.<sup>92</sup> Substantial fines coupled with prison terms are provided for in the new Act.

Mention must also be made of numerous bilateral and multilateral agreements that facilitate cross-border cooperation to combat child trafficking. For instance, Cameroon has concluded a bi-lateral collaboration with Gabon to repatriate Cameroonian trafficking victims from Gabon, and in June 2005, Benin concluded an agreement with the Federal Republic of Nigeria on the Prevention, Repression and Abolition of Human Trafficking, especially

Women and Children. Finally, as a prime example of a multilateral agreement, mention must be made of the July 2005 *Multilateral Cooperation Agreement to Combat Child Trafficking in West Africa*, signed by Benin, Burkina Faso, Cote D'Ivoire, Guinea, Liberia, Mali, Niger, Nigeria and Togo.

Gallinetti and Kassan conclude as follows:

'...it is clear that the issue of trafficking is being actively addressed in numerous ways by various African states. While the adoption of law on the matter is critical, the practical implementation of the law in order for it to be effective in realising children's rights is dependant on a range of other actions.<sup>93</sup> In this regard it is promising to note that the West African countries have recognized the need, *inter alia*, of training, multi-lateral and bi-lateral co-operation with neighboring countries, investigation and prosecution of traffickers and the importance of information gathering by means of electronic databases.'

### 3.3 CHILD LABOUR

When the ILO released the 2006 Global survey on child labour proclaiming that the end of child labour was not only an achievable goal, but that it was one that was within reach, the disappointing disclaimer was that child labour had

<sup>90</sup> USTIP Report, pp. 97 – 98.

<sup>91</sup> USTIP Report, pp. 174 – 175.

<sup>92</sup> Discussed in detail in Kabidi, R. *A Legal Response to child trafficking in Africa: a case study of South African and Benin* (unpublished LLM dissertation, University of Pretoria, 2007)

<sup>93</sup> Kabidi (note 94 above) discussed the example of Benin in this regard, where Village Committees have been established as a rapid response to thwart the transportation of children to neighbouring countries, as a form of early warning system when it is noticed that a child has left the village. He estimates that in 2005, the number of existing committees was around 1,044, of which 840 had been inaugurated with UNICEF assistance.





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increased in sub-Saharan Africa in the period since the first ILO report in 2002.<sup>94</sup> This was attributable to the burgeoning child population, the effects of HIV, and rapid urbanisation, which impels children into marginalised lives in city slums. However, the ILO report continues to flag promising projects, including legal reform, which have taken cognisance of particular forms of child labour, and this section highlights a sample of these policies and legal developments.

The ratification by most African countries (to date there are 165 signatories in total) of the ILO Convention 182 on the Prohibition and Elimination of the Worst forms of Child Labour (1999) has undoubtedly been a catalyst in this regard. Gallinetti<sup>95</sup> refers to recent legislation in Zambia (2004) within the labour law sphere that gives effect to the precepts of this Convention (this at a time when comprehensive Zambian children's legislation had not been finalised). The Employment of Children and Young Persons Act (Laws of Zambia, 2004, Sections 4 and 17) has been categorised as being 'most promising' for deterring and punishing more serious forms of child labour, including child trafficking,

as it specifically prohibits employment of any child under 18 in 'any type of employment or work which by its nature or the circumstances in which it is carried out, constitutes a worst form of [child] labour.'<sup>96</sup> A recent study on child law in Namibia posits the position on child labour thus:

Namibia's new Labour Act goes even further than the Constitution in protecting children against exploitation and hazardous employment. It is illegal under this statute to employ a child under the age of 14 years for any purpose whatsoever.<sup>97</sup> It is illegal to employ any child between the ages of 14 and 16 for certain categories of hazardous work, including employment in mines, factories, electricity works, construction work, or in connection with the installation, erection or dismantling of machinery.<sup>98</sup> Children between the ages of 15 and 16 may not be employed to work underground in a mine. In addition, the Minister of Labour is empowered under the statute to further limit the types of employment which are permissible for children between the ages of 14 and 16. No distinction is made

<sup>94</sup> *The End of Child Labour: Within Reach*, International Labour Office, Geneva, 2006.

<sup>95</sup> *ILO Convention 182 on the Worst Forms of Child Labour with specific reference to children used by adults in the commission of offences* (2007), Dissertation submitted in fulfilment of the LLD, University of the Western Cape.

<sup>96</sup> Thompson, J. *Legal and Practical Obstacles to Prosecution of Child Labour Exploitation in Southern Africa*, paper presented at the RECLISA Conference, South Africa, July 2006, p. 4. The section in the Zambian Statute reads as follows in defining worst forms of child labour:

- (a) all forms of slavery and all practices similar to slavery, such as the sale and trafficking of children and young persons, debt bondage, serfdom, forced and compulsory labour and forced or compulsory recruitment of children and young persons for use in armed conflict;
- (b) the use, procuring or offering of a child or young person for prostitution, production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child or young person for illicit activities, such as the production and trafficking of illegal drugs; and
- (d) work that by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children or young persons.

<sup>97</sup> See Section 3(2) of the Labour Act 15 of 2004.

<sup>98</sup> See Section 3(3) of the Labour Act 15 of 2004.

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between part-time and full-time employment in the provisions on child labour. It is also illegal under the Labour Act for an employer to establish a scheme whereby an employee's child is required to perform labour on behalf of his or her parent, where the child is under the age of 18. Violation of this prohibition constitutes a criminal offence.<sup>99</sup>

In South Africa, considerable strides have been made regarding child labour in the new Children's Act 38 of 2005, seen together with its amending bill 19F of 2006. Child labour is defined as work by a child which:

- (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and
- (b) places at risk the child's well being, education, physical or mental health, or spiritual, moral, emotional and social development.

Further to this, section 150 of the Act gives as one possible ground for finding a child to be a child in need of care and protection, the fact that a child is a victim of child labour. Supplementing existing labour legislation, section 141 contains explicit prohibitions of:

- The use, procuring or offering of a child for slavery or practices similar to slavery
- The use, procuring or offering of a child

- for the purposes of sexual exploitation
- The use, procuring or offering of a child for trafficking
- The use, procuring or offering of a child for use in the commission of certain specified criminal offences
- The use, procuring, offering or employment of a child for child labour.

These provisions consciously address the need to domesticate ILO convention 182, and to provide the framework for the eventual elimination of the worst forms of child labour.

At the level of implementation of a time-bound programme to address the worst form of child labour, ILO commends the example of Tanzania, where the government has committed itself to the elimination of worst forms of child labour in the country by 2010.<sup>100</sup> The ILO 2006 Report documents the steps that the Tanzanian government has undertaken in support of this time-bound programme. These include a child labour strategies document developed to become the Strategic Programme Framework (SPF) for the programme, linked to the National Strategy for Growth and Reduction of Poverty (NSGRP). The second phase of the NSGRP for 2005-2010 has been developed, and includes child labour indicators as well as addressing several important goals directly related to the elimination of child labour. The aim is to

<sup>99</sup> See sections 42 and 108 of the Labour Act 15 of 2004.

<sup>100</sup> *The End of Child Labour: Within Reach*, International Labour Office, Geneva, 2006 p. 38. See also J Gallinetti *Child Labour: a view from Africa*, in J Sloth-Nielsen (ed) *Essays on children's rights in African context* (London: Ashgate, forthcoming); and W Mallya *Awareness raising on child labour: Experience from Tanzania*, Paper delivered at the Regional Child Labour Conference (RECLISA) held in Johannesburg, South Africa, 4-6 July 2006, 1.



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reduce the number of children engaged in the worst forms of child labour by 75% by 2005, and the overall child labour participation rate from the current 25% to less than 10% in 2010. In addition, there has been an effort to reduce the number of out-of-school children through the Ministry of Education's Complementary Basic Education in Tanzania programme. The government has also produced a list of hazardous tasks for children as set out in the WFCL Convention, and this has been translated into local languages to promote community awareness.

Highlighting the significant role of public awareness campaigns in the fight against the worst forms of child labour, Mallya concludes:

'These strategies have produced various results, such as a social mobilization campaign that is community-driven, a sense of local government ownership and responsibility towards the monitoring of the child labour media campaigns, the formulation of community by-laws on child labour and the generation of political will to combat child labour through targeting political leaders in all levels of government through the awareness raising campaigns.'<sup>101</sup>

Combining diverse strategic efforts appears to be characteristic of child-friendly efforts in this sphere. By way of

example, the Madagascar Ministry of Justice has initiated a programme with ILO and IPEC entitled 'Reform of the legal framework for the elimination of the worst forms of child labour,' which is scheduled to run over 29 months and aims at supporting the Ministry for Justice in its law reform efforts, popularization, awareness raising, and education of the population (especially parents) on the rights of children in relation to work. It aims to develop information, education and communication materials, such as booklets, and to enlist the assistance of the media through printing of articles in daily newspapers.<sup>102</sup>

### 3.4 SOCIAL SECURITY

It is a clear and often-argued truth that endemic poverty lies at the heart of children's vulnerability to marginalisation, exclusion and serious rights violations. Poverty lies behind the phenomenon of trafficking, fuels the demand and supply of child labour, propels children to live on the street and become tangled up in the criminal justice system, compromises nutritional status and health outcomes, and it impacts on school retention rates and educational success. While war, conflict and traditional practices harmful to health and well-being do obviously play role in contributing to children's rights violations, it is increasingly being recognised that primary poverty alleviation, access to

<sup>101</sup> Cited in Gallinetti (note 102 above).

<sup>102</sup> Cited in Gallinetti (note 102 above).

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education and improving the societal position of women and female children are likely to be the major factors leading Africa's regeneration and development. Hence, since the late 1990's, the international community has begun to support programmes giving effect to children's right of access to social security as a preventive strategy to provide a minimum floor of protection against poverty, and often also as a frontline response to HIV/AIDS. There have been positive evaluations of the spin-off effects of cash transfers or small grants in relieving the worst effects of poverty, and, especially where economic growth has been positive, African governments have been encouraged to support schemes that were initially donor-funded.<sup>103</sup>

At the outset, the most significant programme on the continent in this regard is a child-friendly practice based on legal foundations: the child support grant in South Africa, the flagship grant programme for children living in poverty. Rooted in two constitutional rights (the right of everyone to have access to social security, including

social assistance if unable to maintain themselves and their dependents,<sup>104</sup> and the children's socio-economic rights clause in section 28(1)(c) of the Constitution) the introduction of the child support grant in the late 1990s was premised on a pre-existing social security system. This system included pensions for the elderly, grants for persons with disabilities that render them unable to participate in the labour market, and a state maintenance grant payable to carers of children who qualified as a result of means test. A legacy of apartheid, however, the state maintenance grant had a limited number of beneficiaries, and these were concentrated in more privileged sectors of society. The incoming government after democracy in 1994 soon realised that rollout of this grant to all race groups on a national basis was unaffordable and unsustainable. A Commission of Inquiry into the situation<sup>105</sup> recommended the replacement of the state maintenance grant, benefiting only a few, with a broad-based child support grant of a far more limited size economically, payable to the primary care giver of the child,<sup>106</sup> and targeted at the most

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<sup>103</sup> See Nyamweya P et al, *Evaluation of Sida support to Unicef country programme, Kenya (2006)*, available at <[www.oecd.org/dataoecd/5/8/39125999.pdf](http://www.oecd.org/dataoecd/5/8/39125999.pdf)>. For a discussion of cash transfers in Africa see N Kakwani, F Soares, H H. Son (2006), *Cash Transfers for School-Age Children in African Countries: Simulation of Impacts on Poverty and School Attendance*, *Development Policy Review* 24 (5), 553–569; and N Kakwani, F Soares and H Son (2005), *Conditional Cash Transfers in African Countries*, Brasilia: International Poverty Centre. See also MCDSS/GTZ (2005), *Monitoring Report of the Pilot Social Cash Transfer Scheme, Kalomo District, Zambia (2nd edn)*, Lusaka: Ministry of Community Development and Social Services. See also B Schubert and R Slater *Social Cash Transfers in Low-Income African Countries: Conditional or Unconditional?* (2006) 24(5) *Development Policy Review* 571–578. See also D Sridhar and A Duffield, *A review of the impact of cash transfer programmes on child nutritional status*, Save the Children UK, 2006, available at [www.savethechildren.org.uk](http://www.savethechildren.org.uk) (accessed 21 November 2007).

<sup>104</sup> Section 27(1)(a). The South African constitution, negotiated by a Constitutional Assembly between 1994 and 1996, is unique in its provision for an array of justiciable socio-economic rights. A significant body of jurisprudence and academic analysis has grown up around the socio-economic rights dimensions of south African constitutionalism, a full analysis of which lies outside the scope of this study. See, in overview, C Mbazira, *Enforcing the Economic, Social and Cultural Rights in the South African Constitution*, University of the Western Cape, LLD (unpublished) 2007; and S Liebenberg, *Socio-Economic rights*, in S Woolman et al, *Constitutional Law of South Africa* (2<sup>nd</sup> ed) (2005, Juta and Co).

<sup>105</sup> The Taylor Committee of Inquiry into the State Maintenance System, Department of Social Development, 1998.

<sup>106</sup> The principle was that the grant would 'follow the child', recognising that many children are cared for on a day-to-day basis by someone other than a biological parent – for instance, extended family members such as grandmothers.



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economically vulnerable.<sup>107</sup> The Welfare Laws Amendment Act of 1998 introduced the changes, and these were further encapsulated in a new Social Assistance Act of 2004, which now governs the functioning of the social security system as a whole.<sup>108</sup>

The child support grant was initially payable in a fairly meagre amount – the equivalent of US\$ 15 per month per child, for a maximum of six children. Over time since 1998, it has risen to double that figure. A limitation that saw the grant being made available only for the primary caregiver of a child until the age of 7 has been progressively lifted, and as at the time of writing access to the grant ends at the age of 14 years. A consortium of lobbyists<sup>109</sup> successfully argued for the extension of the reach of the grant from 7 years to 14 years, and they continue to advocate for its extension until vulnerable children up to 18 years of age are covered. At time of writing indications have been given that the government will increase the age

further to 18 years, consistent with definitions in constitutional and international law of the end of childhood.<sup>110</sup>

However, what distinguishes this system and marks it out for consideration as good practice is the extent to which the child support grant has been progressively rolled out. Thus, both in concept<sup>111</sup> and in implementation, the model has been lauded. From a low base when introduced ten years ago, the grant now reaches more than 7 million vulnerable children, and is a good example of child-friendly implementation of the child's right to social assistance and an adequate standard of living.

Nor is the cash transfer model as a primary preventative mechanism for poverty alleviation and responding to HIV confined to South Africa. Since the turn of the millennium, cash transfer programmes have been introduced in some districts in Kenya, Malawi, Tanzania, Mozambique and Lesotho. These initiatives had a strong

<sup>107</sup> The means test is only one criterion for accessing the grant. Factors such as the type of accommodation in which the grant applicant resides (e.g. formal or informal housing) also play a role. See ACCESS (Alliance for Children's Entitlement to Social Security) at [www.access.org.za](http://www.access.org.za).

<sup>108</sup> A proposal by the South African law reform Commission to include all child-related grants in the envisaged Children's Act 38 OF 2005 did not meet with Cabinet approval, due to the pending overhaul of the social assistance laws and the introduction of a South African Social Security Agency (SASSA) to whom administration of the social assistance programmes would be 'outsourced'. SASSA commenced operations in the latter half of 2006.

<sup>109</sup> Including ACCESS (Alliance for Children's Entitlements to Social Security).

<sup>110</sup> See Budget Speech of the Minister of Finance, February 2007.

<sup>111</sup> There are nevertheless debates around the conceptualisation of the scheme, and there have been legal challenges to some of its criteria. The debates concerning cash payments revolve around arguments that these create dependency amongst recipients, act as disincentives to work (and conversely as an incentive, particularly amongst unmarried girls, to have children in order to be able to access the grant as a means of income). It has been stringently argued that frequently the cash does not reach the child beneficiary for whom it is intended, but rather gets redistributed within the wider family circle, or gets misspent and abused. Obviously, anecdotal evidence of this is adduced.

The contrary arguments, based on solid social science and economic research conducted in particular with respect to the effects on household income and economic security of the old age pension, puts these concerns in perspective: the broader overall effect of the social security system has been to lift the poorest of the poor to a new level of basic self-sufficiency in which they can begin to function in the cash economy. The weight of opinion, therefore, comes down firmly in favour of grants as a mechanism for poverty alleviation and development. A legal challenge to exclusionary criteria was heard recently in the Pretoria High Court, and rests on the premise that the exclusion as beneficiaries of children who cannot produce an official identification number assigned as a result of birth registration is discriminatory and inconsistent with the Constitution; judgement in this matter is at the time of writing still awaited.

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focus on the implications of HIV/AIDS on children at the grass roots level, and have been positively evaluated internationally.<sup>112</sup> The South African model stands out at this stage, however, because it is grounded in constitutional imperatives and based on national legislation, as opposed to being a programme of cash transfers located only at a programmatic level, or available only in limited pilot sites.

### 4. MAINSTREAMING LEGAL AND POLICY RESPONSES TO CHILDREN INFECTED AND AFFECTED BY HIV/AIDS

#### 4.1 INTRODUCTION

Vast amounts of literature on HIV/AIDS have come into being since the scaling up of responses to the disease in the 1990s. As the implications and effect of HIV/AIDS upon children have come to the fore, most notably in the context of Africa (the region hardest hit by the pandemic), legal and

policy responses have adapted to accommodate children's vulnerability amidst the AIDS crisis.<sup>113</sup> But the point has also been made that despite a plethora of programme and policy interventions – which have shifted measurably within relatively short periods of time, as new thinking on the challenges of prevention, care and treatment have emerged<sup>114</sup> – very little can be adduced in the way of legal literature specific to children that can underscore this analysis.<sup>115</sup> It has been noted that most countries have a national policy on HIV or a children's strategy that incorporates one on orphans and vulnerable children (OVC).<sup>116</sup>

In 2003, UNICEF convened an OVC Partners Forum to scale up and improve responses to OVC at national levels: this was effected through a Rapid Country Assessment Analysis and Action Planning (RAAAP) initiative, which targeted 17 countries in sub-Saharan Africa, including South Africa, Swaziland, Mozambique, Malawi, Namibia, Lesotho and Zimbabwe.

<sup>112</sup> See Sridhar and Duffiel, note 105 above, for instance.

<sup>113</sup> In the 2006 UNAIDS/WHO Report on the global epidemic, it was estimated that 39.5 million people were living with HIV, with sub-Saharan Africa accounting for 24.7 million (UNAIDS/WHO, *AIDS epidemic update (2006)* <[http://data.unaids.org/pub/EpiReport/2006/2006\\_EpiUpdate\\_en.pdf](http://data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf)> (accessed 23 October 2007). The trend of new infection rates, according to this report, appears to be stable, and declines in national HIV prevalence rates have been observed in some African countries.

<sup>114</sup> A recent work, *HIV testing from an African Human rights system perspective: an analysis of the legal and policy framework of Botswana, Ethiopia and Uganda* (M Tadesse, unpublished LLM thesis, University of Pretoria, 2007) describes the recent developments concerning voluntary testing and counselling (VCT) which has proved ineffective in establishing a growing body of citizens aware of, and hence able to access assistance for, their sero-positive status. This is due to the stigma and discrimination associated with HIV, rather than ignorance of its existing mode(s) of transmission. The focus has shifted to provider-initiated testing and counselling, or the 'opt-out system.' In an effort to bolster the numbers of individuals who find out their HIV status, the PITC model sees HIV tests being offered all persons seeking health services (and sometimes those seeking specific health services, such as prenatal services) who then at the same time gain access to their HIV status.

<sup>115</sup> See, for one such source, J Sloth-Nielsen, *Of Newborns and Nubiles: Some critical challenges to children's rights in Africa in the era of HIV/AIDS* (2005), 13 *International Journal on Children's Rights* 73. This article, appearing in a double-sized, themed issue of the international journal on children's health and the law, and which was subsequently published in book form (MDA Freeman *Children and health rights*, Ashgate, Dartmouth 2006), was the only one in the entire legal compendium that mentioned HIV/AIDS. The absence of scholarly consideration of legal responses to HIV/AIDS and children's rights was noted in J Sloth-Nielsen and B Mezmur, *Their rights - our responsibility: towards a research agenda for children's rights in Africa* (African Child Policy Forum, Addis Ababa, forthcoming, 2007). It is thought that the reason for this lacuna is the perception amongst (western) legal scholars that HIV is a problem peculiar to Africa.

<sup>116</sup> *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa*, Save the Children, UK (2006).



## MAINSTREAMING LEGAL AND POLICY RESPONSES TO CHILDREN INFECTED AND AFFECTED BY HIV/AIDS

This RAAAP was guided by the Framework for the Protection, Care And Support of Orphans and Vulnerable Children living in a world with HIV, endorsed by a broad range of donor organisations and governments, UNICEF, and UNAIDS. One strategy of the five agreed to in the common agenda relates to ensuring that governments protect the most vulnerable children through improved policy and legislation. This has informed the various themes that can be identified in legislation affecting OVC that this report now reviews.

Since a multiplicity of HIV-related legal and policy issues can be identified pertaining to children growing up in the era of HIV/AIDS, it is apposite to provide a summary of these first, before examining country responses.<sup>117</sup>

### PREVENTION

Prevention, from the perspective of legal frameworks (as opposed to media and educational campaigns which fall outside the ambit of this study) principally involves access to information, devices and post-exposure prophylaxis (PEP) to prevent the transmission of the disease. Of importance to children in the African context is transmission of HIV through sexual contact (consensual or otherwise), rather than exposure through other means such as needlestick injuries, contact with body fluids during emergency and health interventions, or needle sharing amongst drug users. The parameters of legal and

policy regulation therefore concern the ability of children to access information, relevant devices, and PEP.

### TREATMENT

While most aspects concerning the availability of treatment constitute a service delivery issue, there are aspects that entail policy and legal responses in the child rights arena. Firstly, treatment is dependent on knowledge of positive HIV status; thus, questions arise as to whether and at what age children can access and consent to HIV tests in order to determine their status. HIV testing raises a number of child rights concerns, such as the preservation of the confidentiality of test results, privacy, and non-discrimination.

### CHILD-HEADED HOUSEHOLDS

The emergence of child-headed households has been of particular concern to the children's rights community since it dawned upon social scientists that the disease was having a disproportional impact on women of child-bearing age, who were inevitably also primary carers of other children. It can be argued that policy responses to OVC dramatically increased in scale and intensity around the turn of the millennium, but that only to a limited extent have these been translated into higher-end enforceable legal frameworks. To the extent that the existence of child-headed households threatens the very core of the children's rights premise that

<sup>117</sup> The issue of mother-to-child-transmission (MTCT) of HIV/AIDS is not included in the breakdown of themes, as it is considered as a health service delivery issue, and the legal implications from a child rights perspective are negligible – either preventive treatment is provided during the birth process, or it is not. See, however, the consideration of one legal dimension, the enforcement of the constitutional right to health care services, in *TAC vs Government of the Republic of South Africa* (note 34 above).

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children have the right to parental or alternative adult care until they reach the end of childhood, complicated jurisprudential questions arise about sanctioning the independent existence of such fragile family forms. The question of how to ensure their protection, access to available resources, education, survival and development come to the fore from a legal point of view.

## INHERITANCE

It has become evident that property transfer to the benefit of surviving children is an especially thorny issue when customary law and communal ownership arises, since children are by and large not beneficiaries after the deaths of care givers. Property grabbing and dispossession by relatives has been an unwelcome feature of the rise of HIV/AIDS, which law-makers have of necessity attempted to address. Some of these initiatives to the benefit of children will be highlighted.

## VITAL REGISTRATION

The registration of the details of children rendered vulnerable or orphaned by HIV has been introduced as a policy response to foster improved service delivery and identification of those in need. With a legal basis, this approach should be considered under the aegis of law reform for the protection of African children in the era of HIV.

## ALTERNATIVE CARE

The growing number of OVC and other children rendered vulnerable by HIV has resulted in a sustained legal and policy examination of the alternative care system. Communities and kinship structures, themselves affected by the disease, have not been able to absorb vulnerable children to the extent that they have done in the past. Among the identified legal and policy responses that have attracted attention are not only formal care (institutional or otherwise), but informal care, adoption and fostering as well.

## 4.2 CHILD-FRIENDLY APPROACHES IN THE FIGHT AGAINST HIV

### *HIV testing – enabling legislation and policy*

A number of countries have addressed the question of children's consent to testing and access to treatment in the HIV context in both legal and policy frameworks. The trend thus far has been to provide for children's evolving capacity by specifying an age for consent lower than the age of consent in relation to other matters (for example, consent to medical treatment or to surgical interventions).

In Ethiopia, the 2007 Federal HIV/AIDS Prevention and Control Council/Federal Ministry of Health *Guidelines for HIV Counselling and Testing in Ethiopia* accord children aged 15 the capacity to give informed consent to HIV<sup>118</sup> interventions.

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<sup>118</sup> HIV testing for children aged under 15 shall only be done for the benefit of the child, and with the parents' or guardians' consent. Hence, parents cannot rely on this provision to require a child to submit to a HIV test purely for the purposes of satisfying curiosity.



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However, children aged 13 and above are in certain situations regarded as mature minors, able to furnish consent to testing without parental consent.<sup>119</sup> These include children who are commercial sex workers, street children, children heading families, sexually active adolescents, and those who are married or pregnant. The Guidelines guarantee confidentiality of results (with insignificant exceptions), in accordance with acknowledged universal human rights principles.

In Uganda, children of 12 years may furnish independent consent to HIV testing, provided they have the capacity to understand the implications of the results of the HIV test.<sup>120</sup> Further, it is provided that where children aged below 12 are brought for testing by parents or guardian, the HIV test must be done only to facilitate the medical care of the child: it must be clinically indicated or a risk of infection must be evident. It is spelt out that HIV testing on children may not be carried out for screening purposes, or to satisfy parental curiosity.<sup>121</sup>

South Africa's Children's Act 38 of 2005, some parts of which were put into operation in July 2007, and the accompanying Children's Act Amendment Bill 19F of 2006, passed by Parliament on 22 November 2007, take full cognisance of the impact of HIV upon children and its role in exacerbating vulnerability. In this

regard, it is illuminating that the law even uses HIV in the titles to sections 130–133.<sup>122</sup> These deal comprehensively with HIV testing, and provide for the testing of a child (who, for the purposes of the Act, is a person aged below 18 years) only where this is in the best interests of the child, the required consent has been given, or where such a test is necessary to protect a health worker or other person who may be at risk of HIV through contact with the child's bodily fluids.

As far as consent is concerned, a child who is aged 12 years or older may consent to his or her own test, and a child below the age of 12 is also authorised to consent provided that he or she is of sufficient maturity to understand the benefits, risks, and social implications of an HIV test. In cases where that child is aged below 12 and is not able to furnish valid consent, parents or caregivers (who need neither be parents nor guardians, but could be the person in charge of the day-to-day care of the child) are empowered to give consent to the test, and failing this, the provincial head of social development may be approached. Various other possible consent givers are stipulated, including a children's court, which is established at each magisterial jurisdiction. Section 132 of the Children's Act contains the well-accepted policy that no HIV test should be performed without pre-and post-test

<sup>119</sup> Tadesse (note 116 above) 46.

<sup>120</sup> Tadesse (note 116 above) 51, citing Ministry of Health, Republic of Uganda, *Uganda National Policy on HIV counselling and testing* (2005).

<sup>121</sup> See note 122 above, referring to para 4(5).

<sup>122</sup> Discussed in J Sloth-Nielsen 'Chapter 7: Child Protection' in Davel CJ and Skelton A (eds) *A Commentary on the Children's Act (2007)*, Juta and Co Lansdown.

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counselling, and it is further provided that this 'must be provided by an appropriately trained person.' Counselling should be provided to the child who is of sufficient maturity to understand the implications of the result, both pre-and post-test. Children's rights to confidentiality are also provided for, insofar as the results of an HIV test may not be disclosed without consent.

These new provisions promote the policy goal that children (as with all potential victims of the virus) should be placed in the best possible position to become acquainted with their sero-status, and that providing for their capacity to consent independent of their parent's assent (or even knowledge) facilitates this objective, as well as catering to the situation that, increasingly, children may not have parents as a result of HIV/AIDS. A final innovation worthy of mention is that where children are aged below 12 years and are not able to understand the risks, implications and benefits of an HIV test, but it is nevertheless in the best interests of the child that one be performed, consent can be furnished by a wide range of care-givers not limited to legal guardians or to biological parents. This is also intended to accommodate children who lack parents, or whose parents are unable to furnish consent.

A further provision in the South African Children's Act, which has met with a heated and adverse public response, provides for children's access to condoms

and reproductive devices as of the age of 12 years, provided that in the instance of the latter, proper medical advice is given to the child and a medical examination is carried out to ensure that there are no medical reasons why a specific contraceptive should not be provided to the child. This provision links to prevention efforts aimed at reducing the spread of HIV/AIDS amongst youth, and is therefore characterised as protective of those who are sexually active, even though, at the same time, this age is well below the formal legal age for consent to sexual intercourse.<sup>123</sup>

### PROTECTION AGAINST NON-DISCRIMINATION

A law on legal protection of persons infected and affected by HIV/AIDS was adopted in Burundi in May 2005, with the key aim of mainstreaming the principle of non-discrimination. Mozambique's draft children's legislation has non-discrimination as an overriding principle, which will also benefit HIV-positive children. South Africa's Children's Act and the Lesotho Child Care and Protection Bill (2004) also provide for protection against discrimination.

### VITAL REGISTRATION AND INHERITANCE

The Lesotho Children's Protection and Welfare Bill (2004) makes several important innovations for children without parental care.

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<sup>123</sup> Part XXXV (clause 245) of the Lesotho Child Care and Protection Bill contains identical provisions to the South African model. See J Sloth-Nielsen, *Lesotho* (paper prepared for the Expert Roundtable on Harmonisation of Laws in Eastern and Southern Africa, African Child Policy Forum, October 2006).

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Firstly, it provides for the right of orphaned and vulnerable children to vital registration. Registration of orphans also appears to be a response adopted in Botswana, where OVC are registered with the name of a care-giver, who is then eligible to receive assistance in the form of monthly food baskets. There is also, in some cases, the possibility of free school uniforms, school fee waivers, and housing assistance.<sup>124</sup>

Secondly, the Lesotho draft legislation gives children rights to reasonable access to the estate of their parents.<sup>125</sup> There is an intentional emphasis in the Bill that both boy and girl children should enjoy similar rights in respect of family property.<sup>126</sup> Duties are placed on a range of role players in this regard, including employers, the Master of the High Court, and financial institutions. This is intended to ensure that orphaned children are not dispossessed of family property, and that the customary law that reserves inheritance rights for the eldest male relative (the rule of primogeniture) does not result in orphaned children being left destitute. In Swaziland, steps have been taken to mitigate the effects of dispossession that occurs under customary law when property passes out of the hands of orphaned children, but these have not yet been concretised in legislative form.<sup>127</sup>

In Malawi, the Wills and Inheritance Act was amended in 1998 to provide (amongst other things) better protection to OVC and widows, and to mitigate against the adverse effects of property grabbing. The entire sphere of child law in Malawi is destined for further reform once the Child (Care Protection and Justice) Bill (2006) is enacted.

### ALTERNATIVE CARE AND POLICIES AIMED AT SUPPORTING OVCS

The last few years (since 2003 in particular) have seen the development or overhaul of OVC policies in virtually all countries in sub-Saharan Africa.<sup>128</sup> Only a selection can be detailed here.

The formulation in Lesotho of a National Policy on Orphans and Vulnerable Children was completed during 2005. Kimane and Chipoyera state as follows:

This Policy recognizes poverty, the HIV/AIDS pandemic and food insecurity to be the current biggest threats to the survival, care, protection and development of children. All efforts directed at meeting the basic needs of children including securing primary education for them and reducing their vulnerability are defeated by these threats. According to the policy, children involved in child labour and in

<sup>124</sup> *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa*, Save the Children, UK, (2006) 25.

<sup>125</sup> Clause 38 et seq of the Lesotho Child Protection and Welfare Bill 2004.

<sup>126</sup> Dr I Kimane, *The Lesotho Child Protection and Welfare Bill 2005: why the delays in enacting the children's law?* (unpublished paper presented at the University of the Western Cape/Miller Du Toit conference, 'The globalization of child and family law' 26th – 27th January, 2006).

<sup>127</sup> A review of existing child law in Swaziland has been undertaken, and drafting of a comprehensive new children's act is likely to commence next year (personal communication, Save the Children, Swaziland office, November 2007). See, too, J Gallinetti, *Swaziland* (country report prepared for the African Child Policy Forum, 2006)

<sup>128</sup> *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa*, Save the Children, UK, 2006 at p 25. *Caring for Children affected by HIV/AIDS*, Innocenti Research Centre, UNICEF, 2006.

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commercial sex belong to the broad spectrum of vulnerable groups found in Lesotho. The overall purpose of the policy is to provide an enabling environment in which all vulnerable children would enjoy their rights and be adequately cared for, supported and protected. This would be achieved through the implementation of strategies aimed at addressing factors such as economic, food insecurity, poverty, lack of education, health, nutrition and social protection.<sup>129</sup>

The Lesotho government has introduced a bursary scheme specifically targeted at OVC whose participation in secondary education is low. It is clear that considerable energy and commitment is being targeted towards the problems experienced by children in Lesotho as a result of the HIV crisis, both at policy and legal levels.

In Malawi in 2005, the government launched the 'National Plan of Action for Orphans and Vulnerable Children.' This policy provides a framework for the government and other stakeholders, like civil society and donors, to work together to address the problems of vulnerable children. The government has also been implementing a community-based programme for orphan care. Under this initiative, training and resources are provided to community-based structures such as families and

religious groups, who look after orphans and needy children. The structures include families and religious institutions. A limited foster care scheme exists that makes provision for a monthly stipend of K200 (US\$ 1.5) to foster parents. In Mozambique, too, a cash transfer scheme has been a primary response to assist households worst affected by HIV. The amount involved is very small, but is nevertheless significant in reaching the most vulnerable households.<sup>130</sup>

The new South African Children's Act 19 of 2005 and the Children's Act Amendment Bill (19F) of 2006, passed by Parliament on 22 November 2007, significantly upgrade legal provisions concerning alternative care. Various innovations reflect the accommodation of HIV/AIDS-related developments which result in children requiring one or another form of alternative care. These include:

- Provision for a freeing order, enabling expeditious consideration of the possibility of adoption, such as where an abandoned child is found for whom there is no prospect of acquiring parental consent to adoption.
- A new register of potentially adoptable children and prospective adoptive parents, (RACAP), to enable matching of available children to families on a national level.

<sup>129</sup> Legal I Kimane and H Chipoyera, *Discussion Document on Child Labour in Lesotho* (International Labour Organization, unpublished draft dated 24 May 2006) 35.

<sup>130</sup> *Legal and Policy Frameworks to Protect the Rights of Vulnerable Children in Africa*, Save the Children, UK, 2006, 24 – 25.



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- The recognition in law of a new concept of foster care, called cluster foster care, which enables non-profit organisations to register cluster foster care schemes for the reception of more than six children (whereas conventional foster care is limited to 6 children per foster parent), so that efforts to absorb children orphaned by HIV can be scaled up. Extensive further provisions are being drafted which will regulate the registration of such schemes, their funding, and the interplay between cluster foster care schemes and the foster care grants currently payable to children placed in foster care by court order.
- Extensive provisions appear in the Act and Bill relating to child-headed households. These are discussed below.

Kenya is also preparing a number of documents elaborating policies relevant to HIV, including foster care rules, adoption regulations, guidelines for children in institutional care, and (in 2005) approved regulations dealing with charitable institutions (institutions for orphans included amongst them).<sup>131</sup> Successful foster care programmes have been identified in Tanzania and Liberia as well.<sup>132</sup>

### CHILD-HEADED HOUSEHOLDS

In *Caring for Children Affected by HIV and AIDS*,<sup>133</sup> mention is made of the South African model of supporting, rather than separating, child-headed households, as a promising practice. Initially proposed by the Law Reform Commission, legal recognition is accorded child-headed households in section 137 of the Children's Act Amendment Bill 19F of 2007, which was granted parliamentary approval on 22 November 2007. Section 137 provides (in part) the following definition:

'a provincial head of social development may recognise a household as a child-headed household if:

- (a) the parent or care-giver of the household is terminally ill, has died or has abandoned the children in the household;
  - (b) no adult family member is available to provide care for the children in the household;
  - (c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and
  - (d) it is in the best interests of the children in the household.
- (2) a child-headed household must function under the general support of a adult designated by

<sup>131</sup> Public presentation on the development of children's law in Kenya, 1st African conference on child Sexual Abuse, Nairobi, 24 October 2007.

<sup>132</sup> *Caring for Children Affected by HIV and AIDS*, Innocenti Research Centre, UNICEF, (2006) 21. Fuller details of the scheme in Tanzania are provided on p 29 of this publication; however, as a practice model, it has not yet found its way into concrete legal provisions.

<sup>133</sup> Innocenti Research Centre, UNICEF (2006) 17.

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- (a) a children's court; or
- (b) an organ of state or a non governmental organisation determined by the provincial head of social development.'

As mentioned, the South African provisions go further than any other on the continent in addressing the legal recognition of child-headed households as what has been termed 'a new family form'.<sup>134</sup> Their intention was fourfold:

1. To enable the primary care-giver heading such a household<sup>135</sup> to collect and administer any social welfare grants that may be payable in respect of younger siblings in the household, notably the child support grant discussed in section 3.3 above
2. To enable siblings residing in functioning households to stay together; rather than having the state intervene and possibly separate them
3. To protect child-headed households from the litany of potential abuses that vulnerable children have experienced within communities, including being preyed upon by adults trying to access grants, by according them the greatest possible degree of functional independence
4. To identify such households in order to provide social protection and support.

Hence, the provision cited above requiring the appointment of a mentor or adult to provide such support. The Regulations to the Act, once drafted, will prescribe the duties that the supervising adult is enjoined to perform, and the remainder of the subsections clarify the mutual role of the adult supervisor and the child heading the household.

- Either the child (aged 16 or older) or the adult may collect and administer any social security grant or other assistance to which the household is entitled (section 137(5)(a))
- Any grant collected and administered by the adult must be accounted for to the organ of state or non governmental organisation that appointed the supervisor in the first place (section 137(5)(b))
- The adult supervisor may not take any decisions concerning the household without consulting the child heading the household and, subject to their age, maturity and stage of development, other children in the household (section 137(6))
- The child heading the household may take all day-to-day decisions relating to the household and the children in the household (section 137(7))
- The child heading the household or any other child of sufficient age and maturity may report to the adult supervisor to the organ of state or non-governmental organisation that

<sup>134</sup> J Sloth-Nielsen (note 117 above).

<sup>135</sup> Such primary care-giver may, in terms of the Social Assistance Act 2004, be a recipient of a grant at the age of 16, the age at which a 13-digit bar coded identification document is issued.



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appointed the supervisor if the child or children is or are not satisfied with the manner in which the supervising adult is performing his or her duties (section 137(1)(8)).

It can be deduced from this that a high degree of autonomy is envisaged for legally recognised child-headed households, indicative of what could be said to be a child-friendly approach.<sup>136</sup> Further, the appointment of an adult mentor, if needs be by a children's court, builds on the home-based care and supervision model of HIV/AIDS service delivery that was part of the government strategic policy initiative in the 2000-2005 plan, and concretises this approach in legal terms.

In conclusion, the HIV/AIDS pandemic has brought with it numerous challenges for children's rights, most especially in sub-Saharan Africa, where prevalence rates are extremely concerning. As the CRC Committee has recognised in its General Comment No 3 (*HIV/AIDS and the Rights of the Child*),<sup>137</sup> many of these challenges lie at the level of policy or practice, especially as regards health service delivery and prevention campaigns. There are also several issues of legal import

surrounding HIV/AIDS, and this section has highlighted promising examples of law-making designed to address them.

### 5. LAWS AND POLICIES FACILITATING CHILDREN'S ACCESS TO PRIMARY EDUCATION

#### 5.1 INTRODUCTION

Education is a fundamental human right, fitting within the so-called economic, social, and cultural rights<sup>138</sup> – a group of rights that include the right to health services, the right to social security and the right to work. However, in many respects, the right to education is also a civil and political right, since people cannot fully realize their freedoms without education.<sup>139</sup> This is true partly because claiming one's rights usually requires some degree of awareness of the right in question.

Education is also an enabling right<sup>140</sup> that permits the exercise of other fundamental rights. Thus the right to education functions as a multiplier – it enhances the fulfilment of all other rights and freedoms when it is guaranteed.<sup>141</sup> Equally, it jeopardizes them all when it is violated.<sup>142</sup>

<sup>136</sup> There are detractors from this view, who argue that this model vests children prematurely with the responsibilities of adulthood and robs them of the chance to be children. They see this in itself as violating, rather than promoting, children's rights.

<sup>137</sup> CRC/GC/2003/1.

<sup>138</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 11: *Plans of Action for Primary Education* (Article 14 of the International Covenant on Economic, Social and Cultural Rights), 20th Sess., U.N. Doc. E/C.12/1999/4 (1999) [hereinafter ICESCR General Comment 11].

<sup>139</sup> *Ibid.*

<sup>140</sup> The right to education is also sometimes described as an empowerment right, as it has an enormous liberating potential and makes it possible for the individual to take charge of his/her life. See K D Beiter, *The protection of the right to education by international law* (2006) (Martinus Nijhoff Publishers: Boston), 28.

<sup>141</sup> See J Sloth-Nielsen and B D Mezmur, *Free education is a right for me: A report on free and compulsory primary education* (2007) (Save the Children), executive summary.

<sup>142</sup> J Sloth-Nielsen and B Mezmur (note 143 above) executive summary.

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More than half a century ago, article 26 of the UDHR enshrined the right to free basic<sup>143</sup> education. Subsequent commitments – the 1966 International Covenant on Economic and Social Rights, and the 1989 CRC – have reaffirmed this right. At the regional level, the ACRWC committed all African states to the full realisation of the right to education, with a particular focus on free and compulsory primary education.<sup>144</sup> The UNESCO Convention against Discrimination in Education (1960) is also an important instrument in this regard.

A number of other commitments are also made at different levels, and a few are worthy of mention. The Conference of African States on Education, convened in Addis Ababa in 1961, recommended that primary education be universal, compulsory and free by 1980, while education at the secondary level should be provided to 30 percent of the children who complete primary school.<sup>145</sup> The World Declaration on Education for All is another commitment – this was made in Jomtien, Thailand in March 1990, and assesses the basic learning needs for all states.<sup>146</sup>

The UN Millennium Development Goals (MDGs) include the target of ensuring that

all boys and girls complete a full course of primary schooling. MDG number 2 is the achievement of universal primary education by 2015, whilst MDG 3 is the elimination of gender disparities in primary and secondary education (this target was supposed to have been achieved by 2005, but was not met). Considerable momentum has built up in support of the commitments expressed by the MDGs, and for developing countries there is pressure to develop good quality plans and transparent means of achieving education for all (EFA).

The key provision on 'free' and 'compulsory' primary education under the CRC, article 28(1)(a), provides that 'States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available free to all.'

Therefore, article 28(1)(a) states the core minimum: that 'free' and 'compulsory' education at the primary stage is a measure that states parties are obliged to secure for all children, not just low-income children or other specially-demarcated groups of children.

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<sup>143</sup> NB: the words 'primary' and 'basic' are often used interchangeably in existing literature.

<sup>144</sup> Numerous other declarations, conventions, covenants and constitutions reiterate education's status as a right.

<sup>145</sup> See, generally, the *Final Report of the Conference of African states on the Development of Education in Africa*, Addis Ababa, 15-25 May 1961 <<http://unesdoc.unesco.org/images/0007/000774/077416e.pdf>> (accessed 25 October 2007).

<sup>146</sup> Article 2 provides that '[to] serve the basic learning needs of all requires more than a recommitment to basic education as it now exists. What is needed is an expanded vision that surpasses present resource levels, institutional structures, curricula, and conventional delivery systems, while building on the best current practice.'





## LAWS AND POLICIES FACILITATING CHILDREN'S ACCESS TO PRIMARY EDUCATION

### Article 11(3) of the ACRWC provides:

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

- a) provide free and compulsory basic education;
- b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
- c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
- d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
- e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Article 11 of the ACRWC thus entrenches a similar obligation to the CRC on states parties. However, two additions are discernible in the ACRWC.

- Article 11(3)(e) obliges states to take affirmative action and measures with regard to female, disadvantaged and gifted children. The provision attempts to address social imbalances, which can be corrected by state action
- Article 11(6) provides protection and promotion of the rights of girls who fall pregnant while in education. It provides the opportunity for girls to complete their education, on the grounds of their individual ability, without interruption. Pregnancy is not a legitimate ground for any kind of discrimination.

An indicator of good legislation/policy for free and compulsory primary education can be found in the so-called '4A scheme' first developed by Katarina Tomasevski, the former UN Special Rapporteur on the right to education. This was later entrenched in General Comment No. 13 of the CESCR entitled *The right to education* (article 13 of the Covenant). This scheme analyses the right to education in terms of the following essential features:

- Availability
- Accessibility (which includes physical accessibility, economic accessibility, and non-discrimination)
- Acceptability
- Adaptability.

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## THE 4-A SCHEME (WHAT GOVERNMENTS SHOULD DO)

1	Availability	- Schools and teachers	<ul style="list-style-type: none"> <li>– Fiscal allocations matching human rights obligations</li> <li>– Schools matching school-aged children (number, diversity)</li> <li>– Teachers (education and training, recruitment, labour rights, trade union freedoms)</li> </ul>
2	Accessibility	- Compulsory and post-compulsory	<ul style="list-style-type: none"> <li>– Elimination of legal and administrative barriers</li> <li>– Elimination of financial obstacles</li> <li>– Identification and elimination of discriminatory denials of access</li> <li>– Elimination of obstacles to compulsory schooling (fees, distance, schedule)</li> </ul>
3	Acceptability	- Regulation and supervision	<ul style="list-style-type: none"> <li>– Parental choice of education for their children (with human rights correctives)</li> <li>– Enforcement of minimal standards (quality, safety, environmental health)</li> <li>– Language of instruction</li> <li>– Freedom from censorship</li> <li>– Recognition of children as subjects of rights</li> </ul>
4	Adaptability	- Special needs and out-of-school children	<ul style="list-style-type: none"> <li>– Minority children</li> <li>– Indigenous children</li> <li>– Working children</li> <li>– Children with disabilities</li> <li>– Child migrants, travellers</li> <li>– Concordance of age-determined rights</li> <li>– Elimination of child marriage</li> <li>– Elimination of child labour</li> <li>– Prevention of child soldiering</li> </ul>

*K.Adapted from K.Tomasevki <sup>147</sup>*

<sup>147</sup> K.Tomasevski Right to education premier No. 3: Human rights obligations: Making education available, accessible, and adaptable (2002), 12 and 14.



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A legal framework that promotes the 4A-scheme as highlighted above could be taken as a good practice example. In the main, such a framework should facilitate the financial and physical accessibility of primary education, and respond to the special needs of out-of-school children.

### 5.2 FREE PRIMARY EDUCATION

Under Article 26 of the UDHR, although 'free' is often understood as free of charge, it can and should be interpreted in a broader sense – for instance 'free' should encompass school supplies as well as school fees.<sup>148</sup> Children are the majority of Africa's population, and poor children are the majority within that majority; and both the CRC and the ACRWC recognize that the right to education cannot be realized unless primary schooling is made genuinely free.

Although not commonly the case, the issue of children's access to socio-economic rights is mentioned explicitly in a number of African constitutions.<sup>149</sup> The right to education, however, is often found in African constitutions and legislation, and

this is particularly true of the right to free and compulsory primary education.<sup>150</sup> According to a report by Action Aid [first], education is an entitlement that is sanctioned by states, through legislation and national constitutions - twenty-seven sub-Saharan African countries have a constitutional guarantee of free basic education for all children... and therefore education is a justiciable right.<sup>151</sup> For instance, article 20 of Namibia's Constitution provides that all people should have access to education, and that basic education should be both free and compulsory.<sup>152</sup> The Constitution of 2005 of Southern Sudan states that 'education is a right for every citizen';<sup>153</sup> and that 'primary education is compulsory and the State shall provide it free.'<sup>154</sup> Similar sentiments are expressed by article 17 of the Malian Constitution, articles 35 (2) and (4) of the Constitution of Chad, the Constitution of Ghana, and article 30 of the Ugandan Constitution.

Constitutionalizing the right to free and compulsory primary education (and, for that matter, any children's rights) is a good practice with significant merits. Firstly, it helps to draw attention to children's

<sup>148</sup> S Aikman and E Unterhalter (eds), *Beyond Access: Transforming Policy and Practice for Gender Equality in Education* (2005, Oxfam).

<sup>149</sup> See, for instance, the Constitution of the People's Democratic Republic of Algeria (article 59), the Constitution of the Republic of Angola (article 31), and the Constitution of the Republic of Burundi (article 39). For further discussion see J Sloth-Nielsen (note 27 above).

<sup>150</sup> Articles 28(1)(a) of the CRC and 11(3)(a) of the ACRWC clearly provide for this right.

<sup>151</sup> Action Aid, *Education in Africa: Responding to a human rights violation*, <[http://www.actionaid.org.uk/doc\\_lib/135\\_1\\_education\\_in\\_africa.pdf](http://www.actionaid.org.uk/doc_lib/135_1_education_in_africa.pdf)> (accessed 23 October 2007).

<sup>152</sup> Article 20 states that:

- All persons shall have a right to education
- Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge
- Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorized by act of Parliament on grounds of health or other considerations pertaining to the public interest.

<sup>153</sup> Article 44 (1) of Constitution.

<sup>154</sup> Article 44 (2) of Constitution.

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Country	Legal guarantee of free education	Legal guarantee of free education	Country	Legal guarantee of free education	Legal guarantee of free education
Angola		No	Liberia		No
Benin	Progressive		Madagascar	Yes	
Botswana		No	Malawi		No
Burkina Faso	Progressive		Mali	Yes	
Burundi		No	Mauritania	Yes	
Cameroon		No	Mauritius	Yes	
Cape Verde		No	Mozambique		No
Central African Republic		No	Namibia	Yes	
Chad	Yes		Niger	Yes	
Comoros			Nigeria	Progressive	
Côte d'Ivoire		No	Rwanda	Yes	
Congo Brazzaville	Yes	No	Sao Tomé and Príncipe	Yes	
DRC	Yes		Senegal	Yes	
Equatorial Guinea	Yes		Seychelles	Yes	
Eritrea	Progressive		Sierra Leone		No
Ethiopia		No	Somalia		No
Gabon	Yes		South Africa		No
Gambia	Yes		Swaziland	Yes	
Ghana	Yes		Tanzania		No
Guinea		No	Togo	Progressive	
Guinea-Bissau	Yes		Uganda		No
Kenya		No	Zambia		No
Lesotho	Progressive		Zimbabwe		No

Adapted from K Tomasevski Global Report 2006: *The State of the Right to Education Worldwide: Free or Fee (2006)*, 6-7.

NB: Where the constitution mandates primary education to be free, this is denoted by a 'Yes'. The absence of such guarantee is marked with a 'No'. The third option, 'progressive', reflects a commitment to gradual introduction and broadening of free education as circumstances permit. This term, 'progressive', reflects the requirement of international human rights treaties for the progressive realization of the right to education where it cannot be guaranteed fully and immediately.



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special need for education. Secondly, a constitutional right to free and compulsory primary education has a heightened status, overriding that of ordinary legislation and thereby binding the state's power. Thirdly, organs of states, such as ministries of education and finance, can be held to account for the delivery of children's constitutional right to education.<sup>155</sup> Last but not least, the rigorous procedure required for amending or repealing constitutional provisions places children's constitutional right to education on a concrete footing.<sup>156</sup>

Subordinate national legislation declaring free and compulsory primary education is not in short supply. Examples include section 7 of the Kenyan Children's Act, the Education Act of 2004 of Sierra Leone, Mali's Act No. 99-046 of 28 December 1999 containing the Education Policy Act, the Act on the general organisation of education (Act No. 16/96) of Gabon, sections 4(3) and 9 of Chad's Act No.016/PR/06,<sup>157</sup> article 11 of the Finance Act in Cameroon,<sup>158</sup> and section 8 of the Children's Act of Ghana coupled with the Education Act of 1961 (Act 87).

Nonetheless, there seems to be a lack of guidance and common understanding of what constitutes free primary education as an obligation of governments.<sup>159</sup> Although a good number of African countries nominally provide the right to free and compulsory primary education, according to the former UN Special Rapporteur on the right to education, in 2006 only three African Countries could be considered as providing a 'proper' free primary education:<sup>160</sup> Mauritius, Seychelles and Sao Tomé and Príncipe.<sup>161</sup>

The experience of Mauritius is instructive as a good practice. Both the Constitution and the Education Act of Mauritius recommend free and compulsory schooling for children aged between 5 and 12 years - in line with what the CRC Committee usually recommends.<sup>162</sup> The existence of a clearly stipulated age-range for compulsory education (in order to avoid uneven enforcement) is also commendable. In 2000, the Mauritius Government spent 39, 068 million Rupees on education, 14.9% of the total recurrent expenditure for 2000/2001 (and well above the 11% generally recommended by UNESCO).<sup>163</sup>

<sup>155</sup> The recent recommendation of the CRC Committee in the context of its General Day of Discussion on available resources for the rights of the child, held in October 2007, highlights that the role of the ministries of finance in the process of country reports and ensuing 'constructive dialogue' should be developed further.

<sup>156</sup> J Sloth-Nielsen (note 27 above) 100.

<sup>157</sup> Act No 016/PR/06 of 13 March 2003 that provides directives and orientation for primary and elementary education. See <[www.jurifra.com/?base=jort&action=viewDoc&iddoc=1278&highlight=false&position=0](http://www.jurifra.com/?base=jort&action=viewDoc&iddoc=1278&highlight=false&position=0)> (accessed 23 November 2007).

<sup>158</sup> Finance Act No 2000/08 of 30 June 2000, as referred to in C Heyns (ed) *Human Rights Law in Africa* Vol 2 (2004, Martinus Nijhoff) 946.

<sup>159</sup> See generally Sloth-Nielsen and Mezmur (note 143 above).

<sup>160</sup> K Tomasevski, *Global Report 2006: The State of the Right to Education Worldwide: Free or Fee* (2006), 15-16.

<sup>161</sup> K Tomasevski (note 162 above).

<sup>162</sup> It is to be noted, however, that the CRC Committee has also recommended 8 years compulsory schooling. For example, in the context of Kenya, see *Concluding Observations on Kenya's Second Periodic Report*, CRC/C/KEN/CO/2 (2 February 2007), para. 58(a). It is worth mentioning that in Chad, for instance, free and compulsory education applies to children between 6 and 16 years. See Section 4(3) of Act No 016/PR/06 of 13 March 2003, which provides directives and orientation for primary and elementary education. See <[www.jurifra.com/?base=jort&action=viewDoc&iddoc=1278&highlight=false&position=0](http://www.jurifra.com/?base=jort&action=viewDoc&iddoc=1278&highlight=false&position=0)> (accessed 23 November 2007).

<sup>163</sup> CRC Committee, *Second Periodic Report of Mauritius* (2006), para 428.

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In 2003, the Mauritius government made the following public declaration:

'...[The government of Mauritius is] discharging its obligation to provide primary education that is compulsory and available free to all by providing all primary school children with a midday snack as an incentive to regular attendance and ensuring that each village council area has at least one primary school, i.e. the primary schools are within walking distance for all pupils.'<sup>164</sup>

Considerable investment of resources, both human and material, has been put into the education sector in Mauritius, backed by a well-defined legislation and policy. As a result, impressive progress has been achieved in terms of free, universal, compulsory primary education, provision of free textbooks, free secondary education, and provision of a fairly wide range of higher education courses at the University of Mauritius.<sup>165</sup>

After considering Mauritius's report in 2006, the CRC Committee acknowledged the remarkable improvements made in the field of education, including the ongoing reforms of the education system.<sup>166</sup> The introduction of the Zone Education

Prioritaire (ZEP), as an affirmative action measure to reduce disparities in the educational achievement of children, was also lauded.<sup>167</sup> In an implicit recognition of satisfaction with Mauritius' achievements in regard to free and compulsory primary education, the CRC Committee requested that Mauritius ensure that proposed reforms secure access to free and compulsory secondary education for all children, regardless of their social status and ethnic background.<sup>168</sup>

In Seychelles, a broad definition of *free* education reaches beyond the compulsory curriculum to extra-curricular activities (such as music and dance), which poor children might not be able to afford. This could be identified as a good practice,<sup>169</sup> and it should not come as a surprise that the CRC Committee is encouraged by the existence of free compulsory education and early childhood education programmes with virtually universal enrolment.<sup>170</sup> Wherever direct costs are essential to the educational undertaking (including provision of text books, school uniforms, learning materials, and equipment) and extra-mural activity, and examination fees, are covered by the government. This seems to be in accordance with what international human rights law perceives as *free* primary education.<sup>171</sup>

<sup>164</sup> UN Docs. E/1990/5/Add.21, 1994, para. 338, CRC/C/3/Add.36, 1995, paras. 4 and 96.

<sup>165</sup> Wikipedia, *Education in Mauritius* <[http://en.wikipedia.org/wiki/Education\\_in\\_Mauritius#Primary\\_sector](http://en.wikipedia.org/wiki/Education_in_Mauritius#Primary_sector)> (accessed 10 October 2007).

<sup>166</sup> CRC Committee, *Concluding Observations on Second Periodic Report of Mauritius* (2006) para 60.

<sup>167</sup> *Concluding Observations, Mauritius* (note 168 above) para 60.

<sup>168</sup> *Concluding Observations, Mauritius* (note 168 above) para 61.

<sup>169</sup> Tomasevski (note 162 above) 16. It is indicated that '[the] Ministry of Education ensures that school activities which are undertaken during the school day are provided free of charge and that resources are made available to subsidize those children who cannot afford to undertake out-of-school activities, for example music and dance.' See UN Docs. CERD/C/430/Add.1 (2003), para 359 and CERD/C/430/Add.1 (2003), paras. 374 and 377, as cited in Tomasevski (note 162 above) 16.

<sup>170</sup> *Concluding Observations, Seychelles* (CRC/C/15/Add.189) (9 October 2002) para 48.

<sup>171</sup> See generally J Sloth-Nielsen and B Mezmur (note 143 above).



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This does not, however, mean that indirect costs – such as transport, school meals, and further educational equipment – should not be borne by governments. The obligation of governments under article 28(1)(e) of the CRC to '[take] measures to encourage regular attendance at schools and the reduction of drop-out rates' demands that, where there is the need, they cover indirect costs. The CRC Committee points out that the obligation to provide for cost-free primary education also entails an obligation to provide assistance to purchase uniforms and schoolbooks, at least for children of poor families.<sup>172</sup> In this regard, promising examples abound. For instance, school feeding schemes are becoming commonplace in a number of African countries – such as in Lesotho, South Africa, Malawi, Tanzania,

Zambia, Ethiopia, Eritrea, Kenya, Uganda, Sudan, Chad, and Central African Republic.

Where possible, governments should also cover opportunity costs. Opportunity costs are a result of the choice of going to school instead of, for example, performing tasks at home, and constitute the loss of benefit a child could have achieved by contributing to the household income through work. In a small number of very poor countries, including Kenya, Mozambique, Zambia, Malawi, and Ethiopia cash transfers (also as discussed in section 3.3 above) have begun to show empirical evidence that compensation for the opportunity costs of education has a positive impact on enrolment and attendance at primary school.<sup>173</sup>

<sup>172</sup> Examples are CRC Committee, Concluding Observations, Sierra Leone (UN Doc. CRC/C/94, 2000), paras. 180-181. The Central African Republic (UN Doc. CRC/C/100, 2000), para. 468; Cameroon (UN Doc. CRC/C/111, 2001), para. 380; Guinea-Bissau (UN Doc. CRC/C/118, 2002), para. 75; and Mozambique (UN Doc. CRC/C/114, 2002) para 306.

<sup>173</sup> For further details on cash transfers, see section 3.3 (particularly footnote 104) above, on social security.

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Country	Date of introduction	What does 'free' mean? <sup>174</sup>	Government finance	External agencies
Malawi	October 1994	Free tuition, books and stationery. Uniform not compulsory	Education 11% of government recurrent budget (1990/01) to 24% (1997), of which 65% on primary education	40% of the primary education budget at introduction of free primary education
Uganda	January 1997	Free tuition for 6–12 year olds. Costs remain for clothing, school food, some materials and school fund contributions	12% of government budget in 1992 to 25% in 1998. 70% of this on primary education	Agencies cover over 50% of education budget
United Republic of Tanzania	October 2001	Free tuition for 7–10-year olds first, later to be extended. No mandatory cash contribution. Uniforms not officially compulsory	Post free tuition, education receives 25% of the government budget, of which 62% is for primary	Agencies provide over 60% of the primary education budget, excluding direct budget support
Kenya	January 2003	Free tuition and no school levies, but the costs of uniform and examinations remain	Prior to free primary, 29% of recurrent budget on education. Now 36% of budget (6% of GDP), 55% on primary, 93% on salaries	2003 World Bank approved US\$50 million and DFID US\$21 million. Other agencies helping to bridge immediate gaps in advance of strategic plan

Source: Riddell (2003) <sup>175</sup>

### 5.3 COMPULSORY PRIMARY EDUCATION

Making primary education compulsory is also an obligation under the CRC and the

ACRWC, and constitutes a fundamental tenet of international human rights law. According to Verheyde,<sup>176</sup> alongside legislative measures to impose compulsory education

<sup>174</sup> NB: there might be some discrepancies, in terms of what is provided, and between the official position and what is practiced on the ground in some instances.

<sup>175</sup> A Riddell, *The Introduction of Free Primary Education in Sub-Saharan Africa* (16 May 2003) 4, and a variety of national documents. Figures in parentheses are not found in the administrative data used in the Statistical annex of this report as cited in the EFA/UNESCO *Global Monitoring Report 2006: Literacy for life* (2006) < <http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>> (accessed 23 February 2007).

<sup>176</sup> M Verheyde Article 28: The right to education, in A Alen, J vande Lannotte, E Verhellen, F Ang, E Berghmann and M Verheyde (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006, Martinus Nijhoff) 24.





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to a specific age and abolishing registration fees, alternative strategies for ensuring school attendance (such as the provision of transport and nutrition) have been shown to facilitate progressive implementation of the right to compulsory education.<sup>177</sup> It has been correctly argued elsewhere that the term 'compulsory' really means 'a protection of the rights of the child, who may claim certain rights that nobody, neither the State nor even the parents, may deny.'<sup>178</sup>

In a very clear and laudable manner, the Education Act 2004 of Sierra Leone makes basic primary education compulsory, and provides further that neglect by a parent/guardian in failing to send his/her child to school for basic education amounts to a punishable criminal offence.<sup>179</sup> In a contrary vein, the Botswana government's 10 years free basic education has allowed enrolment rates to reach 87%, but as education is not compulsory, vulnerable children are over-represented in the 13% who remain out of school.<sup>180</sup>

Ironically, there are some African countries, including Comoros and South Africa, that make primary education compulsory, but not free. In this regard, the lesson to be learned is that nobody can be required to do the impossible. Parents cannot be obliged to ensure that their children attend school if they cannot afford the cost

of schooling. Making education compulsory in international law was (and is) contingent on making it free.<sup>181</sup>

### 5.4 ADDRESSING THE RIGHT TO PRIMARY EDUCATION OF VULNERABLE CHILDREN

Among other rights, those of rural children, working children, children with disabilities and girls from disadvantaged backgrounds all call for specific steps to assure them access to primary education. The CRC Committee usually expresses concern at the gender and regional disparities in enrolment in schools, absenteeism, and high dropout and repeat rates. A case in point is Niger, where the CRC Committee has recommended that the state party '[progressively] ensure that girls and boys, from urban, rural and least developed areas, all have equal access to educational opportunities.'<sup>182</sup> A similar concern has been raised in the context of Tunisia.<sup>183</sup>

As far as the rights of female children are concerned, the Education Act of 2004 of Sierra Leone is again exemplary, as it expressly encourages education for female children and promotes skills/vocational training for early school leavers.<sup>184</sup> In Sudan, the establishment of a girls' basic

<sup>177</sup> Verheyde (note 178 above).

<sup>178</sup> K D Beiter *The protection of the right to education by international law* (2006, Martinus Nijhoff) 31.

<sup>179</sup> Section 3 of the Act.

<sup>180</sup> Education Statistics, (2001) CSO.

<sup>181</sup> In the drafting of the foundation for all human rights treaties, the Universal Declaration of Human Rights, there was never a question about education being made compulsory without being free.

<sup>182</sup> CRC Committee, *Concluding Observations on the Periodic Report of Niger* (2002), para 59(a).

<sup>183</sup> CRC Committee, *Concluding Observations on the Periodic Report of Tunisia* (2002), para 39.

<sup>184</sup> CRC Committee, *Periodic Report of Sierra Leone* (2006), para 255.

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education service and of an education service for nomadic children has helped improve the situation of marginalised children.<sup>185</sup> In Benin, abolishment of school fees for girls in rural areas, coupled with the establishment and maintenance of a network of parents, teachers, NGOs, students, and community leaders set up to change family schooling practices in relation to girls, has helped to increase girls' primary education.<sup>186</sup> Another important innovation comes from Chad, where the state has assumed the additional burden of promoting the schooling/education of girl children by combating stereotypes, and creating structures adapted to the need of handicapped children and children living in rural areas, especially those from nomadic groups.<sup>187</sup> In addition, Ethiopia's policy (which can be flagged as good practice) has resulted in the reduction of travel time to and from schools, as well as the minimisation of risks associated with distance, which has had a further positive effect on girls' education.<sup>188</sup> According to UNESCO:

Successful strategies leading to higher enrolment of girls typically focus on actions inside schools, within the community and at a broader societal level. Women teachers, fee-free schooling, schools closer to home with

basic sanitation and separate toilets, protection against sexual violence and community support for girls' schooling are essential elements of a strategy towards greater gender equality.<sup>189</sup>

It is also important to note the interface between free primary education and education in early childhood development (ECD), and the particular impact of the latter on girls. Experience from Kenya seems to suggest that where pre-school programmes are strengthened by increasing participation of children aged 3 to 6, this in turn frees older girls from child care duties, so that they can attend school.

In recognition of the fact that different types of interventions are needed to reach different categories of marginalised children, Uganda's policy of providing evening schools and mobile schools as complementary opportunities for primary education could be labelled as a good practice.<sup>190</sup> In the same vein, Ethiopia's complementary approaches to primary schooling designed to reach pupils who never entered, or who dropped out of, school has been shown to be most suitable for students in the pastoralist and agro-pastoralist areas.<sup>191</sup> Satellite schools in Tanzania have also been established to reduce walking distance to schools.

<sup>185</sup> CRC Committee, *Concluding Observations on the Periodic Report of Sudan* (2002), para 53.

<sup>186</sup> EFA/UNESCO *Global Monitoring Report 2006: Literacy for life* (2006), <<http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>> (accessed 23 February 2007). This should by no means be read to imply that the practice of not abolishing school fees for boys is legally sound under international law.

<sup>187</sup> Section 15(1), 15(5) and 21(2) of Act No 016/PR/06 (note 164 above).

<sup>188</sup> CRC Committee, *Periodic Report of Ethiopia* (2005) para 196.

<sup>189</sup> EFA/UNESCO *Global Monitoring Report 2006: Literacy for life* (2006), <<http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>> (accessed 23 February 2007).

<sup>190</sup> Sloth-Nielsen and Mezmur (note 143 above) 44.

<sup>191</sup> CRC Committee, *Periodic Report of Ethiopia* (2005), para 198.



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### 5.5 OTHER RELATED RIGHTS

The promotion and realisation of the right to free and compulsory primary education needs to be supplemented by the realisation of other rights of the child. These rights cover both groups of rights, socio-economic and civil/political, and relate to protection, participation, and provision.

Within the context of protection, for instance, the need to prohibit all legalised violence against children has been highlighted, as children's own concern at the almost universally high prevalence of corporal punishment in schools acts as a barrier to primary education.<sup>192</sup> It is argued that compliance with the values recognized in article 29 (1) of the CRC on the aims of education 'clearly requires that schools be child-friendly in the fullest sense of the term, and that they be consistent in all respects with the dignity of the child.'<sup>193</sup> For instance, research conducted in Togo has shown vividly that lack of gender parity in primary and secondary education is intimately linked to violence and abuse in schools.<sup>194</sup>

In connection with this, sexual violence poses a particular challenge, and legislation needs to address this clearly. In Malawi, it is reported by the Government that:

'[in] order to create a safe school environment, tough disciplinary measures have been put in place for teachers that abuse and exploit children and recommendations have been made to criminalise the notorious practice of bullying by fellow pupils and students.'<sup>195</sup>

This, if it materialises, could go a long way to countering some of the obstacles relating to violence that children face in the school environment. At the practical level, too, promising experiences exist. In this regard, the experience of Cote d'Ivoire is interesting: the clearing away of shrubs around schools has been shown to lessen risk of rape, and such protection/prevention measures may encourage girls (and their parents) towards enrolment in school.

The interface between some harmful cultural practices and access to primary education is a real one. If experience is to be of some guidance, legislation that clearly proscribes early marriage helps to facilitate attendance at primary school. In Kenya, it is reported that 'in rural areas... early marriage accounts for 12 % of dropouts.'<sup>196</sup> Now that legislation has been adopted proscribing early marriage in Kenya, it is expected that dropping out of school as a result of early marriage will diminish.

<sup>192</sup> General Comment No 8 of the CRC Committee, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (2006), para 9.

<sup>193</sup> General Comment No 1 of the CRC Committee *The aims of education* (2001) para 8.

<sup>194</sup> See Plan, *Suffering to succeed: Violence and abuse in schools in Togo* (2006) <[http://www.crcr.org/docs/plan\\_ed\\_togo.pdf](http://www.crcr.org/docs/plan_ed_togo.pdf)> (accessed 10 October 2007).

<sup>195</sup> CRC Committee, *Periodic Report of Malawi* (2007) <<http://www.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.MWI.2.pdf>> (accessed 5 November 2007), para 251.

<sup>196</sup> R. Avenstrup et al, Kenya, Lesotho, Malawi, and Uganda: Universal primary education and poverty reduction. In *Reducing Poverty, Sustaining Growth – What Works, What Doesn't and Why: A Global Exchange for Scaling up Success*. Paper presented to Scaling Up Poverty Reduction: A Global Learning Process and Conference, Shanghai (2004) 15.

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There is also a direct relationship between birth registration systems and access to free and compulsory primary education. For instance, in education systems where a birth certificate is required for enrolment, the requirement often serves as a barrier to primary education. A case in point is Sudan, where there is a very low level of enrolment in pre-school, primary and secondary schools, owing – among other things – to the fact that education is not compulsory, and a birth certificate is required for enrolment. In this regard, the CRC Committee often recommends that state parties establish flexible forms of school registration that do not require the presentation of a birth registration certificate.

### 6. CONSULTATIVE PROCESSES

#### 6.1 INTRODUCTION

The CRC is widely considered to have revolutionised child rights, in no small measure because of its recognition of the principle of child participation.<sup>197</sup> It is argued that children's participation rights are a 'cluster of rights,' of which 'the core seems to consist of the respect for the views of the child (article 12), the right to freedom of expression (article 13), the right to freedom of thought, conscience and religion (article 14), the right to freedom of association and peaceful assembly (article 15), and the evolving capacities as legitimate limitation ground for parental guidance (article 5).'<sup>198</sup>

Article 12 of the CRC in particular has the intention of ensuring that children are afforded a direct stake in the all processes that relate to them, and makes the following provisions:

State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>199</sup>

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>200</sup>

The African Children's Charter shares a similar sentiment, and entrenches the right to participation.<sup>201</sup> The most specific provision is article 7, which states that:

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate these opinions subject to such restrictions as are prescribed by laws.

<sup>197</sup> See article 12 of the CRC. The ACRWC also recognises this principle in article 7.

<sup>198</sup> F Ang et al, *Participation rights in the UN Convention on the Rights of the Child* in F Ang et al, *Participation rights of children* (2006, Intersentia) 9.

<sup>199</sup> Article 12 (1) of the CRC.

<sup>200</sup> Article 12 (2) of the CRC.

<sup>201</sup> Articles 4 and 12 deal with promotion of participation and children's right to information respectively.



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In considering the implications of the normative provisions on child participation, it is relatively easy to decipher that article 12(2) of the CRC that relates specifically to the right of an individual child to participate in judicial and administrative proceedings, whereas article 12 (1) refers to 'the right to express those views freely in *all matters* affecting the child.' The latter part should be interpreted as including the participation of the child in all levels of decision-making.

This principle is considered sacrosanct principally because it underscores the idea that children are autonomous beings capable of forming views and making rational decisions. The CRC Committee has also identified this right as one of the four general principles of Convention. This means that the implementation of article 12 is an integral part of the implementation of the other articles of the Convention, as well as a free standing right of the child. In the succinct words of the CRC Committee,

'...recognising the right of the child to express views and to participate in various activities, according to her/his evolving capacities, is beneficial for the child, for the family, for the community, the school, the State, for democracy.'<sup>202</sup>

It is not necessary to justify in further detail the 'added value' that child participation

has in promoting a rights-based discourse pertaining to children.

The right holders under article 12 of the CRC and article 7 of the African Children's Charter are not necessarily all children, as defined under article 1 of the CRC and article 2 of the African's Children Charter, but rather children 'capable of forming their own views; However, as one good practice indicator, it should be underscored that legislation should not impose an age-based determination of capacity to contribute views. In support of this, Hodgkin and Newell correctly argue that the text of the CRC itself reveals that the CRC does not provide support to those who would impose a minimum age on either the ascertainment or the consideration of children's views.'<sup>203</sup>

In addition, it is necessary for legislation to sanction that those views be expressed 'freely.' This in part entails that there should be no 'interference,' and the child should have the option of whether or not to express his or her views.<sup>204</sup> Nonetheless, 'no interference' does not mean that children should be deprived of assistance in exercising their right to participation and freedom of expression.<sup>205</sup>

Children's participation should not be limited to specific fields. For legislation to be dubbed as indicative of good practice,

<sup>202</sup> CRC Committee. General Day of Discussion on *The right of the child to be heard* (2006) <[http://www.2ohchr.org/english/bodies/crc/docs/discussion/Final\\_Recommendations\\_after\\_DGD.doc](http://www.2ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc)> (accessed 23 October 2007).

<sup>203</sup> R. Hodgkin and P. Newell, *Implementation handbook for the Convention on the Rights of the Child* (2002), UNICEF, fully revised version, 164.

<sup>204</sup> See S. Detrick, *A Commentary on the UN Convention on the Rights of the Child* (1999, Kluwer Law International) 221.

<sup>205</sup> G. van Bueren, *The international law on the rights of the child* (1998, Martinus Nijhoff) 132.

children should be allowed to express their views in 'all matters affecting the child.' This includes, as the CRC Committee experience shows, a whole range of issues and settings, such as the family, the local community, the national political level, and at school.<sup>206</sup>

Thus the right to participation should be fully integrated in all laws affecting children at all levels. As a positive obligation, states should be obliged to encourage and ensure the participation of children, in particular within family, school, local community, and social life. Even though the kinds of structures and mechanisms necessary to establish the requisite channels remains an open question,<sup>207</sup> ensuring participation does dictate that appropriate institutional mechanisms allowing for child participation are put in place. Domestic legislation that enjoins the state to ensure that children are provided with the opportunity to express their views in all matters concerning them would be incomplete without the further stipulation that their views be given due weight. Governments should also undertake national awareness-raising campaigns to change traditional adult-centred attitudes that hinder children's right to express their views freely in all matters that affect them.

According to the CRC Committee, children's participation should not be limited only to issues *directly* affecting them, but should also include the involvement of children in policy-making, and legislative efforts pertaining to the rights of all children. In support of this, the Guidelines on Periodic Reports of 1996<sup>208</sup> require states to indicate how the views of the child obtained through public opinion and consultations are taken into account in legal provisions and policy decisions.

Bearing in mind the above preliminary points, this section attempts to consider the extent to which the notion of child participation has been domesticated in African legal systems.

### 6.2 RECOGNITION OF THE PRINCIPLE OF CHILD PARTICIPATION

The idea that children are autonomous human beings capable of making rational choices is relatively alien to many African societies.<sup>209</sup> Instead, children in these societies are often considered to be deficient in their decision making capacities and deserving of protection.<sup>210</sup> Decisions concerning children are often made by (a group of) male elders; at most, children are

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<sup>206</sup> F Ang et al, *Participation rights in the UN Convention on the Rights of the Child*, in F Ang et al, *Participation rights of children* (2006, Intersentia) 16. See also *Concluding observations of Burkina Faso* (2002) para 26, *Morocco* (2003) para 31 and *Zambia* (2003) para 49.

<sup>207</sup> Ang (note 208 above) 22.

<sup>208</sup> Para 47.

<sup>209</sup> African Child Policy Forum, *Harmonisation of laws relating to children in Eastern and Southern Africa: A draft report* (2006) 44.

<sup>210</sup> See DM Chirwa *The merits and demerits of the African Charter on the Rights and Welfare of the Child* (2002), 10(2) *International Journal of Children's Rights* 160; DM Chirwa *Harmonisation of national and international laws to protect children's rights: The Malawi case study* (African Child Policy Forum, 2006) 20; M Tabengwa *Harmonisation of national and international laws to protect children's rights: The Botswana case study* (African Child Policy Forum, 2006) 10; J Gallinetti *Harmonisation of national and international laws to protect children's rights: The Mozambique case study* (African Child Policy Forum, 2006) 10.



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heard indirectly through such agents as aunts, uncles or grand parents.<sup>211</sup> For instance, in the context of Angola, concern has been raised that that traditional norms of the state party do not encourage children to express their views in the family, in schools, in other institutions, or in the community.<sup>212</sup> In Equatorial Guinea, traditional practices and attitudes also still limit the full implementation of article 12 of the Convention, in particular for girls.<sup>213</sup>

In many African jurisdictions, legislation has also previously failed to provide for child participation in decision-making processes. Where the views of children have been allowed in custody and other civil proceedings, this has been through the piecemeal development of the common law.

However, recently adopted legislation establishes a trend towards recognising the principle of child participation expressly,<sup>214</sup> although this principle is still predominantly associated with formal proceedings concerning the child, such as criminal

proceedings and civil proceedings on custody, maintenance, adoption and so forth.<sup>215</sup> The South African Children's Act is distinctive in that it recognises explicitly that the principle of child participation has horizontal application (within the family, for example) and is hence of wider than usual application. For example, it is provided that before a person holding parental responsibilities and rights in respect of a child takes any major decision involving a child, he or she must give due consideration to any views and wishes of the child, bearing in mind the child's age, maturity, and stage of development.<sup>216</sup> It also specifically enjoins the children's court to allow a child to give his or her views in *any matter* before them.<sup>217</sup> The children's court has wide powers to intervene to protect a child during cross-examination, or to allow the child to be examined through an intermediary if it is in the best interests of the child.<sup>218</sup>

Libyan law is similarly expansive. In that country, 'the child's opinions, testimony and statements may be heard concerning any matter in connection with legal proceedings

<sup>211</sup> Chirwa (note 212 above). Large as Africa is, one should expect variances in cultural practices. For example, in Eritrea, the Tigre and Hidareb ethnic groups have been known to accord children opportunities to express their views, which are taken very seriously, on familial and communal issues and those pertaining to livestock farming. There are other ethnic groups that also give certain respect to the views of children. See M B Hagos (note 18 above) 55–56.

<sup>212</sup> CRC Committee, *Concluding Observations, Angola*, (2004), para 24. A similar challenge exists in Botswana – see CRC Committee, *Concluding Observations, Botswana* (2004) para 33.

<sup>213</sup> CRC Committee, *Concluding Observations, Equatorial Guinea* (2004) para 28.

<sup>214</sup> For instance, section 10 of the South African Children's Act, section 4(4) of the Kenyan Children's Act, and section 11 of the Ghanaian Act.

<sup>215</sup> See, for instance, in Malawi, Rwanda, South Africa, Kenya and Zambia. DM Chirwa, *Harmonisation of national and international laws to protect children's rights: The Malawi case study* (above note 212) 20; N Gakumba, *Harmonisation of national and international laws to protect children's rights: The Rwanda case study* (African Child Policy Forum, 2006) 16; DN Ng'ambi *Harmonisation of national and international laws to protect children's rights: The Zambia case study* (African Child Policy Forum, 2006) 23–24.

<sup>216</sup> Section 31. Major decisions include decisions concerning the administration of a child's property; assisting the child in administrative, contractual and other legal matters; giving or refusing consent to the child's marriage, adoption, departure from the country or application for a passport, and alienation of the child's property; the contact between the child and co-holder of parental responsibilities; assignment of guardianship or child care to another person; or any other decision which is likely to change or have an adverse effect on the child's living conditions, education, health, personal relations with a parent or family member, or the wellbeing of the child.

<sup>217</sup> Section 61(1).

<sup>218</sup> Section 61(1)(c) and (2).

in which he is a party' and 'the child's opinion is sought concerning all matters in connection with the child's life and lifestyle in the residential institutions where he or she lives.'<sup>219</sup> In Kenya, the government is currently developing guidelines on child participation.

### 6.3 LEGAL REPRESENTATION

The right to be heard in any judicial and administrative proceedings affecting the child is a procedural guarantee granted to children in a very wide range of judicial matters and administrative proceedings. The right to be heard may also be exercised through the child's representative or an 'appropriate body.'

Key to effective child participation in formal legal proceedings is legal representation. The African Children's Charter guarantees every child the right to be afforded legal and other appropriate assistance in the preparation and presentation of his or her defence.<sup>220</sup>

This right is formulated without qualification, thereby suggesting that legal representation at the state's expense is required in all legal proceedings where a child is accused or found guilty of having infringed penal law. However, it is doubtful whether this provision can be so expansively interpreted, given the financial implications. In contrast to the African Children's Charter, the right of the child to legal and other assistance in

the CRC is formulated broadly without suggesting that it must inevitably be realised at the expense of the state.<sup>221</sup> The common denominator of both instruments, though, is that they guarantee this right in the context of criminal proceedings in which the child is accused or has been convicted of a criminal offence.

Interestingly, recent legislation on children in African countries points towards an extended application of the right to legal representation. This right is required to be respected not only in criminal proceedings, but in civil ones as well.<sup>222</sup> The Kenyan and South African Children's Acts are distinctive partly because of this feature and partly because they are biased in favour of legal representation for children at the state's expense. Section 77 of the Kenyan Children's Act provides that:

- (1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.
- (2) Any expenses incurred in relation to the legal representation of a child under subsection (1) shall be defrayed out of monies provided by Parliament.

Likewise, section 55(1) of the South African Children's Act provides that:

Where a child involved in a matter

<sup>219</sup> Quoted in International Bureau for Children's Rights (note 63 above) 102.

<sup>220</sup> Article 17(2)(iii).

<sup>221</sup> See article 40(2)(b)(ii).

<sup>222</sup> See, for instance, section 16(1)(e) of the Ugandan Children Act; section 38 of the Ghanaian Children's Act.





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before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act 22 of 1969).<sup>223</sup>

Of note also is Nigeria's Child Rights Act 2003, which provides that 'the court may, for the purpose of any specified proceedings, appoint a guardian *ad litem* for the child concerned to safeguard the interests of the child, unless it is satisfied that it is not necessary to do so.'<sup>224</sup> This Act also empowers courts 'to consult the wishes of the child in considering what order ought to be made in protective proceedings.'<sup>225</sup>

These provisions cannot be interpreted to mean that the state has the obligation to provide legal aid in all judicial proceedings affecting the child. Other factors are important considerations as well, including:

the seriousness of the charge against the child; the complexity of the proceedings; the best interests of the child; the vulnerability of the child; the age, maturity and development of the child; and the potential consequences of the proceedings. Nevertheless, these provisions raise a presumption in favour of state-funded legal aid.<sup>226</sup>

### 6.4 YOUTH PARLIAMENTS AND FORUMS

The idea of youth parliaments, national conferences or summits for children has become commonplace in Africa. Such institutions provide a forum where children discuss human rights and developmental and other issues affecting their lives. They are currently in use in Egypt,<sup>227</sup> Morocco,<sup>228</sup> Tunisia,<sup>229</sup> Malawi,<sup>230</sup> Rwanda,<sup>231</sup> Nigeria,<sup>232</sup> Burkina Faso,<sup>233</sup> and Zambia.<sup>234</sup>

In Botswana, in connection with the review of the Children's Act, a children's forum took place in April 2001 in which children

<sup>223</sup> Section 55(2) provides that the Board must deal with a matter referred to in subsection (1) in accordance with section 3B of that Act, read with the changes required by the context. Section 3B of the Legal Aid Act, as amended by the Legal Aid Amendment Act 1996 (Act No 20 of 1996), provides that before a court in criminal proceedings can order that a person be provided with legal representation, it shall consider the personal circumstances of the person, the nature and gravity of the charge, whether any other legal representation at state expense is available, and any other relevant factor.

<sup>224</sup> Section 89. The conditions under which the appointment of a guardian *ad litem* will be appropriate include: where none has already been appointed for the child; where the child has sufficient understanding to instruct a legal practitioner and wishes to do so; and where it appears to the Court that it would be in the best interest of the child for him/her to be represented by a legal practitioner. See section 89(4).

<sup>225</sup> Section 75.

<sup>226</sup> Ongoing attempts to mainstream and scale up the delivery of legal services to children via the government-funded Legal Aid Board are fully described in J Redpath, *Realising children's rights to legal representation and to be heard in judicial proceedings*, African Child Policy Forum, forthcoming, 2007.

<sup>227</sup> *Ibid.*, 178.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> Chirwa *Harmonisation of national and international laws to protect children's rights: The Malawi case study* (note 212 above) 19–20.

<sup>231</sup> N Gakumba *Harmonisation of national and international laws to protect children's rights: The Rwanda case study* (African Child Policy Forum, 2006) 16. The Constitution of Rwanda, under section 187, establishes the National Youth Council of Rwanda, which is a forum for the exchange of ideas among young people.

<sup>232</sup> The Federal Ministry of Women Affairs (Nigeria), *Country report on violence against children* (2004). Submitted to the UN Secretary General Independent Expert on the study on violence against children.

<sup>233</sup> Personal Communication, J-B Zoungrana.

<sup>234</sup> Ng'ambi *Harmonisation of national and international laws to protect children's rights: The Zambia case study* (above note 217) 23–24.

aged 11-18 from around the country were brought together to express their opinions about how legislation should be changed.<sup>235</sup> Promising attempts are also in existence in the Republic of Congo, through the establishment of the Parliament of the Congolese Child,<sup>236</sup> and in 2006 the Congolese government was encouraged to '...adopt the envisaged law on the inclusion of the Parliament of the Congolese Child in the parliamentary process.'<sup>237</sup> In Senegal, the law makes provision for the child's views to be taken into account in proceedings concerning him or her and the Government has reported that '... the children's and youth parliaments participate in these arrangements.'<sup>238</sup>

A particular experience from Uganda signifies the potential value that child participation could have in informing legal and policy interventions, and should be mentioned here as a good practice. In 2005, Save the Children Uganda undertook a study that examined the views and opinions of children and adults on violence against children. The study took as its point of departure article 19 of the CRC, which articulates the responsibility to protect children from all forms of violence. Until then, in Uganda, very little was known from a children's perspective about the nature and extent of violence against them, the perpetrators of this violence, and children's views about what ought to be done about

it. The purpose of the study was therefore to generate credible information to inform the development of policy and programme interventions, and to develop a meaningful response to the problem.<sup>239</sup>

This study could also be mentioned as a good practice in light of the direct application of ethical principles in undertaking child participation initiatives, as described by Hart. The researchers developed the project plan based on an ethical policy that guided all their interaction with children.<sup>240</sup> In accordance with these guiding principles, they ensured that children were informed of the purpose of the project and how the information would be used; participation in the project was voluntary, and confidentiality was ensured. Given the sometimes traumatic nature of the subject matter, plans were also put in place for children who required further support to be referred to the appropriate local services.

Of note here also is the experience of Mozambique in consulting children in law reform processes. In 2003, Mozambique began a process of reviewing all its legislation pertaining to children. The Government's brief to the service providers who were to undertake this process in preparation for the development of a new children's code for Mozambique expressly included that the opinions of children should be sought

<sup>235</sup> State Party Report, Botswana (2004) para 97.

<sup>236</sup> State Party Report(2006) para 30.

<sup>237</sup> Republic of Congo (2006) para 31 (a).

<sup>238</sup> Senegal (2006), para 185

<sup>239</sup> Naker, D, Violence Against Children: The Voices of Ugandan Children and Adults, Raising Voices, Save the Children in Uganda, 2005.

<sup>240</sup> The report notes that Save the Children, Uganda makes use of guidelines issued by the Save the Children Alliance which guide all interactions with and participation of children in any activity.



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before developing the final recommendations. This child participation process sought to explore the views of Mozambican children on children's rights, and establish where they felt the realisation of these rights was lacking.<sup>241</sup> The final recommendations prepared after reviewing all legislation in Mozambique by the service providers reflected the views of the children consulted, which in turn informed the two draft bills that emerged in 2007.

However, in the grand scheme of things, youth parliaments and summits of conferences on the continent remain largely symbolic gestures of child autonomy and participation, with little in the way of meaningful long-term implications at this stage. This is a conclusion made with reference to the recommendation by the CRC Committee that:

...listening to children should not be seen as an end in itself, but rather as a means by which states make their interactions with children and their interactions on their behalf ever more sensitive to the implementation of children's rights...article 12 requires consistent and ongoing arrangements. Involvement of and consultation with children must avoid being tokenistic.<sup>242</sup>

These forums do sometimes appear tokenistic, especially as they are by and large not structurally linked to formal

government machinery. Further, in most countries where they exist, no legislation has been adopted to govern the conduct of youth parliaments, including the appointment of members, the regulation of members, and the relationship between these parliaments and the national parliament or other government departments. This lack of formalisation also affects the legitimacy of these forums as a real voice of children in the countries involved. In order for them to be taken seriously, they must be formalised and mainstreamed in the state machinery, to ensure that decisions taken by children are treated with due seriousness, and that they are genuinely representative of all children.

In conclusion, African traditions remain largely steeped in the notion that children require protection, and allow for limited room for children's participation in the decisions that affect them. However, as this section has shown, remarkable changes are nonetheless underway. A number of countries, including South Africa, Kenya, Ghana, Zambia, and Libya, now expressly recognise the principle of child participation. In Kenya, Nigeria and South Africa, legislation makes provision for legal representation at state expense in legal proceedings affecting the child insofar as it is in the best interests of the child. Children may now be heard in a wide range of judicial proceedings, including in custody, maintenance and adoption proceedings, as well as generally in courts, child panels, family tribunals, lay forums and village

<sup>241</sup> L. Ehlers and V. Mathiti V, *Children's Perspectives on Children's Rights in Mozambique*, Community Law Centre, University of the Western Cape, unpublished (2003) 6.

<sup>242</sup> CRC/GC/2003/5 para.12

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executive committees. In Egypt, Morocco, Tunisia, Malawi, Rwanda, Nigeria and Zambia, various forms of youth forums, such as national conferences or summits and youth parliaments, have also been established to afford children an opportunity to voice their views on state policies or on legislative measures that directly or indirectly impact on their rights and welfare. The experience of Uganda in involving children in research, and Mozambique's efforts as an example of involving children in law reform efforts, should be furthered. These are encouraging efforts that must be commended. However, as has been mentioned elsewhere in this section, much more can and should be done to enhance the participation rights of children on the continent.

## 7. MODELS OF DISPUTE RESOLUTION/ADJUDICATION AFFECTING CHILDREN

### 7.1 INTRODUCTION

Children, like adults, find themselves from time to time at the centre of disputes requiring adjudication or other dispute resolution processes. Children may be the subject of disputes either as the perpetrators of the conduct leading to such a dispute (whether the dispute is criminal or civil), or as victims of the same.

It is important to note that while both children and adults may be affected by the dispute resolution and adjudication processes, children are more vulnerable, because of their age and the fact that, for the larger part, their lives are subject to the decisions and behaviour of adults.<sup>243</sup> Furthermore, even where children are not directly involved in a dispute between adults, they are often affected by the processes of adjudication and its outcomes. The most common example of this is where child maintenance and custody are at issue in a divorce or separation settlement: although usually only the wife and husband are party to the proceedings, any order arising has obvious effects for their children.<sup>244</sup> It is therefore of the ultimate importance that, in any justice and dispute resolution system, the rights and special needs of children be of primary concern; the best interests of the child should be promoted to the fullest extent possible.<sup>245</sup>

Because children may suffer physically and psychologically as a consequence of such disputes, it is important that the models of dispute resolution and adjudication process adopted by every country be child-friendly, and that they aim to advance the welfare and best interests of the child. The models should be less accusatorial and more inquisitorial;<sup>246</sup> where the child is the perpetrator of an act which is against the law, the system should focus rather on

<sup>243</sup> S Asquith and M Hill, Introduction, in Stewart Asquith & Malcolm Hill (eds.) *Justice for children* (1994, Martinus Nijhoff) 13.

<sup>244</sup> D Kassan, *How can the voice of the child be adequately heard in family law proceedings?* Mini-thesis submitted in partial fulfillment of the degree of Masters of Law in the Faculty of Law, University of the Western Cape (November 2004, unpublished) 1.

<sup>245</sup> M Morris, *The search for justice in the juvenile justice system*. Paper presented at the International Conference on the Rights of the Child, June 1992, Organized by the Community Law Centre, University of the Western Cape, reproduced in compilation of conference papers edited by the Centre for Development Studies, 150.

<sup>246</sup> For a discussion of accusatorial and inquisitorial systems, see K Müller and K Holleley, *Introducing the child witness* (2000, Printridge) 2.

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child protection than on reacting punitively to the delinquency.<sup>247</sup> In addition, it is desirable that the process itself results in the rehabilitation and reintegration of the child.<sup>248</sup>

Indeed, international children's rights law, for instance, provides that the aim of treatment of every child during a criminal trial, and also if found guilty of infringing penal law, should be his or her reformation, reintegration into his or her family, and social rehabilitation.<sup>249</sup> International law also urges states to establish law and procedures that deal with child offenders 'whenever appropriate and desirable,' without resorting to judicial proceedings.<sup>250</sup>

Furthermore, as discussed in the preceding section, international children's rights law requires states parties to assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him/her, particularly any judicial and administrative proceedings affecting the child.<sup>251</sup>

It is on the basis of these principles that one can draw the indicators of best models of dispute resolution/adjudication involving children.<sup>252</sup> These are reflected in the box below.

### Indicators of best models of dispute resolution and adjudication involving children

1. Adjudication processes must be child-friendly; they must avoid inflicting psychological and/or physical stigmatisation on the child
2. Adjudication should be simple, in terms of its procedures and language, and should be conducted in a conducive and non-threatening environment
3. Adjudication model must establish systems that allow for the resolution of disputes without resorting to judicial proceedings
4. Processes must be participatory by allowing a child to air his/her views. Models should also encourage participation of a wide variety of persons and institutions, including local communities where this is necessary
5. Processes should be accompanied by specialised services necessary both for the facilitation of the process and realisation of its objectives
6. Adjudication should aim at rehabilitating and re-integrating into society the child, whether such child is a perpetrator or victim of criminal or other wrongful conduct
7. Confidentiality and the identity of the child should be protected whenever this is reasonably necessary
8. In juvenile justice matters, diversion should be preferred to detention; detention should therefore be a matter of last resort.

<sup>247</sup> A Lockyer *The Scottish children's hearings system: Internal developments and the UN Convention*, in S Asquith and Malcolm Hill (eds.) *Justice for children* (1994, Martinus Nijhoff Publishers) 125.

<sup>248</sup> With respect to reintegration in criminal justice, see J Gallinetti, L Muntingh and A Skelton, *Child justice concepts*, in J Sloth-Nielsen and J Gallinetti (eds.), *Child justice in Africa: A Guide to Good Practice* (2004, Community Law Centre, University of the Western Cape) 32.

<sup>249</sup> See article 17(3) of the ACRWC. The CRC (article 40) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (UN Standard Minimum Rules) (para 11) promote the same spirit. See also CRC Committee General Comment no 10 (2007) (Children's rights in juvenile justice), discussed in J Sloth-Nielsen, *A new vision for child justice in international law* (2007) (vol 9:1) Article 40. CRC, article 40(3)(a). See also para 11(1) of the UN Standard Minimum Rules.

<sup>250</sup> Article 12 of the CRC and article 4(2) of the ACRWC.

<sup>252</sup> See section 8.5 below on child victims and witnesses of crime, where reference is made to the UN Guidelines on child victims and witnesses of crime (2005).

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On the basis of the above, best practices in the child adjudication and dispute resolution processes in identified African Countries are discussed below. It should be noted, however, that all the above indicators need not exist; the relevance of each of indicator depends on context, the issues at hand and the circumstances of every case.

## 7.2 GOOD PRACTICES IN AFRICAN COUNTRIES

From the early 1990s, a considerable number of African countries have invested substantial resources and time in harmonising their laws and practices with international child rights in the area of dispute resolution and adjudication. While juvenile justice has been the biggest beneficiary of this process, other adjudication processes affecting children, such as adoption and marital dispute settlement processes, have also benefited. This is in addition to the increasing use of community-based structures that promote dispute resolution out of formal court. The reform processes have also been aimed at the establishment of dispute settlement and adjudication processes that create child-friendly environments. To achieve this, many countries have established specialised children's courts, in addition to creating and making use of the existing informal structures to settle child-related disputes.

## PROLIFERATION OF SPECIALISED COURTS

There are a number of reasons why international human rights law obliges states to establish separate justice systems and courts for children. Many different models and structures can be identified internationally; what is common, however, is that all jurisdictions have tried to uphold the notion of separation – that is to say, that children deserve different treatment from adults, and that different specific legislation and institutions should apply to children and to offenders.<sup>253</sup> Children are presumed to be immature both physically and mentally; they are deemed not to have fully developed their moral and cognitive capacities.<sup>254</sup> Consequently, any system of dispute resolution must create an environment that is non-stigmatising and conducive to engagement for the child. As can be deduced from the indicators above, such system should be less formal than usual in its processes and procedures.

It is important to note, however, that there must be a balance between informality and the protection of the fundamental rights of the child.<sup>255</sup> Best practice, therefore, is that when introducing an informal system, safeguards should be built in to ensure that children's due process and other rights are fully protected. This is what a number of African countries have done: they have

<sup>253</sup> See J Sloth-Nielsen, *The role of international law in juvenile justice reform in South Africa* (2001, LLD dissertation, University of the Western Cape, unpublished) 57; See also G Odongo, *The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context* (2005, LLD dissertation, University of the Western Cape, unpublished) 21.

<sup>254</sup> H N Snyder and M Sickmund, *Juvenile offenders and victims: A national report* (1995), National Center for Juvenile Justice, <[http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/14/e6/f0.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/e6/f0.pdf)> (accessed 10 October 2006), 76.

<sup>255</sup> G Van Buuren, *A commentary on the United Nations Convention on the Rights of the Child: Article 40, Child criminal justice* (2006, Martinus Nijhoff) 25.

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established specialised children's courts which follow less formal procedures, yet which maintain clearly outlined procedures that guarantee respect for the rights of the child, consistent with international law.

In Nigeria, the Children and Young Persons Act<sup>256</sup> provides that a court hearing charges against children or young persons shall – unless the child or young person is charged jointly with any person not a child – sit either in a different building or room from that in which the ordinary sittings of the court are held, or on different days, or at different times, from those which the ordinary sittings are held.<sup>257</sup> Similarly, the Children's Act of Kenya<sup>258</sup> provides for the establishment of Children's Courts, with jurisdiction – amongst other things – to conduct civil proceedings and hear any charge against a child, other than a charge of murder or a charge in which a child is charged together with a person or persons above the age of eighteen.<sup>259</sup> It is reported that since the enactment of the Act the Chief Justice of Kenya has appointed over 115 magistrates to preside over children's courts across the country.<sup>260</sup>

In Uganda, the Family and Children's Courts (FCCs) have been established with

jurisdiction to hear and determine applications relating to child care and protection and criminal charges against children, except where they are charged with a capital offence or jointly with an adult.<sup>261</sup> The Children's Act of Uganda makes the procedures of the FCC child-friendly and non-stigmatising; the courts are supposed to be held in camera, to be as informal as possible, and to be non-adversarial in nature.<sup>262</sup> Trials before these courts are not supposed to be prolonged; matters are supposed to be handled expeditiously and without unnecessary delay.<sup>263</sup> If not completed in three months after the plea was taken, cases have to be dismissed, and the child cannot then be liable to be subject of any further proceedings for the same offence.<sup>264</sup> Furthermore, to avoid stigmatisation during and after the trial, the Act proscribes the use of such terms as 'conviction' or 'sentence.' Instead, such terms as 'proof of an offence against a child' and 'order' are to be used.<sup>265</sup> This is in addition to criminalising the publication of a child's details – name or address, school address of the child, photograph or other matter likely to lead to the identification of the child – without permission of the Court.<sup>266</sup> In a similar fashion to the countries

<sup>256</sup> Cap 32, Laws of Federation of Nigeria and Lagos.

<sup>257</sup> Section 6(2).

<sup>258</sup> Cap 75 (Act No. 8 of 2001).

<sup>259</sup> Section 73(a) and (b).

<sup>260</sup> According to the African Child Policy Forum, *In the best interests of the child: Harmonising laws in Eastern and Southern Africa* (2007) (Hereinafter ACPF 2007) 81.

<sup>261</sup> See sections 14, 93 and 94 of the Children's Act, Cap 59, Laws of Uganda, 2000.

<sup>262</sup> Section 16(2).

<sup>263</sup> Section 99(1).

<sup>264</sup> Section 99(2).

<sup>265</sup> Section 101.

<sup>266</sup> Section 102(2).

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mentioned above, Egypt has juvenile courts with exclusive jurisdiction over any offence committed by a child other than a child above the age of 15 charged with a serious offence committed with an adult.<sup>267</sup> Unlike many other countries, however, the Egyptian juvenile courts are presided over by highly skilled judicial offices. The courts are composed of three judges, assisted by two experts (at least one of whom must be a woman).<sup>268</sup> Egypt has reported to the CRC Committee that juvenile judges are assigned to this function only after meeting very strict conditions and undergoing thorough training. A person is considered suitable to serve in that capacity if he or she has a good reputation and shows ability to act as a children's judge, and the president of the juvenile court is appointed only after a judicial inquiry that confirms fitness. Moreover, all judges must successfully complete specialist courses, organised by the National Centre for Judicial Studies and the National Centre for Social and Criminal Studies, to study the problems facing juveniles.<sup>269</sup>

In Senegal, each of the 11 regions has a juvenile court, which is part of the regional court, with an investigating judge responsible for juvenile cases and a deputy prosecutor

specially assigned to it. Senegal, unlike most countries, extends the speciality in children's matters to the appellate level. A special division of the Court of Appeal is responsible for hearing and dealing with cases involving minors.<sup>270</sup> This has an obvious advantage, in that it extends the advantages of having a specialised children's court, and which may therefore result in binding precedents upholding children's rights.

In 2005, The Gambia adopted a Children's Act to repeal the Children and Young Persons Act that had regulated the administration of juvenile justice since independence.<sup>271</sup> The new Act establishes a specialised children's court, and provides that there shall be a court to be known as the Children's Court in every Division, and any other Local Government administrative unit designated by the Chief Justice.<sup>272</sup> Every such court is to consist of a chairperson who shall be a magistrate not below the grade of a Magistrate of First Class,<sup>273</sup> and two other persons of proven integrity from the community, one of whom shall be a woman.<sup>274</sup> The children's courts have jurisdiction to hear and determine the following cases: criminal

<sup>267</sup> The courts are constituted under the Juveniles Act, 31 of 1974.

<sup>268</sup> See CRC Committee Egypt's report to the Committee on the Rights of the Child, 11 November 1999, CRC/C/65/Add.9, (Egypt Report, 1999, para 194(iii)).

<sup>269</sup> See paragraph 197 of the report to the UN Committee above.

<sup>270</sup> See Senegal's second *Periodic Report* to Committee on the Rights of the Child, 20 February 2006, CRC/SEN/2, para 126. In spite of this, in its *Concluding Observations* the Committee raised some concerns. Amongst other things, the Committee remains has raised concerns about the lack of specialised juvenile judges, the insufficient number of relevant juvenile courts, and the limited number of adequately trained social educators. See Committee on the Rights of the Child *Concluding Observations to Senegal's Second Periodic Report*, 20 October 2006, CRC/C/SEN/CO/02, para 68.

<sup>271</sup> See M Saine, *The new law on juvenile justice in The Gambia* (2004) 7(4) Article 40, 8; and Marie S, *Protecting the rights of children in trouble with the law: A case study of South Africa and The Gambia* (2005, LLM dissertation, University of Pretoria, unpublished).

<sup>272</sup> Section 68.

<sup>273</sup> Section 69(a).

<sup>274</sup> Section 69(b).





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charges against a child; all civil matters concerning a child including adoption; and applications relating to child care and protection. The Courts do not, however, have jurisdiction in cases where the child is charged with treason, or charged with any offence jointly with an adult.<sup>275</sup>

The procedures in the children's court and throughout the juvenile justice process are designed to be child-friendly, and children are guaranteed a number of rights. The Act provides, for instance, that the right of the child to privacy shall be respected at all stages of the administration of child justice, in order to avoid harm being caused to the child by undue publicity or the process of labelling.<sup>276</sup> Judicial proceedings are also supposed to be conducive to the best interests of the child, and conducted in an atmosphere of understanding that allows the child to participate and express him- or herself freely.<sup>277</sup>

The establishment of children's courts in The Gambia is a positive development in accordance with the recommendations of the CRC Committee; but in its concluding observation to The Gambia's initial report,<sup>278</sup> the CRC Committee regretted the absence of juvenile courts in the country.<sup>279</sup> The Gambian government thus was advised to undertake all necessary

measures to ensure the establishment of juvenile courts and the appointment of judges trained in juvenile matters to serve in these courts.<sup>280</sup>

When chapter four of the new Children's Act 38 of 2005 comes into force, South Africa will enjoy vastly improved legal provisions relating to specialised children's courts. The Act designates every magistrate's court as a children's court.<sup>281</sup> These courts are given jurisdiction to try the following matters: the protection and wellbeing of the child; the care of, or contact with, a child; support of a child; the provision of early childhood services; maltreatment, abuse, neglect, degradation or exploitation of a child except a criminal prosecution in this regard; and the temporary safe care or alternative care of a child, adoption, child care facilities.<sup>282</sup> Unlike other countries, the South African Act provides for elaborate procedures for pre-hearing conferences and other procedures that facilitate the settling of disputes out of court. The Act provides that if a matter referred to the Court is contested, the Court may order that a pre-hearing conference be held with the parties involved in the matter in order to mediate between the parties, settle the dispute between the parties to the extent possible, or define the issues to be heard

<sup>275</sup> Section 213.

<sup>276</sup> Section 205(1). Indeed, the Act in section 205(2) prohibits the publication of any information that may lead to identification of a child offender without the permission of the Court. This is in addition to requiring that records of a child offender be kept confidential and closed to third parties, and that they are only made accessible to persons directly concerned with the disposition of the case at hand, or other duly authorized persons (section 205(3)).

<sup>277</sup> Section 215(1)(a).

<sup>278</sup> CRC Committee, *Concluding Observations on Gambia's Periodic Report* (2001).

<sup>279</sup> CRC Committee, note 280 above, para 66.

<sup>280</sup> CRC Committee, note 280 above, para 68(c).

<sup>281</sup> Section 42(1). See, for a general explanation of the provisions of this chapter of the Children's Act, J Gallinetti, *Chapter 4: Children's courts*, in Davey CJ and Skelton A, *A commentary on the Children's Act*, Juta and co, Lansdown, 2007

<sup>282</sup> Section 45(1).

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by the Court.<sup>283</sup> As will be illustrated later, this is an important step towards diversion of children from the formal justice system, but in the context of care proceedings.

In some countries, like Senegal, Uganda, South Africa and Kenya, the specialised courts (though designated as children's courts) still operate within the structures of the formal judiciary. As seen above, in South Africa, every magistrate's court is designated a children's court, and earlier attempts to legislate for specialised appointments to serve in these courts were thwarted in Parliament. In Uganda, it is magistrates at the level of grade II and above that can be assigned to preside over children's courts. These magistrates fall within the hierarchal structure of the judiciary, but it can be asserted that the structuring these courts as part and parcel of the judiciary brings with it some benefits. Foremost among such benefits, considering the paucity of legal skills and resources in most African countries, is the ability of the children's courts to benefit from the expertise and resources placed at the disposal of the judiciary. The setting also allows the children's court system to grow together with the judiciary as a whole, and makes communication and coordination between the children's courts and other courts much easier. Other countries that have specialised children's courts include

Benin,<sup>284</sup> Zambia,<sup>285</sup> Madagascar, Comoros, Lesotho, Botswana and Angola.

A good practice model, which has served as an inspiration regionally, is the 'one-stop child justice centre' concept referred to in section I of this report, now found in three jurisdictions in South Africa. The concept sees the grouping of all services in the juvenile justice system under one roof, away from the ordinary courts: the building contains a 'mini' police station, an office for probation officers and diversion services providers, court and prosecution services, and a courtroom. Although the concept had not been formally evaluated at time of writing, initial results show that such centres make for a much more child-friendly process, through the amalgamation of services for children in conflict with the law in a single venue, and very careful selection of staff to work there.<sup>286</sup>

### DIVERSION FROM THE FORMAL SYSTEM

Diversion is a process through which child offenders are handled outside the formal justice system, and are redirected to the community for the purposes of their rehabilitation, reformation and reintegration.<sup>287</sup> Diversion is especially ideal in those cases where the offence is of a non-serious nature and where the family, the

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<sup>283</sup> Section 69(1).

<sup>284</sup> Heyns (note 160 above) 888.

<sup>285</sup> See Zambia's response to the list of issues from the Human Rights Committee relating to the *Periodic Report on the International Covenant on Civil and Political Rights* (undated), <[http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/zambia\\_replies90.pdf](http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/zambia_replies90.pdf)> (accessed 05 October 2007) 27.

<sup>286</sup> See J Sloth-Nielsen, *A Guide to the establishment of one stop child justice centres*, unpublished document on file with the author, commissioned by the South African Department of Justice (2004).

<sup>287</sup> See B Mbambo, *Diversion: A central feature of the new child justice system*, in T Maepa (ed.), *Beyond retribution: Prospects for restorative justice in South Africa* (2005), The Restorative Justice Centre and the Institute for Security Studies, ISS Monograph 111.



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school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner towards resolving the dispute.<sup>288</sup> Diversion has a number of benefits, including: making the child offender accountable; providing an option for reparation; identifying the underlying problems motivating the offending conduct; providing educational and rehabilitative opportunities to the child; and lessening the case-load on the formal justice system.<sup>289</sup> This is in addition to eliminating the stigmatisation attached to being accused of a crime, and the brutalisation that often arises from children's contact with institutions linked to the justice system, such as police lock-ups and detention facilities.<sup>290</sup>

Uganda and Lesotho offer very good examples of how community-based structures can be used to resolve disputes involving or affecting children, whether civil or criminal in nature. In Uganda, administrative governance structures flow upwards from the village Local Council I (LC 1), the lowest administrative unit, to the district level (LC 5). These administration structures enjoy some limited judicial powers, recently strengthened with the passing of the 2006 Local Council Courts Act.<sup>291</sup>

The new law creates five levels of Committee courts:

- Village (level 1)
- Parish (level 2)
- Town (level 3)
- Division (level 4)
- Sub-county (level 5).<sup>292</sup>

Appeals from these courts work as follows: level 1 court to level 2; level 2 to levels 3, 4 and 5; and from levels 3, 4 and 5 to the Chief Magistrate.<sup>293</sup> In addition to criminal jurisdiction, these courts have powers to try 'light' civil matters, especially in community settings.

The Children's Act of Uganda takes advantage of this very important administrative structure. The Act expressly grants the LC courts some form of criminal jurisdiction in cases involving children,<sup>294</sup> and has empowered the LC courts to try the following criminal offences: affray; common assault; causing actual bodily harm; theft; criminal trespass; and causing malicious damage to property.<sup>295</sup>

The LC courts are the designated courts of first instance in respect of the above offences. They operate in an informal

<sup>288</sup> See commentary to para 11 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules), Adopted by General Assembly Resolution 40/33 of 29 November 1985 <[http://www.unhcr.ch/html/menu3/b/h\\_comp48.htm](http://www.unhcr.ch/html/menu3/b/h_comp48.htm)> (accessed 7 November 2007).

<sup>289</sup> See L.M. Muntingh, *The effectiveness of diversion programmes – a longitudinal evaluation of cases* (2001), National Institute for Crime Prevention and Offender Reintegration, 6.

<sup>290</sup> Sloth-Nielsen (note 255 above) 245 and 246.

<sup>291</sup> Act passed by Parliament on 22 April 2006.

<sup>292</sup> Section 3 of the Local Council Court Act.

<sup>293</sup> See section 32 of the Local Council Court Act.

<sup>294</sup> Section 93(2).

<sup>295</sup> Schedule 3 of the Children's Act.

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manner, can be convened at any time, and prohibit legal representation. These courts are (notwithstanding other penalties prescribed by the penal laws) empowered to make any of the following orders: reconciliation; compensation; restitution; apology; or caution.<sup>296</sup> In addition, the courts may make guidance orders by which children are placed under the guidance, supervision, advice and assistance of a designated person.<sup>297</sup> The Local Council Courts Act defines the civil jurisdiction of these courts as covering:

- Debts
- Contracts
- Assault and battery
- Conversion
- Damage to property
- Trespass
- Disputes in respect of land held under customary tenure
- Disputes relating to the identities of customary heirs
- Customary heirs.<sup>298</sup>

In addition, the jurisdiction of these courts in relation to matters concerning children is defined as covering disputes concerning marriage, marital status, separation, divorce, and/or parentage of children.<sup>299</sup>

In Lesotho, when the Children's Protection and Welfare Bill (2004) is promulgated, it will create local courts called Village Child Justice Committees.<sup>300</sup> This Bill stipulates

that the members of a village justice committee shall be the village chief and six other elected members; these committees are to be tasked with convening and facilitating family group conferences and victim offender mediation. This proposed legislation goes even further than the Ugandan law: in an innovative manner, it provides for open village healing circles to be convened by the chairperson of the village child justice committee. This is in regard to delinquent acts committed in any of the following circumstances:

- Where there have been two or more acts of anti-social behaviour perpetrated by a child
- Where the acts impact on all members of the community
- Where two or more children are involved
- Where there is group related conflict such as that between two villages
- Where there is a high probability that the anti-social behaviour or offence will be replicated.<sup>301</sup>

This community-based system of adjudication has a number of advantages. In addition to familiarising the local communities with the rights of children, community resolution of criminal disputes helps foster reconciliation between the victim and the perpetrator and their respective families.<sup>302</sup> The system

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<sup>296</sup> Section 93(4).

<sup>297</sup> Section 93(5). This order must be for a maximum of six months; section 93(6).

<sup>298</sup> See section 10 and the third schedule.

<sup>299</sup> *Ibid.*

<sup>300</sup> Section 125.

<sup>301</sup> Section 128 of the Lesotho Children's Protection and Welfare Bill.

<sup>302</sup> C Mbazira, *Report on the harmonisation and implementation of children's rights in east and southern Africa: Diversion as a good practice in Uganda*, prepared for the African Child Policy Forum (December 2006). See also The African Child Policy Forum, *Realising rights for children. Good Practice: Eastern and Southern Africa* (2007, African Child Policy Forum) <[http://www.africanchildforum.org/Documents/Good\\_Practice.pdf](http://www.africanchildforum.org/Documents/Good_Practice.pdf)> (accessed 11 October 2007).



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also helps to promote the principles of restorative and community justice.<sup>303</sup> For example, according to one commentator,<sup>304</sup> the proposed Lesotho structure is an interesting adjunct to contemporary restorative justice initiatives: the process allows for the resolution of disputes in an informal manner which not only promotes reconciliation and restorative justice, but is psychologically empowering for the offender, victim and community as a whole. This is in addition to allowing children to be tried outside the formal system, which tends to make justice more readily accessible.<sup>305</sup> These courts use local languages, are locally available even in rural areas, and are less complicated. As previously mentioned, in Uganda, for instance, legal representation before these courts is prohibited. Such courts also sit in informal settings, with the intention of being less intimidating to children.<sup>306</sup>

In addition to making use of informal traditional structures, the proposed legislation in Lesotho makes provisions for various structured programmes of diversion. The Children's Protection and Welfare Bill, for instance, gives the probation officer a number of options to deal with children that do not have criminal capacity:

- Refer the child and/or the family to counselling or therapy
- Arrange support services for the child's family

- Take no further action
- Convene a conference (attended by the child, the child's parents or appropriate adult, the victim of the offence, and any other persons deemed relevant by the child care worker or probation officer).

The purpose of such a conference is to obtain more information and details of the circumstances surrounding the alleged offence, and then to formulate a plan of how to proceed. The mechanisms for the advancement of diversion include a preliminary inquiry, which is a pre-trial procedure at which diversion can be considered at the earliest possible stage after arrest of a child.<sup>307</sup> At a second level, during or after the trial, there are a number of diversion options, including orders for monetary compensation and community service to victims of crimes or the child's immediate community. This is in addition to other restorative justice options, such as referral of the child to family group conferences (FGCs) or victim offender mediation (VOM).<sup>308</sup> The intention is to enact a tiered approach in which level two diversions apply to more serious offences in respect of which level one diversion may not be appropriate.

In Ethiopia, Community-Based Correction Programme Centres have been established, the main objective of which is to prevent children from getting involved in anti-social

<sup>303</sup> B Matshego, *Best practices in the institutional and community-based treatment of young offenders* (2001) 3(3) Article 40

<sup>304</sup> J Sloth-Nielsen, *Harmonisation of national and international laws to protect children's rights: The Lesotho case-study* (2006, African Child Policy Forum) 24.

<sup>305</sup> See G Odongo (note 255 above) 11.

<sup>306</sup> See Save the Children in Uganda, *Some impacts of the Children's Act in Uganda, 1996 – 2005: A comparative study and evaluation of the Children's Act in relation to children in conflict with the law in eight districts in Uganda* (2005, unpublished report on file with author) 26.

<sup>307</sup> J Sloth-Nielsen (note 255 above) 21.

<sup>308</sup> Section 133 of the Lesotho Children's Protection and Welfare Bill, 2004

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activities, and to correct and rehabilitate young, first-time, petty offenders while they remain with their families. The centres work hand in hand with the Child Protection Units (CPUs) of the police force.<sup>309</sup> When a CPU classifies a case as requiring rehabilitation, a treatment plan is drawn up in consultation with the child and his or her parents/guardians. Under the aegis of the programme, the child is supposed to report to a Community-Based Correction Centre at least once a week.<sup>310</sup> It has been reported that there are currently six such centres in Addis Ababa.<sup>311</sup>

Another country that has adopted a progressive diversion process, and which fulfils some of the good practice indicators, is The Gambia. The 2005 Children's Act, for instance, requires a prosecutor or any other person dealing with a case involving a child offender to encourage the disposal of the case using other means of settlement other than a formal trial.<sup>312</sup> The police, prosecutors or other persons are given powers to exercise discretion to divert the case if the offence involved is a misdemeanour and (a) there is need for reconciliation; (b) the family, the school or other institution involved has reacted or is likely to react in an appropriate and constructive manner; and (c) if the interests of the child and parties involved make this course appropriate.<sup>313</sup> Arresting police officers are also required to release the child from

custody unless the interests of justice require otherwise.<sup>314</sup>

At the children's court level in The Gambia, magistrates are obliged to release the child on bail unless there is a serious danger to the child.<sup>315</sup> The Act also provides that detention shall be a measure of last resort, used only for the shortest possible time. According to the Act, wherever possible, detention pending trial shall be replaced with alternative measures, including close supervision, and/or care by placement with a member of the child's family or in an educational setting or home approved by a Social Welfare or Probation Officer.<sup>316</sup> Where the child's offence is proved, the court has a number of sentencing options that promote diversion. These include:

- Discharging the child
- Placing the child under care, guidance or supervision
- Committing the child by means of a corrective order to the care of a guardian and a supervision officer or relative of the child
- Sending the child to an approved institution
- Ordering the child to participate in group counselling or similar activities; to pay a fine, damages or compensation or cost; or to undertake community service.

<sup>309</sup> However, it needs to be noted that the centres only exist in urban areas.

<sup>310</sup> See 2005, UNICEF Assessment Report, *Justice for Children: Good Practices and Remaining Challenges*, UNICEF, (2005) 47, as referred to by A Assefa and S Yohannes *Harmonisation of national and international laws to protect children's rights: The Ethiopia case study*, 35.

<sup>311</sup> *Ibid.*

<sup>312</sup> Section 207(1).

<sup>313</sup> Section 207(2).

<sup>314</sup> Section 210(4).

<sup>315</sup> Section 211.

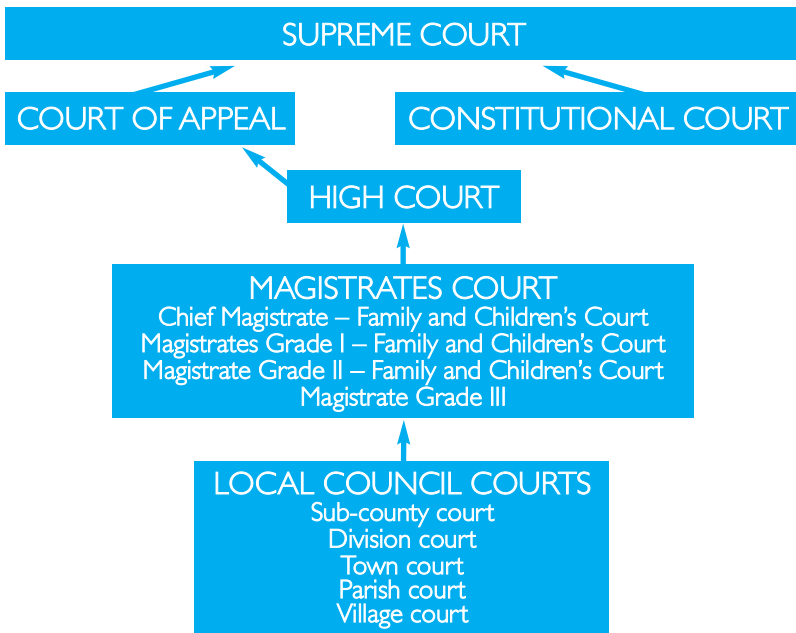
<sup>316</sup> Section 211(2).

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The Children’s Act of The Gambia, in a very innovative and progressive way, makes special provisions for the detention of nursing or expectant mothers, ensuring that a court shall, on sentencing a nursing or expectant mother, consider the imposition of a non-institutional sentence as an alternative to imprisonment.<sup>317</sup>

This measure gives direct effect to article 30 of the African Children’s Charter. Additionally, the Act provides that where an institutional sentence is mandatory or desirable, such a mother shall be detained at an appropriate centre or place designated by the Secretary of State for that purpose.<sup>318</sup>

Judicial structure of courts in Uganda and the position children’s courts and LC Courts



### THE ROLE OF NON-STATE ACTORS IN PROMOTING DIVERSION

Where diversion has been used successfully, voluntary organisations and NGOs have usually played a very important role, by developing and delivering programmes that can be harnessed as diversion;<sup>319</sup> this

is in addition to expanding access to these programmes, sometimes outside formal government structures. The National Institute for Crime Prevention and Reintegration of Offenders in South Africa is exemplary in this respect – this example is detailed below.

<sup>317</sup> Section 218(2).

<sup>318</sup> Section 218(3).

<sup>319</sup> J Sloth-Nielsen, Policy development: Change and reform within existing justice systems, in J Sloth-Nielsen & Jacqui Gallinetti (eds.), *Child justice in Africa: A guide to good practice* (2004, Community Law Centre, University of the Western Cape) 43.

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### Diversion by the National Institute for Crime Prevention and Reintegration of Offenders in South Africa (NICRO)

Diversion was introduced in South Africa by NICRO, together with Lawyers for Human Rights, in the 1990s. NICRO has since then introduced a number of diversion programmes, including Pre-trial Community Service (PTCS), the Youth Empowerment Scheme (YES), Victim Offender Mediation (VOM), Family Group Conferences (FGC), and a scheme called 'The Journey'.

According to NICRO, the primary objective of their diversion programme is the 'avert the incarceration of young offenders in order to avoid exposure to hardened criminal elements, lifestyles, values and norms which undeniably perpetuate the cycle of crime and frequently lead to further conflicts with the law.'

YES is a life skills programme spread over a period of six weeks involving 15–25 participants. The programme addresses such issues as conflict resolution, crime and child law, parent-child relationships and responsible decision-making.

The PTCS programme allows the offender to perform a number of hours of community service in lieu of incarceration. In consultation with the prosecutor, NICRO sets the number of hours, and monitors the offender.

The VOM programme gives the offender and the victim the opportunity to meet and work out a mediated agreement aimed at restorative justice.

The FGC programme has the same objectives as VOM, except that FGC involves the families of the parties.

The Journey is aimed at high-risk offenders, and stipulates at least 12 months of life skills training.

In 2006–2007 alone, NICRO was able to render its diversion services to 17,786 young persons. NICRO has also developed minimum standards and manuals for diversion, and has assisted in the development of minimum norms and standards on diversion for the National Department of Social Development. This has occurred in spite of the fact that there are no legal provisions expressly sanctioning diversion in South Africa.

It should, however, be noted that diversion appears prominently in South Africa's Child Justice Bill 49/2002, which at time of writing is before Parliament.

The South African Child Justice Bill 49 of 2002, which has served as a model for the development of legislation in other contexts on the continent despite not yet having been enacted by Parliament, defines its objectives as including the support of reconciliation by means of restorative

justice, and involving parents, families, victims and communities in child justice processes, in order to encourage the reintegration of the child.<sup>320</sup> Consistent with international child rights law, the Bill considers detention as a matter of last resort.<sup>321</sup> The Bill defines the purposes of diversion as to:

<sup>320</sup> Section 2.

<sup>321</sup> See section 3(2).





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- Encourage the child to be accountable
- Meet the needs of the individual child
- Promote the reintegration of the child into the family and community
- Provide an opportunity to those affected by the harm to express their views
- Prevent stigmatisation of the child
- Prevent adverse consequences following subjection to the criminal justice system
- Prevent the child from acquiring a criminal record.<sup>322</sup>

As introduced, the Bill contained a set of minimum standards applicable to diversion and diversion options. These can be seen in the box below.

### MINIMUM STANDARDS APPLICABLE TO DIVERSION AND DIVERSION OPTIONS IN THE CHILD JUSTICE BILL OF SOUTH AFRICA

45(1) No child may be excluded from a diversion programme due to inability to pay any fee required for such programme.

(2) A child may be required to perform community services as an element of diversion with due consideration for the child's age and development.

(3) Diversion options—

- must promote the dignity and wellbeing of the child, and the development of his or her sense of self-worth and ability to contribute to society;
- may not be exploitative, harmful or hazardous to a child's physical or mental health;
- must be appropriate to the age and maturity of the child; and
- may not interfere with the child's schooling.

(4) Diversion options must, where reasonably possible—

- impart useful skills;
- include a restorative justice element which aims at healing relationships including the relationship with the victim;
- include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;
- be presented in a location reasonably accessible to the child, and a child who cannot afford transport in order to attend the selected diversion programme should, as far as possible, be provided with the means to do so.

(5) Any diversion option presented by a government department or a non-governmental organisation, which has predetermined the content and duration and which involves a service to groups of children or offers a service to individual children on a regular basis, must be registered as prescribed.

<sup>322</sup> Section 43

## SPECIALISED SERVICES AND LEGAL PROVISIONS GIVING THEM EFFECT

In conclusion, access to justice is a key component in evaluating the child-friendliness of legal systems. International law provides clear guidance in formulating indicators in this area, principal among which are separation from adult processes and specialisation in adjudicative models. This section has identified promising developments in many countries in Africa to develop and entrench child-friendly courts and systems in a sustainable manner; moreover, an African advance that has been highlighted for reflection is the promotion of alternative and community-based modes of dispute resolution which accord well with African traditions and customs, and which are not alien to a rights-based agenda.

### 8. SPECIALISED SERVICES AND LEGAL PROVISIONS GIVING THEM EFFECT

#### 8.1 INTRODUCTION

The CRC enjoins states to take all appropriate legislative, administrative, social and educational measures to protect children from all kinds of abuse while in the care of their parents, legal guardians or any other person.<sup>323</sup> According to the Convention, such protection measures should include effective procedures for the establishment of social programmes to provide necessary

support for the child and for those who have the care of the child. This is in addition to making provision for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment and judicial involvement.<sup>324</sup> Furthermore, the CRC requires states to provide special protection and treatment to children temporarily or permanently deprived of their family environment.<sup>325</sup> The African Children's Charter is crafted along the same lines; it also requires measures to protect the child, which should include special monitoring units to provide necessary support for children and their care-givers.<sup>326</sup>

There are a number of circumstances where children, and sometimes their families, may require specialised services. These include:

- When children have been deprived of their family environments
- When children are victims of abuse and neglect and in need of alternative care
- When children are going through the criminal justice system, either as perpetrators or as victims of crime
- When children have special needs, resulting either from physical or psychological disabilities.

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<sup>323</sup> Article 19(2).

<sup>324</sup> Article 19(2).

<sup>325</sup> Article 20(1).

<sup>326</sup> See article 16.



## SPECIALISED SERVICES AND LEGAL PROVISIONS GIVING THEM EFFECT

The provision of specialised services in all the above circumstances is dependent on three things:

1. Proper legislative frameworks making provision for specialised services
2. Establishment of proper institutional structures to implement legislative provisions
3. The presence of skilled personnel conversant with children's matters.

### 8.2 SPECIALISED SERVICES FOR CHILDREN IN CONFLICT WITH THE LAW

In order to ensure that children accused of criminal offences are not detained in the same prisons as adults, many countries in Africa have established special institutions for the reformation and rehabilitation of children. The previously-mentioned Children's Act of Gambia establishes national rehabilitation centres charged with rehabilitating detained children. To ensure that these centres are run properly, the Act also establishes a Committee of Visitors mandated to carry out regular periodic inspections of the centres.<sup>327</sup> The Ugandan Act is no different: it obliges the relevant Minister to establish a National Rehabilitation Centre for Children and such other centres as he or she deems

necessary for the detention, rehabilitation and training of children.<sup>328</sup> The Act also obligates the Minister to appoint a Committee of Visitors to visit the centres periodically and inspect the conditions therein.<sup>329</sup>

While most countries have been sluggish in establishing reformation and rehabilitation centres that match demand, especially in terms of numbers and needs, Egypt is different. The Children's Code of Egypt provides that sentences entailing restrictions of liberty handed down against minors shall be served in a special penal establishment.<sup>330</sup> These establishments, referred to as social welfare institutions for minors, have been established in numbers by the government in collaboration with non-governmental organisations. In its 1999 report to the CRC Committee, Egypt provided statistics that indicated that it was running a total of 29 such establishments.<sup>331</sup>

It should be noted, however, that in most countries these institutions are in a pathetic state, not only in terms of the programmes they pursue, but in the terms of the infrastructure at their disposal. Secondly, while the establishment of these institutions should be encouraged, it is important that they are not used to undermine the principle that the detention of children should be a matter of last resort. Furthermore, any such institutions

<sup>327</sup> See M Saine, *The new law on juvenile justice in The Gambia* (2004) 7(4) Article 40, 8; and Marie S, *Protecting the rights of children in trouble with the law: A case study of South Africa and The Gambia* (2005, LLM dissertation, University of Pretoria, unpublished).

<sup>328</sup> Section 96.

<sup>329</sup> Section 96(1).

<sup>330</sup> Article 141.

<sup>331</sup> Egypt Report, 1999, para 202.

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should not be run as if they are prisons, and the children in them prisoners: this impacts negatively on the children and interferes with their rehabilitation. Diversion, as discussed above, should be promoted as much as possible. However, this does not mean that the programmes in these institutions cannot be designed with the objective of rehabilitating and reintegrating the children into their communities.<sup>332</sup>

### 8.3 SPECIALISED POLICE UNITS

A commendable practice emerging in some countries is the establishment of specialised police units to deal with cases involving children. For instance, in Senegal such units exist, and are called special juvenile brigades.<sup>333</sup> Lesotho, too, has recently established a specific police task force dealing with children and women.<sup>334</sup> In Ethiopia, Child Protection Units (CPUs) have been established within the police force. In addition to improving the handling of accused children, the introduction of CPUs has improved police practice in handling child victims of violence and abuse by ensuring follow-up and support

during legal proceedings.<sup>335</sup> In the Gambia, there is, established in the Police Force, a Child Welfare Unit, which consists of police officers trained for duties including: (a) preventing and controlling child offences; (b) apprehending children accused of committing offences, (c) investigating child offences; and (d) performing such other functions as may be referred to them under relevant regulations.<sup>336</sup>

### 8.4 PROBATION AND SOCIAL WELFARE OFFICERS

Lesotho has a probation office well established in the Ministry of Justice; indeed, the former Director of the Probation Unit, Ntsikeng Qhubu, won an international award for promoting restorative justice and for tireless campaigning for child welfare and child rights. Spurred on by her work, restorative justice has become integrated into the organisational fibre of the Lesotho probation service, and has gained broad support from the public and government officials.<sup>337</sup> The Probation Unit has also played a very important role in promoting diversion of children from the formal

<sup>332</sup> Indeed, in its *Concluding Observations on Egypt's Initial Report*, the CRC Committee noted that deprivation of liberty should always be envisaged as a matter of last resort, and that particular attention should be paid to rehabilitation measures, psychological recovery and social integration. The CRC Committee also noted that deprivation of liberty should be regularly monitored by a judge or an independent body. See para 12 of the *Concluding Observations* adopted by the CRC Committee at its 73rd meeting (third session), held on 28 January 1993. Reproduced in L Holmström (ed), *Concluding observations of the UN Committee on the Rights of the Child: Third to Seventeenth Session (1993 – 1999)* (2000, Martinus Nijhoff) 139.

<sup>333</sup> See Senegal's *Periodic Report to the CRC Committee* (2006) para 126.

<sup>334</sup> J Sloth-Nielsen *Harmonisation of national and international laws to protect children's rights: The Lesotho case study* (2006, The African Child Policy Forum) 18.

<sup>335</sup> See UNICEF *Assessment Report, Justice for Children: Good Practices and Remaining Challenges* (2005, UNICEF) 47, as referred to by A Assefa and S Yohannes, *Harmonisation of national and international laws to protect children's rights: The Ethiopia case study* (2006, The African Child Policy Forum) 35.

<sup>336</sup> Section 206.

<sup>337</sup> See National Probation Service <<http://www.probation.homeoffice.gov.uk/output/Page163.asp>> (accessed 16 November 2007).



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justice system and encouraging magistrates to use non-custodial sentences.<sup>338</sup> It has powers to commence proceedings in court in respect of children that are in need of care,<sup>339</sup> and compiles reports that may be used by the court in such cases. UNICEF has worked jointly with government to train probation officers, and to familiarise them with problems that affect children and their rights.

In the Gambia, probation officers, together with social welfare officers, play very important roles in implementing the provisions of the Children's Act. On most occasions the probation officers discharge the same functions as social welfare officers in cases involving children. The probation officer also plays a number of roles in the administration of juvenile justice and facilitating the processes of the children's courts, and has the right to attend the proceedings of the Court.<sup>340</sup> Where children have to be diverted either pending or after disposal of a case, the probation and social welfare officers play very important roles in determining where the child should be placed. Any such placement, whether at a home or a school, must be approved by these officers.<sup>341</sup>

Additionally, the probation officer is empowered by the Act to supervise

children that have been discharged after being found to have committed an offence. The social welfare officers are also empowered, on reasonable suspicion that a child is being abused or is in need of care and protection, to investigate the case.<sup>342</sup> If need be, the social welfare officer or probation officer in such a case may take the child to court and seek an appropriate order for the protection of the child.<sup>343</sup>

The Children's Act of Uganda also vests a number of functions in the Probations and Social Welfare Officer (PSWO). The PSWO is mandated to attend all proceedings of the Family and Children's Court, and is obliged to advise the Court on a number matters before the Court makes any orders. This is in addition to commencing proceedings intended for the protection of the child. The PSWO may, for instance, make an application for a supervision or interim supervision order placing a child under his or her supervision, while leaving the child in the custody of his or her parents. This is in addition to making an application for a care order placing the child in the care of a warden of an approved home, or with an approved foster parent.<sup>344</sup> Yet before any such orders are made, the Court is obliged to require the PSWO to prepare a written welfare report in respect of the child.<sup>345</sup> This report is supposed to

<sup>338</sup> See CRC Committee, *Concluding Observations on Lesotho* (2001) para 229.

<sup>339</sup> CRC Committee (note 340 above), para 60.

<sup>340</sup> Section 72(2)(d).

<sup>341</sup> Sections 212(2) and 212(11).

<sup>342</sup> Section 77(1).

<sup>343</sup> Section 78.

<sup>344</sup> Section 19. The Act describes circumstances under which the Court may make a supervision or care order; the Court must be satisfied that the child is suffering or is likely to suffer significant harm, and that the harm or probability of harm is attributable to the care given to the child, or is likely to be given to the child if the order were not made, or that the child is beyond parental control (section 21).

<sup>345</sup> Section 20(1).

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contain matters relating to the welfare of the child, and recommendations as to any action that ought to be taken by the Court.<sup>346</sup> The duties of the PSWO continue even after the termination of a care order, and he or she is supposed to work with the parents, guardians or relatives of the child, who is expected to return after the termination of the care order.<sup>347</sup> The duties of the PSWO officer under these circumstances include child and family counselling, before, during and after the child's return, and gaining the assistance of those in the community who can help in the process of resolving the problems which caused the care order to be made.<sup>348</sup> In criminal matters, if the charge against a child has been either admitted or proved, and when a court considers making a detention order, the PSWO is supposed to prepare a report that must be taken into account by the court.<sup>349</sup> This report is supposed, among other things, to include the social and family background of the child, the

circumstances in which he or she is living, and the conditions under which his or her offence was committed.<sup>350</sup>

The PSWOs in Uganda, therefore, play a very important role in ensuring the welfare of children in a variety of circumstances, and in ensuring that children are protected from abuse, neglect and maltreatment. The PSWO may, for instance, take action to safeguard the child, either on the basis of information received, or if he or she has reasonable cause to believe that a child who lives or is found in his or her district is suffering, or is likely to suffer, significant harm.<sup>351</sup> The PSWO is in many respects a conduit of the various orders that the Family and Children Court may issue to protect the child. As seen above, PSWO is able to bring to various judicial proceedings social facts that may be relevant in reaching a proper decision. Such information, though very important, may otherwise be absent in judicial proceedings.

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<sup>346</sup> Section 20(5).

<sup>347</sup> Section 32(1).

<sup>348</sup> Section 32(2).

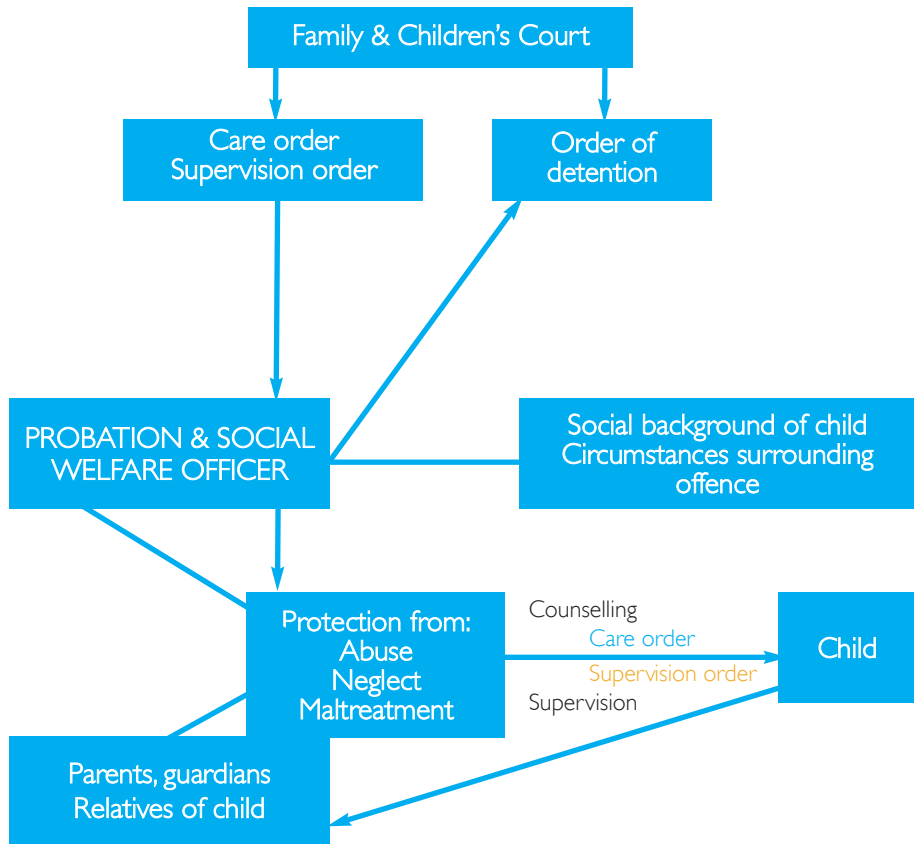
<sup>349</sup> Section 95(1).

<sup>350</sup> Section 95(2).

<sup>351</sup> Section 40.



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### 8.5 CHILD WITNESSES AND VICTIMS

Children usually appear in courts to give evidence, either as witnesses of criminal conduct, or as victims of crime. They can also appear as witnesses in civil cases between adults, including family law proceedings. In all of these circumstances, the process should be friendly as possible,

allowing children to give their testimony in an environment that does not inflict psychological harm, or any other form of stigmatisation. As previously seen, most countries have established specialised children's courts with child-friendly procedures including the holding of the proceedings in camera. This may reduce stigmatisation, but is not in itself enough to ensure that courts benefit from the

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testimony of the child, or that the child is protected. Involvement in the essentially adversarial nature of judicial proceedings in most countries tends to leave children intimidated and traumatised.<sup>352</sup>

It is therefore important that states adapt their judicial procedures to make them non-threatening for child witnesses. Where children appear in court as witnesses, especially where they have been victims of crime, it is important that they:

- Be treated with dignity and compassion
- Be informed of the nature and purpose of proceedings
- Be allowed to express themselves
- Be sure that their concerns are considered
- Be given effective assistance in terms of services (including social and psychological services)
- Have their privacy protected
- Be given special protection to avoid any form of harm.<sup>353</sup>

There are notable good practices in this area in South Africa, where the issue of child witnesses has been dealt with in most depth. The most radical yet positive aspect of South African law in this regard is found in provisions that allow children to testify through intermediaries:<sup>354</sup> the Criminal Law Amendment Act<sup>355</sup> provides that whenever criminal proceedings are pending

before any court, and it appears to such court that it would expose any witness under the age of 18 to undue mental stress or suffering if he or she testified at such proceedings, the court may appoint a competent person as an intermediary in order to enable such a witness to give evidence through that intermediary.<sup>356</sup> In such cases, the child is not subject to cross-examination except examination by the court.<sup>357</sup>

In addition to the above, the Department of Justice and Constitutional Development, in conjunction with the South African Police Service (SAPS) and the departments of Social Development and Health, have established several centres, called 'Thuthuzela care centres,' for victims of sexual offences.<sup>358</sup> The main objectives of these centres are to eliminate victimisation, reduce case cycle times, and increase convictions. These centres provide a 24-hour, one-stop service where victims have access to all services, including those of the police, doctors, counsellors, court preparation personnel, and prosecutors. The centres are run by trained police investigators, medical personnel, community volunteers, social workers and prosecutors, all of whom work together.

As is the case with diversion, civil society organisations have played a role in providing services for child witnesses. Resources

<sup>352</sup> See K Müller and K Hollely, *Introducing the child witness* (2000, Printridge) 69.

<sup>353</sup> For discussion of these and other principles, see International Bureau for Children's Rights Guidelines on justice for victims and witnesses of crime (2003), <[http://www.iccnw.org/documents/BCRGuidelinesMar2003\\_e.pdf](http://www.iccnw.org/documents/BCRGuidelinesMar2003_e.pdf)> (accessed 28 November 2007).

<sup>354</sup> See G Jonker and R Swanzen, *Intermediary services for child witnesses testifying in South African criminal courts*, in (2007) 6 *SUR International Journal on Human Rights* 91.

<sup>355</sup> Act 17 of 2001.

<sup>356</sup> Section 170A(1)

<sup>357</sup> Section 170A(2)(a).

<sup>358</sup> See South African Government Information, *National Prosecuting Authority of South Africa (NPA): Sexual Offences and Community Affairs Unit*, <<http://www.info.gov.za/aboutgovt/justice/npa.htm#sexual>> (accessed 28 November 2007).





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Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), for instance, has a project that supports child victims of sexual offences when they appear as witnesses in court. The project is aimed, amongst other goals, at reducing trauma to child victims.<sup>359</sup> The kind of services that RAPCAN provides appear very simple, but they constitute crucial support to vulnerable child witnesses. The services provided include ensuring that:

- Child witnesses are fed, rested and supervised while they wait to testify
- Witnesses are prepared to testify in terms of knowing what to expect
- That witnesses understand the roles of the different people present
- That witnesses are aware of their rights
- That witnesses are thoroughly debriefed after testifying and after the verdict.

Specialised services to children is an area of recent growth and development in the African context. The necessity of building human capital for the furtherance of protection for children is evident, as many countries currently lack skilled personnel in sufficient numbers to provide such services on the required scale. At time of writing, however, there are promising indications of locally developed skills (in Lesotho, for example), as well as via the non-governmental sector, as in the example

of the child victim support provided by RAPCAN. Such examples should be seen as inspirations for the further deepening of the human resource base for promoting children's rights in Africa.

### 9. COORDINATING AND MONITORING CHILD RIGHTS IMPLEMENTATION

#### 9.1 INTRODUCTION

Both the CRC and the ACRWC are more than a declaration of concern for children: they consist of binding obligations. As such, the ratification of the CRC and the ACRWC, like that of any other international human rights treaty, indicates that state parties commit to meet the necessary obligations regarding implementation.<sup>360</sup>

In light of article 4 of the CRC and article I of the ACRWC, state parties have obligations to comply with certain general measures of implementation. Under article 4 of the CRC, as a general measure of implementation, state parties are required to report to the CRC Committee:

'...on existing or planned mechanisms at the national, regional and local levels, and when relevant at the federal and provincial levels, for ensuring implementation of the Convention, for *coordinating policies* relevant to children and for *monitoring progress achieved*...' <sup>361</sup> [emphasis inserted].

<sup>359</sup> See RAPCAN Brochure *Child Protection and Services Programme* (CPSS) <<http://www.rapcan.org.za/rapcan.pdf>> (accessed 28 November 2007).

<sup>360</sup> 'Implementation,' according to the CRC Committee, 'is the process whereby States parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction.' See General Comment No 5 of the CRC Committee, *General measures of implementation for the Convention on the Rights of the Child* (2003), para 1.

<sup>361</sup> *Guidelines for Periodic Reports of the CRC Committee* (1997) para 18.

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Thus, state parties must ensure that governmental departments competent in the areas covered by the CRC and the ACRWC exercise effective coordination of their activities. In addition, although self-monitoring and evaluation is an obligation for governments, the CRC Committee also regards as essential the independent monitoring of progress towards implementation by – for example – parliamentary committees, NGOs, academic institutions, professional associations, youth groups, and independent human rights institutions.<sup>362</sup> It is the latter aspect of monitoring (independent monitoring), and coordination that this section covers.

### 9.2 COORDINATION OF THE IMPLEMENTATION OF CHILD RIGHTS

A good practice indicator recommended by the CRC Committee is the requirement that:

‘States parties... develop rights-based, coordinated, multi-sectoral strategies in order to ensure that children’s best interests are always the starting point for service planning and provision.’<sup>363</sup>

Effective implementation of the CRC is said to require ‘visible cross-sectoral

coordination to recognise and realise children’s rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves.<sup>364</sup> In addition, the coordinating body must be empowered and supported from the highest possible levels of government to allow it to function at its full potential.<sup>365</sup>

Under the CRC, many countries have reported to the CRC Committee on the establishment of their coordinating mechanisms, including those within existing Ministries, new National Councils, Commissions, Child Welfare Boards, and Children’s Bureaus.<sup>366</sup> These bodies are entrusted with overseeing the implementation of the Convention at the national level,<sup>367</sup> and are typically set up to promote the enactment of laws and formulation of policies that benefit children, and to ensure the involvement of all sectors of civil society in the implementation process.<sup>368</sup> The CRC Committee has noted with concern, however, that most of these bodies and mechanisms are not adequately coordinated in practice, and that they often fail to apply the comprehensive approach needed to ensure the full realisation of all children’s rights.<sup>369</sup> Moreover, they are often in dire need of further institutional

<sup>362</sup> General Comment No 5 of the CRC Committee, *General measures of implementation for the Convention on the Rights of the Child* (2003) para 46.

<sup>363</sup> General Comment No 7 of the CRC Committee, *Implementing child rights in early childhood* (2006) para 22.

<sup>364</sup> General Comment No 5 (note 364 above) 27.

<sup>365</sup> As early as 1995, 25 countries in the world had established some form of monitoring mechanism. See *Progress Report on the Follow-Up to the World Summit for Children*, UNICEF, Executive Board, Annual Session, Agenda Item 4, P 1, U.N. Doc. E/ICEF/1995/15 (1995) 34.

<sup>366</sup> Countries that have created such mechanisms include, for instance, Argentina, Bangladesh, Bulgaria, Canada, Nepal, Nigeria, Uganda, Tunisia, and Vietnam.

<sup>367</sup> *Report of the Committee on the Rights of the Child to the Secretary General* (1998) 22.

<sup>368</sup> *Report of the Committee on the Rights of the Child to the Secretary General* (1998) 19.



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capacity, skills and financial resources in order to carry out their mandates.<sup>370</sup> A similar sentiment is shared by Doek,<sup>371</sup> who suggests that where national children's plans of actions do exist, it is critical that a specific body, such as a ministry or an inter-ministerial committee, is mandated and adequately resourced to coordinate the implementation of these plans of action.

Although there are a number of coordinating organs established in almost all African countries that are state parties to the CRC and the ACRCW, one good example worthy of mention is that of Kenya, through the National Council for Children's Services (NCCS). Established under the Children's Act, and hence backed up by legislation, the NCCS is charged with the responsibility for exercising general supervision and control over the planning, financing and coordination of child rights and welfare activities, and with advising the government on all aspects thereof.<sup>372</sup> The NCCS is replicated in the administrative areas through Area Advisory Councils, thereby making its presence felt in a large part of the country. That the government has recruited more children's officers and other children's services personnel in 2006 in response to the rising demand for

children's services, and further opened seven new District Children's Offices in July 2006, has helped expand services closer to communities.<sup>373</sup>

Multi-sectoralism constitutes one of the good practice indicators, and the additional fact that the NCCS has a membership of all the relevant line ministries as well as NGOs, faith-based organisations and private sector actors, makes it an example to highlight.<sup>374</sup> In particular, the location of the NCCS Department of Children's Services (Children's Department) in the Office of the Vice President and Minister of Home Affairs<sup>375</sup> is laudable. That the Department falls within the Vice President's Office – and hence is central to decision making – is also good practice.<sup>376</sup> Civil society's membership of the NCCS should also be highlighted as positive, mainly because in instances where proper communication between a coordinating organ and civil society is lacking (such as in Algeria, for example),<sup>377</sup> efforts for the protection and promotion of children's rights are likely to be frustrated.

The participation of stakeholders in moulding the mandate and composition of

<sup>370</sup> Report of the Committee on the Rights of the Child to the Secretary General (1998) 16.

<sup>371</sup> J Doek *What does the Children's Convention require?* (2006), 20 *Emory International Law Review* 207.

<sup>372</sup> See section 32(1) of the Kenyan Children's Act. See also CRC Committee, *Periodic Report of Kenya* (2007) para 13.

<sup>373</sup> Written replies to CRC Committee's 'list of questions' on *Periodic Report of Kenya* (2007) 32.

<sup>374</sup> CRC Committee, *Periodic Report of Kenya* (2007) para 16.

<sup>375</sup> The Department is tasked with the mandate to provide services for the welfare of children and secure their rights as stipulated in the Children's Act.

<sup>376</sup> NB the fact that the co-ordinating organ is close to decision-making does not necessarily guarantee effectiveness. In this regard, the experience of SA may be adduced, as the Office on the rights of the Child lacks institutional capacity and power.

<sup>377</sup> International Bureau of Children's Rights, *Making children's rights work in North Africa* 17.

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coordinating organs (especially while still in formation) is vital. This is because it helps to send out a clear message to all stakeholders what overall direction the coordinating organ is to take, thereby making the coordination of future efforts a clearer and easier process.

Here, a leaf could be taken from the experience of Mozambique. In July 2007, a National Workshop on the Rights of the Child and Child Protection Mechanisms in Mozambique took place in Maputo. The Workshop was attended by officials of government, members of Parliament, civil society representatives, academics, representatives of bilateral and multilateral organisations, and numerous other stakeholders. A substantial amount of time was spent debating the role, mandate, composition and structure of the National Council under the draft legislation<sup>378</sup> (yet to be established at time of writing), the role of which is to coordinate work between different stakeholders, and see to it that the different measures and programmes on children's matters are synchronised. Although it is at time of writing too early for a proper assessment, the fact that stakeholders were given the opportunity to debate and inform the overall direction of the coordinating organ in Mozambique ought to contribute to the effectiveness of that organ in the future, and deserves to be highlighted as a promising example.

It is a barrier to good practice that there is a general lack of the data, research and practical information on the implementation of the CRC and the ACRWC that could allow for a complete assessment of the situation of children. In a large number of instances, if not in all, effective coordination in any country requires concrete information on the current as well as the future state of children. This information could relate to data that is disaggregated (for example) by age, sex, urban and/or rural habitat for all persons under 18, and by those groups of children in need of special protection. Activities by coordinating organs relating to the development of indicators, national plans of action, studies on law reform, preparation of state party reports (initial and periodic) and so on also require a comprehensive database.

In light of this, Tunisia could be mentioned as a promising example. Established under the Ministry for Women, Family, Children and Elders, the Observatory for Information, Training, Documentation and Study for the Protection of Children's Rights (established by Decree No. 2002-237) has a key role in coordinating, monitoring and reporting on the situation of children. In particular, the Observatory has the following tasks to perform:

- The collection of data and information concerning children
- Analysis and classification of data in databases established for the purpose

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<sup>378</sup> These are the Draft Bill on Child Protection and the Draft Bill on the Jurisdictional Organization of Minors.

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- Conducting evaluations or forward-looking studies and research relating to the protection of the rights of the child
- Organization of apprenticeships and training seminars.<sup>379</sup>

The role of the Observatory in enhancing the information base of the coordinating organ in Tunisia is very significant.

### 9.3 MONITORING OF THE IMPLEMENTATION OF CHILD RIGHTS

Independent monitoring of implementation is an important part of promoting and protecting children's rights. The indicators for a general good practice in monitoring the implementation of child rights can be discerned from the position of the CRC Committee.

Firstly, it is indicated that that monitoring institutions, if not constitutionally entrenched, should at least be legislatively mandated.<sup>380</sup> This legislation should include provisions, linked to the CRC and its Optional Protocols, which set out specific functions, powers and duties relating to children as well those responsible for them, and the laws relating to children's rights in the country concerned.<sup>381</sup>

Secondly, monitoring institutions should be accorded such powers as are necessary to enable them to discharge their mandates

effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence. These powers should include the promotion and protection of the rights of all children under the jurisdiction of the state party, in relation not only to state action or inaction, but also to all relevant public and private entities. The establishment of these independent monitoring institutions in compliance with the Principles relating to the status of national institutions for the promotion and protection of human rights (The 'Paris Principles'),<sup>382</sup> adopted by the UN General Assembly in 1993, is crucial.

In addition, General Comment No. 2 (2002), *The role of independent national human rights institutions in the protection and promotion of the rights of the child*, provides a number of indicators for good practice in monitoring the implementation of child rights. The CRC Committee notes that it:

'...considers the establishment of such bodies to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realisation of children's rights.'

It is underscored that independent human rights institutions are complementary to effective government structures for children, and that the essential element for

<sup>379</sup> Written replies to CRC Committee's 'list of questions' on *Periodic Report of Tunisia* (2002) 22.

<sup>380</sup> General Comment No 2 of the CRC Committee *The role of independent human rights institutions* (2002) para 7.

<sup>381</sup> General Comment No 2 (note 382 above) para 9.

<sup>382</sup> Principles relating to the status of national institutions for the promotion and protection of human rights (The 'Paris Principles'), General Assembly resolution 48/134 of 20 December 1993, annex.

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success is independence. Thus 'the role of national human rights institutions is to monitor independently the State's compliance and progress towards implementation and to do all it can to ensure full respect for children's rights.'<sup>383</sup> It is vital that institutions remain entirely free to set their own agenda and determine their own activities.

It is interesting to note that, even if specialist independent human rights institutions for children, ombudspersons or commissioners for children's rights have been established in a growing number of countries worldwide, this is not necessarily a requirement – especially, in the context of Africa, where resources are very limited. General comment No. 2 again:

... consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.<sup>384</sup>

In Africa, according to Sloth-Nielsen, 'no fewer than 20 countries have established national human rights commissions/institutions.'<sup>385</sup> In addition, 'over 10 ombudsmen/public protectors are also provided for in African constitutions.'<sup>386</sup> Mention should also be made of the fact that 'a little over 45 constitutions of African countries provide for an independent judiciary.'<sup>387</sup> These institutions do fulfil one of the indicators of good practice: they are either constitutionally entrenched or (at least) legislatively mandated. Despite this, it is common knowledge that the degree of success of these institutions in fulfilling their mandates concerning independent monitoring of the implementation of children's rights depends on the availability and strength of the relevant legal, financial, political and social resources in any given country.

The term 'independent monitoring' may be thought self-explanatory, but the independence of these organs is crucially important. For instance, in Senegal, although the establishment of the *Haut Commissariat aux Droits de l'Homme et à la Promotion de la Paix* (High Commission for Human Rights and the Promotion of Peace) within the Office of the President, with the mandate to receive complaints from children, has been labelled positive, concerns remain about the independence

<sup>383</sup> While this may require the institution to develop projects to enhance the promotion and protection of children's rights, it should not lead to the Government delegating its monitoring obligations to the national institution.

<sup>384</sup> General Comment No 2 (note 382 above) para 6.

<sup>385</sup> J Sloth-Nielsen (note 27 above) 99.

<sup>386</sup> J Sloth-Nielsen (note 27 above) 99.

<sup>387</sup> J Sloth-Nielsen (note 27 above) 99.



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of this institution.<sup>388</sup> Togo's *Commission nationale des droits de l'homme* (National Commission for Human Rights) and Sao Tome and Principe's National Child Rights Committee (under the Ministry of Justice) are in similar situations. In Mauritius, where the staff of the Ombudsperson for Children's Office (OCO) (established December 2003) are seconded from other government departments, such status has been found to limit the total effective independence of the Office.<sup>389</sup>

As previously highlighted, the mandate of the independent monitoring organs is equally important. For instance, in the Republic of Congo, the National Human Rights Commission and the Office of the Mediator of the Republic (Ombudsman) are expected to assume responsibility for independently monitoring the implementation of children's rights. However, their mandate is not clear and adequate (an 'adequate mandate' includes a specific power to deal with individual children's rights complaints, as well as with structural and systemic issues relating to the rights of the child). The power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence should also be included. At this juncture, a word of

caution is needed: complaints from children need to be handled in a child-sensitive and expeditious manner.

Regressive measures, as opposed to progressive ones, are naturally not considered good practice<sup>390</sup> – an example being that of Ghana, where the department dealing with child rights under the Ghana Commission of Human Rights and Administrative Justice has been abolished. However, the possibility offered by the same Commission of lodging a complaint *online* should be noted as a promising example.<sup>391</sup> Ensuring the accessibility of independent monitoring organs to children, for the purpose of lodging individual complaints – for example, through the establishment of special toll-free telephone hotlines – can go a long way in promoting effective monitoring. This has been the case, for instance, with Morocco's National Observatory for Children's Rights.

Admittedly, finding a country in Africa that fulfils all the indicators of good practice in independent monitoring of the implementation of children's rights is difficult. However, save for its shortcomings in terms of accessibility and availability to all children in the country (which in part relates to the human and financial resources allocated to

<sup>388</sup> CRC Committee, *Concluding Observations on Senegal's Second Periodic Report* (2006) para 13.

<sup>389</sup> CRC Committee, *Concluding Observations on Mauritius's Second Periodic Report* (2006) para 16.

<sup>390</sup> CRC Committee, *Concluding Observations on Ghana's Second Periodic Report* (2006), para 15. Here, the experience of Nigeria with the National Human Rights Commission (NHRC) and its regional offices, and in particular the appointment of a Special Rapporteur on Child Rights within the NHRC, could be a promising example. See *Concluding Observations on Nigeria's Second Periodic Report* (2005) para 19-20.

<sup>391</sup> The Ghana Commission of Human Rights and Administrative Justice <<http://www.chrajghana.org/index?articleId=0001>> (accessed 22 October 2007).

it),<sup>392</sup> the Special Desk for Children's Affairs within the Commission for Human Rights and Good Governance of Tanzania is worthy of note. Not only does the Commission enjoy a legal base (as mandated under article 129(1) of the Constitution of the United Republic of Tanzania of 1977 (as amended by Act No. 3 of 2000) and established under the Commission of Human Rights and Good Governance Act No. 7/2001); it is also independent from the Government.<sup>393</sup> The Special Desk for Children's Affairs within the Commission specialises in issues pertaining to children's rights, and under section 6 of the Commission of Human Rights and Good Governance Act No. 7/2001, it is mandated to receive, investigate and enquire into complaints on violation of human rights and principles of good governance. Investigation of a complaint from an individual that includes complaints from children is allowed for under section 15 of Act No. 7 of 2001. It is interesting to note that a complaint under the Act may be made in writing, orally, by fax or by e-mail.<sup>394</sup> The fact that the Commission can investigate child rights violations of its own volition has an obvious appeal, and activities undertaken to date include inspection visits to prisons and investigation of complaints relating to children and youth.

## 10. FINAL REMARKS

The brief for this report provided a unique opportunity to reflect on good practices across borders in Africa in strengthening the promotion, protection and fulfilment of children's rights on this continent. Many of Africa's children face direct hardships, are victims of war, strife and trafficking, or succumb to preventable diseases and malnutrition. However, African governments have not only signalled their support for children's rights via ratification of a growing number of children's rights-related international instruments, but – especially in the context of a globalisation – they are showing a discernible trend towards modernisation, encouraging signs of growing economic prosperity, and further concrete indications of good practice at the level of domestication of international commitment in law, policy and practice.

This report has reflected on a diverse array of these encouraging trends, grouped to reflect themes that are particularly important in the African context. In providing a better future for many young people who are benefiting from the identified programmes and policies, these trends are contributing not only to the delivery of children's rights, but – in a very measurable way – to Africa's regeneration and renewal.

<sup>392</sup> CRC Committee, *Concluding Observations on Tanzania's Second Periodic Report* (2006) para 14-15.

<sup>393</sup> The Commission for Human Rights and Good Governance of Tanzania <<http://www.chragg.org/>> (accessed 22 October 2007).

<sup>394</sup> The Commission for Human Rights and Good Governance of Tanzania <<http://www.chragg.org/>> (accessed 22 October 2007).