

Achieving Child Friendly Justice in Africa



The African Child
Policy Forum

**Achieving
Child-Friendly Justice
in Africa**



THE AFRICAN CHILD POLICY FORUM (ACPF)

ACPF is an independent, pan-African institution of policy research and dialogue on the African child.

ACPF was established with the conviction that putting children first on the public agenda is fundamental for the realisation of their rights and wellbeing and for bringing about lasting social and economic progress in Africa.

ACPF's work is rights based, inspired by universal values and informed by global experiences and knowledge. Its work is guided by the UN convention on the rights of the child, the African charter on the rights and Welfare of the child, and other relevant regional and international human rights instruments. ACPF aims to specifically contribute to improved knowledge on children in Africa; monitor and report progress; identify policy options; provide a platform for dialogue; collaborate with governments, inter-governmental organisations and the civil society in the development and implementation of effective pro-child policies and programmes; and also promote a common voice for children in and out of Africa.

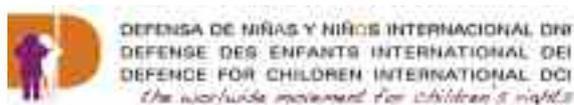
DEFENCE FOR CHILDREN INTERNATIONAL (DCI)

DCI is an independent non-governmental organisation that has been promoting and protecting children's rights on a global, regional, national and local level for over 30 years. When the movement was founded in 1979, few international structures were dedicated to using a human rights-based approach in addressing the many problems faced by the world's children. DCI was established in direct response to this void. DCI has more than 40 national sections (in Africa, the Middle East, Asia, Pacific, Latin America and Europe) and associated members who carry out concrete programmes to promote and protect the rights of children.

At the DCI International Conference held in Bethlehem in 2005 under the theme "Kids Behind Bars", A Child Rights Perspective and at the most recent International General Assembly held in Brussels in October 2008, on "Violence against Children in Conflict with Law", DCI confirmed its commitment to maintaining juvenile justice as its priority concern. In the Brussels Declaration, DCI reconfirmed its commitment to the guiding principles of the UN Convention on the Rights of the Child, General Comment No.10 on Children's Rights in Juvenile Justice.



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ACPF	The African Child Policy Forum
ACRWC	The African Charter on the Rights and Welfare of the Child
ARRS	Arrest, Reception and Referral Service
CRC	The UN Convention on the Rights of the Child
DCI	Defence for Children International
DOVVSU	Domestic Violence and Victims Support Unit
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
FSU	Family Support Unit
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
IFJ	International Federation of Journalists
JDL(s)	Juveniles Deprived of their Liberty
MMA	Media Monitoring Africa
NGO(s)	Non Governmental Organisation(s)
OMCT	World Organisation against Torture
SOCA	Sexual Offences and Community Affairs Unit
UNICEF ESARO	United Nations Children’s Fund, the Eastern and Southern African Regional Office
UNICEF	United Nations Children’s Fund
UNODC	United Nations Office on Drugs and Crime
USA	The United States of America

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This publication is one of the outputs from the Global Conference on Child Justice in Africa, organised by the African Child Policy Forum (ACPF) and Defence for Children International (DCI), which was held in Kampala, Uganda in November 2011. The publication is a study on children and the justice system.

Based on the fact that children come in contact with the justice system in different ways, both in the formal and informal justice systems, or the criminal and civil justice systems, the study charts the progress made and the challenges remaining with regard to justice for children in Africa.

The situations in which children are involved in the justice system are categorised in four broad categories namely, the criminal justice system (when in conflict with the law or as victims and witnesses), the civil justice system (such as when in need of care, protection, judicial review of removal or placement; in custody and access disputes; in guardianship issues; and as unaccompanied or separated foreign children), the administrative justice system (such as school disciplinary proceedings and aspects the care and protection system), and in the customary/traditional courts or informal alternatives. The study therefore provides information on law reform, case law and good practices on children in the justice system, from a range of African countries.

Furthermore, discussion of fundamental principles (such as the best interests of the child, dignity, non-discrimination and the rule of law), and general elements of a child-friendly justice system consisting of information and advice, protection of privacy, special preventive measures, training of professionals, and so on, as envisaged under a variety of international and regional instruments that deal with children in the justice system is incorporated into this study to help as a benchmark to evaluate the situation in Africa.

The standards for child-friendly justice before, during and after judicial proceedings are also examined as provided for in these instruments, to highlight core concerns in relation to child justice systems in the continent. Thus, by providing a contextual analysis of the child-friendliness of the legal systems in various African countries by citing relevant instances from legal provisions, case law, and practical examples, this report provides substantive information which will be a useful tool for advocacy, research and practical implementation of the laws, policies and standards for dealing with children in the justice system.

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(i) Defining justice for children and child-friendly justice

'Justice for children' refers to all situations where children are involved in both criminal and civil justice systems, including administrative or informal justice mechanisms. Child-friendly justice describes justice systems that are designed or adjusted to be sensitive to the particular issues that children face when they come into contact with the law and courts (or legal proceedings) for any reason.

(ii) Identifying situations in which children are involved in justice systems

This study identifies five broad categories of cases or situations in which children come into contact with justice systems:

a) Criminal justice

- Child in conflict with the law: children may be involved in the criminal justice system as children who are accused of, or are recognised as, having infringed the penal law
- Child victims and witnesses: children may also be involved in the criminal justice system as child victims of crime or as child witnesses to crime.

b) Civil justice

Children may be involved in justice systems in many different ways, including the following ways:

- As children in need of care and protection, judicial review of removal or placement
- As children caught up in custody (care) and access (contact) disputes
- Through guardianship issues
- As unaccompanied or separated foreign children.

c) Administrative justice

Sometimes children are dealt with according to administrative procedures, such as:

- Through school disciplinary proceedings
- Through aspects of the care and protection system.

d) Customary/traditional courts or other informal alternatives

Children are often dealt with by customary/traditional systems because these systems are close to the people and inexpensive. These processes also need to be included in the ambit of child-friendly justice, with a view to ensuring processes and outcomes that are compatible with the principles of children's rights.

e) Access to justice for all children

Children can be involved in, or (with appropriate assistance) can themselves bring, a wide range of court cases relating to any of their civil or socio-economic rights.

iii) Applicable international and regional instruments

The study gives an overview of the relevant international and regional instruments and other documents that provide a firm basis for child-friendly justice in Africa. This review indicates that there is a wealth of guidance on the essential elements of child-friendly justice systems, and demonstrates that many of the underpinning principles are already recognised by African states.

(iv) Progress made in law reform

This report makes reference to many new laws; below is a table demonstrating the progress that has been made with regard to

law reform. Child-related laws that have been passed, or Bills that have been drafted, since the United Nations Convention on the Rights of the Child (CRC) came into operation in 1990 (having been adopted in 1989) are listed in the table on a country-by-country basis, and the status of each law is also shown.

The overall impression to be drawn from the table is that many countries have changed their laws to come into line with the provisions of the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC).

There is a predominance of focus on laws relating to child offenders and children in need of care and protection; law reform dealing specifically with child victims and witnesses is less common, as is legislation focusing on civil aspects other than care and protection. Some African countries have also enacted legislation in relation to sexual offences which, although not child-specific, also forms part of the law under which children may come into contact with the justice system.

TABLE DEMONSTRATING PROGRESS WITH REGARD TO CHILD LAW REFORM SINCE THE CRC CAME INTO OPERATION

NO.	COUNTRY	ACT OR BILL	STATUS (PASSED AND IN OPERATION; OR ONLY PASSED; OR STILL IN PROCESS)
1.	BOTSWANA	CHILDREN'S ACT NO. 8 OF 2009	PASSED
2.	DEMOCRATIC REPUBLIC OF CONGO	CHILD PROTECTION CODE NO. 09/001 OF 2009	IN OPERATION
3.	EGYPT	CHILDREN'S ACT NO. 126 OF 2008	IN OPERATION
4.	GHANA	CHILDREN'S ACT NO. 560 OF 1998 JUVENILE JUSTICE ACT NO. 653 OF 2003	IN OPERATION IN OPERATION
5.	KENYA	CHILDREN'S ACT NO. 8 OF 2001 SEXUAL OFFENCES ACT NO. 3 OF 2006	IN OPERATION IN OPERATION
6.	LIBERIA	CHILDREN'S ACT OF 2011	PASSED IN 2011
7.	LESOTHO	CHILDREN'S PROTECTION AND WELFARE ACT OF 2011 SEXUAL OFFENCES ACT NO. 3 OF 2003	PASSED IN 2011 IN OPERATION

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TABLE DEMONSTRATING PROGRESS WITH REGARD TO CHILD LAW REFORM SINCE THE CRC CAME INTO OPERATION

NO.	COUNTRY	ACT OR BILL	STATUS (PASSED AND IN OPERATION; OR ONLY PASSED; OR STILL IN PROCESS)
8.	MALI	MALIAN CODE OF CHILD PROTECTION NO. 02-062/P-RM OF 2002	IN OPERATION
9.	MALAWI	CHILD CARE, PROTECTION AND JUSTICE ACT NO. 22 OF 2010	IN OPERATION
10.	MAURITIUS	THE PROTECTION OF THE CHILD ACT NO. 15 OF 1998	IN OPERATION
		SEXUAL OFFENCE BILL OF 2007	NOT YET PASSED
11.	MOZAMBIQUE	THE LAW FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF THE CHILD ACT NO.7 OF 2008	PASSED
12.	NAMIBIA	CHILD CARE AND PROTECTION BILL	IN PROCESS
		COMBATING RAPE ACT NO. 8 OF 2000	IN OPERATION
13.	NIGERIA	CHILD RIGHTS ACT OF 2003	IN OPERATION IN SOME STATES
14.	RWANDA	LAW NO. 27/2001 RELATING TO CHILDREN'S RIGHTS AND PROTECTION AGAINST VIOLENCE	IN OPERATION
15.	SEYCHELLES	CHILDREN ACT OF 1996	IN OPERATION
16.	SIERRA LEONE	CHILD RIGHTS ACT NO. 43 OF 2007	IN OPERATION
		CHILDREN AND YOUNG PERSON'S ACT 44/1945 AS AMENDED	IN OPERATION
17.	SOMALILAND	JUVENILE JUSTICE LAW NO. 36 OF 2007	IN OPERATION

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TABLE DEMONSTRATING PROGRESS WITH REGARD TO CHILD LAW REFORM
SINCE THE CRC CAME INTO OPERATION

NO.	COUNTRY	ACT OR BILL	STATUS (PASSED AND IN OPERATION; OR ONLY PASSED; OR STILL IN PROCESS)
18.	SOUTH AFRICA	CHILDREN'S ACT NO. 38 OF 2005	IN OPERATION
		CHILD JUSTICE ACT NO. 75 OF 2008	IN OPERATION
		CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT NO. 32 OF 2007	IN OPERATION
19.	SOUTH SUDAN	CHILD ACT NO. 10 OF 2008	IN OPERATION
20.	TANZANIA	THE LAW OF THE CHILD ACT NO. 21 OF 2009	IN OPERATION
		THE SEXUAL OFFENCES SPECIAL PROVISIONS ACT NO. 4 OF 1998	IN OPERATION
21.	TOGO	CHILDREN'S CODE (ACT NO. 2007-017 OF 6 JULY 2007)	IN OPERATION
22.	TUNISIA	CHILD PROTECTION CODE OF 1995	IN OPERATION
23.	UGANDA	CHILDREN'S ACT OF 1997	IN OPERATION
24.	ZANZIBAR	CHILDREN'S ACT NO. 6405 OF 2011	PASSED IN 2011
25.	ZIMBABWE	CHILDREN'S ACT NO. 5 OF 2006	IN OPERATION
		GUARDIANSHIP OF MINORS ACT NO. 5 OF 2003	IN OPERATION

(v) Parts B to G of the study

In parts B to G of this study, an analysis is undertaken of the child friendliness of the legal systems in African countries. After a discussion of the general principles and

elements of a child-friendly justice system, the framework is set out chronologically, beginning with child-friendly justice before judicial proceedings, continuing through

children and the police and child-friendly justice during the judicial system, and concluding with child-friendly justice systems after judicial proceedings. Under each heading the method of the study involves identifying the key concepts, linking these to the established rules and principles in international and regional instruments and documents, then providing a contextual analysis in which African country examples are given. The examples include legal provisions in statutes, case law, and practical examples of projects and programmes.

(vi) Conclusion

The overall impression that the study provides of child-friendly justice in Africa is that much progress has been made. Some countries have well developed legal frameworks, and practice examples show that the laws work reasonably well on the ground. Other countries that have not yet reached the stage of a new law have nevertheless forged ahead with

reform of practice and boast practice examples, though many of these are specific to particular cities or parts of the country only.

Children who are suspected or have been convicted of crimes have received the most attention from lawmakers and practitioners. Special laws and procedures for child victims and witnesses are lacking. The awareness of children in the civil justice system has lagged behind, though children in the care and protection system have received attention in a number of recent laws. Some countries have case law that illustrates the courts' growing awareness of key principles such as the best interests of the child – though this is terrain that can certainly be developed further. Systems clearly need to be strengthened through, amongst other strategies, effective budgeting, appointment and retention of well-trained personnel, and inter-sectoral collaboration between government departments and with civil society organisations.

A. INTRODUCTION

1. The aim of this study

This study was commissioned by the African Child Policy Forum (ACPF) and Defence for Children International (DCI). The background to the study is the acknowledgement that children come into contact with the justice system in many ways. Firstly, they may be involved in criminal proceedings, either because they are accused of committing offences, or because they are victims of or witnesses to crimes. Secondly, they may be involved in civil proceedings – for example in family law or care and protection proceedings, or as complainants where their rights have been violated. In countries that have dual legal systems where customary law is still applicable, these processes might be formal or informal. Many countries also have administrative processes that affect children, such as school disciplinary processes. The full scope of children's involvement in justice systems will be discussed below. However, despite the frequency with which children are involved in justice processes, many justice systems around the world do not cater for the specific needs of children and are still predominantly adult-oriented.

This study aims to chart the progress made and the challenges remaining with regard to justice for children in Africa. It also aims to share information on law reform, case law and good practices from a range of African countries.

This study was prepared as a background document for the Global Conference on Child Justice in Africa (Kampala Conference), held in Kampala, Uganda on 7 and 8 November 2011. It also aims to contribute to the development of African Guidelines for Action for Children in the Justice System in Africa to assist African nations in establishing, maintaining and improving justice systems so that they respond to the specific needs of children. These guidelines were developed in view of the Kampala Conference where the participants also came up with the Munyonyo Declaration on Justice for Children.

Terminology in this field can be confusing. 'Child justice' is understood narrowly by some as applying only to children in conflict with the law. To others it embraces a broader range of issues and is synonymous with 'justice for children'. Others speak of 'child-friendly justice'. This study uses the term 'justice for children' to refer to all scenarios where children might be involved in both criminal and civil justice systems, including administrative or informal justice mechanisms. 'Child-friendly justice' describes justice systems that are designed or adjusted to be sensitive to the particular issues that children face when they come into contact with the law and courts (or proceedings), for any reason.

¹ The Munyonyo Declaration arising from the Global Conference held in Kampala is available at http://www.kampalaconference.info/index.php?option=com_content&view=article&i accessed on 30 November 2011.

2. Identifying situations in which children may be involved in justice systems

'Justice for children' pertains to any situation in which children come into contact with justice systems, including courts (formal or informal) and administrative forums. Although there may be some overlap, this study identifies four broad categories, set out below.

2.1 Criminal Justice

2.1.1 Children in conflict with the law

Children may be involved in the criminal justice system as children who are accused of or are recognised as having infringed the penal law. They are often referred to as child offenders (although some may be innocent) or 'children in conflict with the law'. The system is broad, procedurally covering: prevention; arrest and alternatives to arrest; pre-trial alternatives such as diversion; detention pre-trial and during trial; the trial (courts in camera, identity protection); pre-sentencing procedures; sentencing; and reintegration. Important substantive issues include the minimum age of criminal capacity, criminal records, and the treatment of children in detention. An important guiding principle is detention as a measure of last resort and for the shortest possible period of time.

2.1.2 Child victims and witnesses

Children may also be involved in the criminal justice system as child victims of crime or as child witnesses to crime. For both of these groups of children, procedures

need to be put in place relating to: interviewing children; the possible use of video recording; preparation for court; special protective measures for giving evidence in court; and laws relating to the evaluation of children's evidence by the court. In addition to these general measures, child victims will require a full range of services, including mechanisms for reporting the offence; access to information; psychosocial support; appropriate medical examinations; and sensitive management by trained officials. Privacy and confidentiality are important, including through closed courts and non-disclosure of identifying information.

2.2 Civil justice

2.2.1 Care and protection

Children who may be in need of care and protection can be separated from their parents by the intervention of social welfare authorities. Such removals are subject to judicial review, at which point the courts become involved. For a system to be fully protective of children's rights, it should include court oversight of placement decisions in care and protection proceedings. Although certain decisions in care and protection are made administratively (e.g. by a social worker) these decisions should be reviewable by a court. Foster care, adoption and placement in residential care are all far-reaching decisions that should ideally be made by a court. Inter-country adoption is also an issue related to care and protection proceedings, and courts are usually involved in decisions relating to such measures in countries where they are concluded.

2.2.2 Family law

In family law, children may be caught up in proceedings relating to custody (care) and access (contact) when their parents are divorced; if their parents were never married; or if one parent has died and the grandparents on the side of the deceased parent are seeking custody of or access to the child or children. Sometimes these disputes become international, when a child is taken to (or retained in) another country. Countries that have ratified the Hague Convention on International Child Abduction have identified a Central Authority and established rules for courts to deal with these matters.

Children who have been orphaned do not have natural guardians, and this can prove to be a major impediment to winding up an estate, selling fixed property, obtaining birth certificates and other documentation, and accessing such services as medical treatment. Courts can make orders of guardianship, but this is often done at High Court level, and presents an access to justice problem in some countries.

2.2.3 Unaccompanied foreign children

Unaccompanied foreign children, with or without an asylum claim, will be dealt with by authorities in the receiving country. Although there are international protocols about the manner in which these children are managed, many justice systems are poorly equipped to deal with this group of children in a child-friendly manner.

2.3 Administrative procedures

Sometimes children are dealt with according to administrative procedures. Common examples of this are found in the actions of

school disciplinary bodies that are able to suspend or expel pupils from schools. In some countries, administrative procedures go much further, and include aspects of care and protection within their ambit. Administrative procedures should be subject to – at the very least – internal review procedures; and, failing that, to review by the courts.

2.4 Customary/traditional courts or other informal alternatives

In many African countries customary law still operates parallel to the formal justice system, and is at least partially recognised by the formal system, so long as it does not breach Constitutional principles. Children are often dealt with by such systems, because the systems are close to the people and are inexpensive. Some countries have made efforts to harmonise these systems with the formal system by giving legal recognition to these structures. It is important to include these other ways of doing justice in approaches to justice for children, and to involve them in debates about child-friendly justice. This can be challenging, because some structures do not allow for participation by children, and may produce outcomes that are incompatible with the principles of children's rights. However, customary law is not static, and can be developed.

2.5 Access to justice for all children

The abovementioned groups of children are those most commonly found caught up in criminal and civil law systems, but the list of relevant children is open ended, because children can be involved in a wide range of cases relating to any of their civil or their socio-economic rights, and, with appropriate assistance, can even approach courts

themselves. For example, children in the Philippines² brought a case to prevent forests from being destroyed, based on their right as ‘future generations’ to have the environment preserved for them.

3. International and regional instruments that deal with children in justice systems

3.1 Introduction

Children’s needs in the justice system have been recognised in international law, most notably with regard to children accused of crimes. More recently, a set of guidelines has been written on children as child victims and witnesses, and another set on children in alternative care. The Convention on the Rights of the Child and the regional African Charter on the Rights and Welfare of the Child are more general, but less detailed, on issues pertaining to justice matters. Relevant instruments will be discussed in this paper in chronological order, focussing on their aspects that are relevant to justice for children.

3.2 The Beijing Rules (1985)

The first international instrument to pay dedicated attention to the issue was the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), referred to generally and hereafter as the Beijing Rules.³ These rules provide a framework of essential elements of a good system to deal with child offenders, and contain the following tenets:

- Countries need to set a minimum age of criminal capacity, at an age that is not too low, considering the emotional and mental capacity of children
- The aim of juvenile justice is to emphasise the wellbeing of the child and ensure that any reaction in law will be proportionate to the offender and the offence
- The granting of a high degree of discretion to officials at all stages is encouraged, to allow for alternative measures, but discretion is to be used in an accountable and judicious manner
- Diversion is encouraged
- Specialisation in the police is encouraged
- Children who are not diverted must be dealt with by a competent authority, in an atmosphere of understanding
- Sentencing must be proportionate and must ensure that detention is a measure of last resort
- Corporal punishment as a sentence is prohibited.

3.3 The United Nations Convention on the Rights of the Child (1989)

The United Nations Convention on the Rights of the Child (1989),⁴ hereafter referred to as the CRC, is a wide-ranging instrument that covers many issues. Article 3 of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions,

² *Minors Opposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 173.

³ General Assembly Resolution 40/33 adopted on 29 November 1985.

⁴ General Assembly Resolution 44/25 adopted on 20 November 1989.



courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 9 requires that children shall not be separated from their parents against their will except when competent authorities, subject to judicial review, determine in accordance with applicable law and procedures that the separation is necessary for the best interests of the child. Article 12 provides that a child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or appropriate body. Article 19, which deals with abuse and neglect, specifically mentions procedures for reporting, referral to investigation, and – where appropriate – judicial involvement. There is also reference to law, procedures and competent authorities in relation to care and protection, adoption, refugee children, sexual abuse and sale or trafficking. Article 37 focuses on freedom from cruel, inhuman or degrading treatment, and Article 40 on the administration of juvenile justice. These articles include strong and detailed provisions for issues of justice for children.

All countries on the African continent, with the exception of Somalia and South Sudan, have ratified the Convention on the Rights of the Child.

3.4 United Nations Guidelines for the Prevention of Juvenile Delinquency (1990)⁵

These guidelines are preventive in nature, and focus on the child, the family and the

involvement of the community. The document deals with ‘socialisation processes’, education, participation of youth within community structures, the role of the media, and socio-economic circumstances. The idea of prevention is located squarely within a broader development context.

3.5 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDLS) (1990)⁶

While other instruments stress avoidance or limitation of detention, this instrument (also known as ‘the JDLS’) focuses on conditions of detention. It covers pre-trial detention, detention during trial, and detention as a sentence. It is sufficiently broad to cover not only prisons and police detention, but also any facility that children cannot leave at will. The Rules are founded on the understanding that detention should be avoided where possible, but that where it occurs each child must be treated as an individual, having his or her needs met as far as possible. There is an emphasis on preparing the child for return to society from the moment of entry into a facility. The Rules deal with management of facilities, including their administration, the physical environment and services they offer, appropriate disciplinary procedures, effective compliance monitoring through regular and unannounced inspections, and an independent complaints procedure.

⁵ General Assembly Resolution 45/112 adopted on 14 December 1990, also referred to as the Riyadh Guidelines.

⁶ General Assembly Resolution 45/113 adopted on 14 December 1990, often referred to as ‘the JDLS’.

3.6 United Nations Guidelines for Action on Children in the Criminal Justice System (1997)⁷

The purpose of this document is to promote the effective use of existing international instruments through practical guidelines for action. Notably, this was the first UN document that covered child offenders, child victims and child witnesses within its ambit. The aims of the Guidelines for Action are to provide a framework to achieve the objectives set out in international instruments, and to ensure that this is facilitated through assistance to States Parties in effective implementation (for example, through the provision of technical assistance). In order to ensure effective use of the Guidelines for Action, improved cooperation between governments, relevant entities of the United Nations system, non-governmental organizations, professional groups, the media, academic institutions, children and other members of civil society is deemed essential. The Guidelines for Action are based on the principle that the responsibility to implement the Convention rests clearly with the States Parties there to.

3.7 The United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime (2005)⁸

The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime are intended to be a useful framework to assist countries in enhancing the protection of child victims and witnesses

in the criminal justice system. The Guidelines provide a practical framework to achieve the following objectives: objectives:

- a. To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime, and contribute to the implementation of the Convention on the Rights of the Child by parties to that Convention
- b. To assist Governments, international organizations, public agencies, non-governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime
- c. To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice processes at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- d. To assist and support those caring for children in dealing sensitively with child victims and witnesses.

The Guidelines state that they can also be applied to processes in informal and customary systems of justice such as restorative justice, and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

⁷ Economic and Social Council Resolution 1997/30, adopted in 1997.

⁸ Economic and Social Council Resolution 2005/20, adopted in 2005.

3.8 The United Nations Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (2009)⁹

These Guidelines deal with children in alternative care, and aim to support efforts to keep children in, or return them to, the care of their family; or, failing this, to place them in another appropriate and permanent solution, including adoption or *kafala*. The Guidelines seek further to ensure that whilst such permanent solutions are being sought, the most suitable forms of alternative care should be identified and provided. The Guidelines also suggest measures to promote their application within the framework of development co-operation. With regard to the justice system, the following aspects of the Guidelines are highlighted:

- Guideline 46 provides that any decision to remove a child against the will of his/her parents must be made by competent authorities, in accordance with applicable law and procedures and subject to judicial review, the parents being assured the right of appeal and access to appropriate legal representation.
- Guideline 56 provides that decision-making on alternative care should take place through a judicial, administrative or other adequate and recognised procedure, with legal safeguards including (where appropriate) legal representation.

- Guidelines 100–103 focus on legal responsibility for a child who is in alternative care.

Other important legal issues include procedures relating to the tracing of parents of abandoned babies, foster care, and adoption processes.

3.9 The Hague Conventions

Other international instruments that are relevant to justice for children are selected Hague Conventions. These Conventions are issued by the Hague Conference, which deals with Private International Law.¹⁰ Countries may become members of the Hague Conference, and may then accede to specific conventions.¹¹ Countries that are not members of the Hague Conference may also accede to particular Conventions. It is important to note that the Hague Conventions only come into operation vis-à-vis a particular country if that country has ratified the Convention and made it part of domestic law. The two most important Hague Conventions relating to children are the following:

- The Hague Convention on the Civil Aspects of International Child Abduction (1980),¹² which is aimed at preventing the removal of children from the country where they usually live by a parent or caregiver without the consent of the other parent or caregiver, and which provides mechanisms for the speedy return of children who have been abducted.

⁹ Welcomed by the UN General Assembly on 20 Nov 2009.

¹⁰ For further information go to http://www.hcch.net/index_en.php.

¹¹ African countries that are members of the Hague Conference are Egypt, Mauritius, Morocco and South Africa.

¹² Adopted on 24 October 1980.

- The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (1993),¹³ which provides a framework for the safe adoption of children from one country to another, in accordance with the principles of subsidiarity (i.e. domestic care options must first be explored prior to intercountry adoptions) and the best interests of the child. The Convention sets up detailed procedures for working agreements and aims to prevent illegal adoptions or trafficking in children.

Unfortunately, not many African countries have ratified these Conventions:¹⁴ the Hague Convention on International Child Abduction (1980) has been ratified by only seven African countries (namely Burkina Faso, Gabon, Mauritius, Morocco, Seychelles, South Africa and Zimbabwe); and the Hague Convention on Inter-country Adoption has been ratified by 13 African countries (Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, South Africa and Togo).

3.10 The African Charter on the Rights and Welfare of the Child (1990)

The African Charter on the Rights and Welfare of the Child (referred to hereafter as the ACRWC) was initially adopted in 1990 and entered into force in 1999. Like the CRC, the ACRWC is a comprehensive instrument that covers a wide range of children's rights. The articles that are

particularly relevant to justice for children are Article 4 (on the best interests of the child and considering the views and wishes of children); Article 17 (administration of juvenile justice); Article 16 (protection against child abuse and torture); Article 18 (protection of the family and the protection of children in the dissolution of marriage); Article 19 (parent care and protection); Article 23 (refugee children); Article 24 (adoption); Article 25 (separation from parents); Article 29 (sale, trafficking and abduction); and Article 30 (children of imprisoned mothers). The ACRWC (Article 1(1)) enjoins States to adopt such legislative and other measures as are necessary to give effect to the provisions of the Charter. Although the ACRWC does not provide a lot of detail that is helpful in defining measures specific to justice for children, Articles 4, 17 and 30 do provide stronger wording than the CRC on best interests of the child and on privacy in juvenile justice, whilst the situation of children in prison with their mothers is not dealt with at all in the CRC.

The full list of countries that have ratified the ACRWC is available at the African Union Website.¹⁵ The eight countries that have not ratified are Central African Republic, Djibouti, Democratic Republic of Congo (DRC), Sao Tome and Principe, Somalia, South Sudan, Sudan, Swaziland and Tunisia. Of these, DRC, Sao Tome and Principe and South Sudan have neither signed nor ratified, whilst the majority of the other countries signed more than 10 years ago.¹⁶

¹³ Adopted on 29 May 1993.

¹⁴ Some reasons for this are debated in Skelton A, 'Child rights jurisprudence in Eastern and Southern Africa' (2009) 9(2), *African Human Rights Law Journal* 482-484-5.

¹⁵ <http://www.africa-union.org/root/au/Documents/Treaties/List> (accessed on 26 Sept 2011)

¹⁶ See further Sloth-Nielsen J and Mezmur B, 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9(1), *African Human Rights Law Journal* 336; and Lloyd A, 'The African regional system for the protection of children's rights', in Sloth-Nielsen J (ed), *Children's Rights in Africa: A legal perspective* 33.

3.11 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (1999)

The African Union adopted a resolution to prepare these guidelines at their 26th session in November 1999. Most of the document enunciates general principles and procedures for all persons in the criminal justice system. Of particular importance to this study is Section O, which deals with 'Children and the right to a fair trial', covering both child offenders and, to a lesser extent, child victims and witnesses.

With regard to child offenders, the document sets out detailed guidelines that cover many issues included in the international instruments. It is notable that these guidelines cover many of the gaps in the ACRWC; in fact, there are aspects on which this document is more progressive than the CRC – for example, it contains a provision requiring legal assistance for the child from the moment of arrest, and protection during questioning by police. Notably, it sets a recommended minimum age of criminal capacity of 15 years, which is considerably higher than the now generally accepted international norm of 12 years.

It is commendable that the document includes child victims and witnesses within its ambit, particularly if one considers that this was drafted long before the international standards on child victims and witnesses. It is insufficiently comprehensive, but does contain the basic concepts relevant to the protection of these children.

3.12 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) (2002)

These guidelines urge African states to ratify the UN Convention Against Torture and certain other human rights instruments. Although the guidelines do not focus on children, their provisions are applicable to children who are tortured or subjected to cruel, inhuman or degrading treatment. The document calls for the criminalisation of torture, requires the establishment of complaints and investigation procedures, and provides various safeguards for the prevention of torture or cruel, degrading and inhuman treatment, with a focus on the pre-trial phase.

3.13 The Declaration and Plan of Action for an Africa Fit for Children (2001) and the Call for Accelerated Action (2007)

The First Pan-African Forum on Children was held in Cairo, Egypt in 2001, and the outcome was the Declaration and Plan of Action of Africa Fit for Children. 'An Africa Fit for Children' was Africa's contribution to the UN General Assembly Special Session on Children held in May 2002. The Second Pan-African Forum on Children was held in Cairo, Egypt in October/November 2007, in implementation of a mandate given to the AU Commission in the Plan of Action of Africa Fit for Children, as well as a decision

taken by the Assembly of Heads of State and Government in 2005. The main objective of the Forum was to review and assess the progress made by Member States in implementing commitments made in the Declaration and Plan of Action of Africa Fit for Children.

The Call for Accelerated Action is a 2007 reaffirmation of the need to achieve the targets set in the 2001 Plan of Action. In this regard, the Call focuses on the priority topics: legislative and policy frameworks; institutional frameworks; mobilizing and leveraging resources; enhancing life chances; overcoming HIV and AIDS, realizing the right to education; realizing the right to protection; and realizing the right to participation. The call also identifies priority actions under each topic.

3.14 The Kampala Declaration on Prison Conditions in Africa of 1996¹⁷

The Kampala Declaration was an outcome of a meeting of stakeholders who, after three days of intense deliberations on prison conditions in Africa, reached the consensus that there was a need for recommendations to encourage African states to improve the circumstances under which prisoners are held. The preamble of the Declaration takes specific note of, among other things, the issue of overcrowding in prisons; the lack of hygiene and food in prisons; the need for specific attention to be paid to vulnerable groups including children; and the need to separate juveniles from

adult prisoners. The Declaration recommends that prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release. The Declaration also places emphasis on the need to make use of alternatives to imprisonment. This is of particular importance in relation to children, as imprisonment of children should be a measure of last resort. The Declaration also encourages the use of customary systems for dealing with petty offences, and the use of mediation, civil reparations, community service and non-custodial sentences as alternatives to imprisonment. As part of the Plan of Action of the Declaration, there is a call for urgent and concrete measures to be adopted in order to improve conditions for vulnerable groups in prisons and other places of detention. 'Vulnerable groups' includes juveniles.

3.15 The United Nations Convention on the Rights of Persons with Disabilities and the Optional Protocol on the Convention on the Rights of Persons with Disabilities (2006)¹⁸

This Convention was negotiated during eight sessions of an Ad Hoc Committee of the UN General Assembly, from 2002 to 2006, making it the fastest negotiated human rights treaty.¹⁹ The full list of countries that have signed and/or ratified the Convention and the Protocol is available on the United Nations website.²⁰ In its preamble, the

¹⁷ Adopted at the Kampala Seminar on Prison Conditions in Africa, September 1996.

¹⁸ The Convention and the Protocol were adopted on 13 December 2006, but the Convention entered into force only on 3 May 2008.

¹⁹ See <http://www.un.org/disabilities/default.asp?id=150> accessed on 30 November 2011

²⁰ See <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> accessed on 30 November 2011.



Convention recognises that women and girls with disabilities are often at greater risk – both within and outside the home – of violence, injury or abuse, neglect or negligent treatment, maltreatment, and exploitation; and that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children. The Convention also recalls the obligations undertaken by States Parties to the Convention on the Rights of the Child. Article 7 of the Convention is ‘child specific’ and calls on States Parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms, on an equal basis with other children. Furthermore, in all actions concerning children with disabilities, the Convention stipulates that the best interests of the child shall be a primary consideration. The Convention also calls on States Parties to ensure that children with disabilities have the right to express their views freely on all matters affecting them, that their views be given due weight in accordance with their age and maturity, on an equal basis with other children, and that they be provided with disability- and age-appropriate assistance to realize that right. The Convention makes provision for the establishment of the Committee on the Rights of Persons with Disabilities, which is tasked to monitor the implementation of the Convention through receiving reports and making recommendations to States Parties.²¹

3.16 The United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)²²

The Optional Protocol calls on States Parties to prohibit the sale of children, child prostitution and child pornography.²³ An important provision in relation to the protection of child victims appears in Article 8, which calls on States Parties to adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the Protocol, at all stages of the criminal justice process. In particular, States Parties are called on to adapt procedures to recognise the special needs of children as witnesses; inform child victims of their rights and roles and of the scope, timing and progress of the proceedings and the disposition of their cases; allow the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected; provide appropriate support services to child victims throughout the legal process; protect the privacy and identity of child victims; provide for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation; and to avoid unnecessary delay in the disposition of cases and execution of orders or decrees granting compensation to children.²⁴ Article 3 of the Optional Protocol requires States Parties to ensure that, in

²¹ See article 34 to 39 of the Convention.

²² The Protocol was adopted on 25 May 2000 and entered into force on 18 January 2002.

²³ See article 1 of the Optional Protocol.

²⁴ See article 8(1)(a) to 8(1)(g) of the Optional Protocol.

their treatment by the criminal justice system, the best interests of children who are victims of the offences described in the Protocol shall be a primary consideration. States Parties are further required to take measures to ensure appropriate training, and in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present protocol.²⁵

4. Trend towards a systems approach

All these systems, with the exceptions of the CRC and ACRWC (which are general in nature and which therefore lack specificity about systems), have been developed around specific issues, such as protection of juveniles deprived of liberty, or the issues of child victims and witnesses. In the past decade, however, there has been an international trend towards ‘systems approaches’.

4.1 UN Guidance Note on Justice for Children

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children stresses the importance of a systems approach, stating as follows:

Work to implement child justice standards is still frequently handled separately from broader justice and security reform. It is also often undertaken through vertical approaches, aimed at improving either the juvenile justice system or responses to child victims

and witnesses, without acknowledging the frequent overlap between these categories and the professionals and institutions with responsibility towards them. Access to justice, through increasingly recognised as an important strategy for protection of the rights of vulnerable groups, and thus for fighting poverty, rarely takes children into account.

The note provides the guiding principles and framework for UN activities on justice for children at the national level. It is framed within the UN mandate to support the realisation of human rights, poverty reduction and the Millennium Development Goals, and is a contribution to the UN agenda for coherence in the area of rule of law. According to the Guidance Note, the goal of the justice for children approach is to ensure that children are better served and protected by justice systems, including the security and social welfare sectors. It aims specifically at ensuring full application of international norms and standards for all children who come into contact with justice and related systems as victims, witnesses and alleged offenders; and for those for whom judicial, state, administrative or non-state adjudicatory intervention is needed, for example regarding their care, custody or protection. The Guidance Note of the Secretary-General set out the following guiding principles:

1. Ensuring that the best interests of the child are given primary consideration
2. Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination

²⁵ See article 8(4) of the Optional Protocol.



3. Advancing the right of the child to express his or her views freely and to be heard
4. Protecting every child from abuse, exploitation and violence
5. Treating every child with dignity and compassion
6. Respecting legal guarantees and safeguards in all processes
7. Preventing conflict with the law as a crucial element of any juvenile justice policy
8. Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time
9. Mainstreaming children's issues in all rule of law efforts.

The note also discusses how 'justice for children' efforts are to be integrated into the framework for strengthening the rule of law. This framework includes such elements as:

- The Constitution, or equivalent, and a legal framework for the implementation thereof
- Transitional justice processes and mechanisms – protecting and promoting children's rights within these
- A public and civil society that contributes to strengthening the rule of law and holds public officials and institutions accountable, with the participation of children

- Institutions and actions for justice, governance, security and human rights, including:
 - Institutional reform and capacity building
 - Programmes to promote integrity and accountability
 - Monitoring bodies
 - Promoting integration of child rights into support to non-state/informal justice mechanisms
 - Peace agreements, where applicable
 - Building the knowledge base on children in justice systems
 - Supporting the establishment of restorative justice, diversion and alternatives to detention
 - Enabling full involvement of the social sector in justice for children, and strengthening coordination
 - Promoting child-sensitive procedures that ensure the full-fledged participation of children.

4.2 United Nations Resolution on human rights in the administration of justice, in particular juvenile justice (2011)²⁶

This document views the issues of child justice within a rule of law perspective. It reaffirms the principle that deprivation of liberty must be a measure of last resort. It also introduces the idea that:

*...the best interests of the child shall be an important consideration in all matters concerning the child or related to sentencing of his or her parents.*²⁷

²⁶ Adopted by the Human Rights Council at its Eighteenth session, A/HRC/18/L.9, on 23 September 2011.

²⁷ The UN Committee on the Rights of the Child General Day of Discussion on 30 September 2011 was on Children of Incarcerated Parents. The relevance of this to Africa is the fact that Article 30 of the ACRWC contains a unique provision on the children of imprisoned mothers.

The resolution emphasises the ‘systems’ approach, encouraging all states that have not yet integrated children’s issues into their overall rule of law efforts to do so. It also encourages states to foster close co-operation between the justice sector, different services in charge of law enforcement, and the social welfare and education sectors, in order to promote the use of alternative measures in juvenile justice.

Other interesting features of the Resolution are that it highlights violence against children initiatives, urges states not to criminalise children for acts for which adults are not prosecuted, and calls on states to set a minimum age of criminal capacity of not lower than 12 years, in line with the UN Committee on the Rights of the Child’s General Comment No 10.

4.3 UNICEF ESARO’s regional meeting on ESARO and the ‘Lilongwe Commitment on Justice for Children’

The Eastern and Southern African Regional Office of the United Nation Children’s Fund (UNICEF) hosted a regional meeting on Justice for Children, which took place in Lilongwe, Malawi, on 24-27 August 2009. Using the starting point of the international instruments and the UN Approach to Justice for Children (as set out in the guidelines of the Secretary General) the meeting examined systems approaches in some detail. It then embarked on an analysis of the progress of countries present, with reference to a systems approach to Justice for Children. At the end of the conference, the delegates agreed upon the wording of a document entitled ‘Lilongwe Commitment on Justice for Children’. Acknowledging that there was evidence of significant progress in the region but still a need to enhance

systems and their effective implementation, the delegates committed themselves to carry out the following tasks:

1. Promote, encourage, support and facilitate the domestication of international agreements, legal reforms and the formulation of appropriate and adequate legislation, policies, protocols and strategies aimed at promoting justice for children. This includes children who come into contact with the traditional, formal and informal justice systems, whether as offenders, victims or witnesses in criminal and civil trials, or as victims of abuse, neglect, trafficking and exploitation, or as children who are participating in or parties to civil processes relating to their care and protection;
2. Promote an enabling framework for cooperation on an agency-to-agency basis in sharing technical expertise in the improvement of access to age appropriate and empathetic justice systems for children in our countries in line and in compliance with the best interests of the child
3. Promote inter-sectoral work in each country on costing, budgeting and implementation planning to support more efficient, effective and adequately resourced systems for justice for children
4. Develop inter-sectoral aligned information management systems in relation to justice for children
5. Enhance capacity for research, data capturing, intra-agency data sharing, and monitoring and evaluation of the processes and systems that support justice for children
6. Strengthen human resources to support child-friendly delivery of justice for children by attracting, appointing and retaining adequate and appropriately skilled personnel, as well as by facilitating capacity



development by engaging in regular needs assessments for resource planning, providing ongoing training, and developing practice standards and manuals. Specialisation and skills retention should be promoted while facilitating promotional opportunities for staff working with children in the justice and social systems

7. Establish and strengthen national and international partnerships and pledge to continuously forge and strengthen collaboration with all sectors of Civil Society, as well as inter-governmental organisations and development partners
8. Promote the design and development of an accessible repository of good practices for the region to facilitate sharing of successful strategies and lessons learnt on processes and mechanisms for implementation, strengthening and promotion of justice for children in the Eastern and Southern African Region
9. Communicate in the region through accessible mechanisms to exchange ideas, legal and policy frameworks, protocols, strategies, costing models, and procedural models.

4.4 Child-friendly-justice

In keeping with the systems approach to justice for children, there have been developments in the promotion of 'child-friendly justice'. Notably, the Committee of Ministers of the Council of Europe has developed Guidelines on Child-friendly Justice.²⁸ The document provides the following useful definition:

Child-friendly-justice' refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights of due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

The fundamental principles identified in the document are:

1. Participation
2. Best interests of the child
3. Dignity
4. Protection from discrimination
5. Rule of law.

The document then provides detailed guidelines covering the child-friendly justice before, during and after judicial proceedings, under the following headings:

- A. General elements of child-friendly justice
- B. Child-friendly justice before judicial proceedings
- C. Children and the police
- D. Child-friendly justice during judicial proceedings
- E. Child-friendly justice after judicial proceedings.

²⁸ Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. Available at [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref+CM/Del/Dec\(2010\)1098/10.2abc&Language](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref+CM/Del/Dec(2010)1098/10.2abc&Language) accessed on 08 September 2011.

B. FUNDAMENTAL PRINCIPLES OF A CHILD-FRIENDLY JUSTICE SYSTEM

These principles relate to all actions in child-friendly justice systems, whether they are criminal, civil or administrative, and regardless of whether they are formal or informal processes. Where they do not currently apply, for example in traditional/customary law processes, commitment should be made to making them progressively applicable.

child should be considered of sufficient age and maturity to participate. Some countries make participation subject to age and maturity/understanding, while others allow for any child capable of forming his or her views to participate in decisions that affect him or her.

1. Participation

1.1 Basic concepts

- 1.1.1 Children have the right to be informed about their rights, to be given access to justice and to be consulted and heard in proceedings involving or affecting them. This includes giving due weight to their views, bearing in mind their age and maturity, and providing assistance to them in the communication of their views, including for children with communication difficulties.
- 1.1.2 Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views as well as the circumstances of the case.

1.2 Contextual analysis

Many African countries have recognised the right of a child to participate, and have made legislative provision for this. There is variation from country to country regarding when a

1.3 Examples

The Children’s Act of Uganda provides for child participation in Section 16(1) (e), which states that a child has a right to legal representation in the Children’s and Family Court. Section 20(4) provides that where a child in respect of whom a welfare report is made is of sufficient age and understanding, he or she shall be interviewed by the social welfare officer.

Section 11 of the Law of the Child Act of 2009 of Tanzania states that a child shall have a right of opinion, and that no person shall deprive a child capable of forming views of the right to express an opinion, to be listened to, and to participate in decisions that affect his or her wellbeing. Similarly, Section 11 of the Children’s Act 560 of 1998 of Ghana states that a person shall not deprive a child capable of forming views of the right to express an opinion, to be listened to, and to participate in decisions which affect the child’s wellbeing, the opinion of the child being given due weight in accordance with the age and maturity of the child.



The Child Act of South Sudan, Act 10 of 2008, states in Section 26(2) that every female child has the right to equal participation on a non-discriminatory basis, as equal partner to the male child, in social, economic and political activities. This provision recognises patterns of discrimination against girls and requires that they be treated equally with their male counterparts.

One of the hallmarks of the South African Children's Act is the right of children to participate when decisions are made that will affect their lives. The right to participate is included as a general principle underpinning the Children's Act 38 of 2005. The general principle not only applies to the implementation of the Children's Act, but must also be observed in any matter concerning a child. Section 10 of the Children's Act states that:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

Furthermore, Sections 6 and 31 both stipulate that the child's views and wishes must be obtained prior to making a decision that causes a significant change in the child's life, and the child's views must be given due consideration. The duty to ensure the child's participation is such that a presiding officer in the Children's Court must formally record the reasons on the court record if the child did not participate in the children's court proceedings.²⁹

Section 8 of the Children's Act 8 of 2009 of Botswana not only ensures the child's right to participation but includes guidelines on how to facilitate this right:

be able to participate in decisions which have a significant impact on that child's life shall have a right to do so.

(2) For the purpose of ensuring that the child is able to participate in the decision-making process, the child shall be given –

(a) adequate information, in a manner and language that the child understands, about –

(i) the decision to be made,

(ii) the reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,

(iii) the ways in which the child can participate in the decision-making process, and

(iv) any relevant complaint or review procedures;

(b) the opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding;

(c) any assistance that is necessary for the child to express those wishes and views;

(d) adequate information regarding how the child's wishes and views will be taken into account;

(e) adequate information about the decision made and a full explanation of the reasons for the decision; and

(f) an opportunity to respond to the decision made.

²⁹ Section 61 of the Children's Act 38 of 2005.

The Children's Protection and Welfare Act of Lesotho takes into account the fact that a child's capacity to participate in decision-making regarding his or her life increases as the child grows up. Section 4(1) states that all actions concerning a child shall take full account of his or her evolving capacities.

In Sierra Leone the Children's Forum Network allows children to participate on a national level. The Children's Forum Network was established in 2001 and operates as a child-to-child network, and now has regional branches established with assistance from the government. The Network has an administrative wing and a 'Children's parliament' at every regional office, designed to manage, coordinate, debate, organize and advance, through sensitization and advocacy, the rights and welfare of children. Through such coordination and debate, the Children's Forum Network has, among other things, trained its peers on the provisions of the Convention, discussed HIV/AIDS and its harmful effects on children, used radio and television to discuss and advance child welfare issues, and, in March 2002, launched the Children's Manifesto that called on the Government to consolidate peace efforts and improve child rights and welfare in Sierra Leone.

Media Monitoring Africa (MMA) is an organisation that monitors the protection of children in the media and works in several countries in Southern Africa. MMA's Children and Media project involves children directly in media work, such as the Children's News Agency, and in media campaigns such as Media Freedom Week. MMA has organised meetings for children with editors, and this work has led to an agreement with editors in South Africa to have a new children's section in the Press Code.

2. Best interests of the child

2.1 Basic concepts

- 1.1 Children's right to have their best interests be the primary consideration in all matters concerning them should be guaranteed through effective implementation.
- 2.1.2 In assessing the best interests of the child, his or her views must be given due weight, and the child's other rights should be respected at all times.
- 2.1.3 If more than one child is involved in a matter, the best interests of each child should be separately assessed and balanced with a view to reconciling possible conflicting interests of children.
- 2.1.4 Whilst judicial authorities make the final decisions about best interests, multi-disciplinary approaches should be used in assessment of best interests.

2.2 Contextual analysis

The standard of the best interests of the child appears to have been incorporated in the legislation of most, if not all, African states. There are differences in the wording and weight attached to the best interests of the child; however, what is encouraging is that at least in writing there appears to be uniformity in recognising that in every matter concerning the child, the consideration of the best interests of that child is a determining factor.

- Section 2 of the Children’s Act of Ghana states that the best interests of the child shall be paramount in a matter concerning a child.
- The Law of the Child Act of Tanzania states that the best interests of the child shall be the primary consideration in all actions concerning a child, whether undertaken by public or private social welfare institutions, courts, or administrative bodies.³⁰
- Section 4(2) of the Children’s Act of Kenya requires that in all actions

concerning children, whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary concern.

- The best interests of the child are at the heart of all legal provisions relating to children in Tunisia, and are expressly enshrined and implemented by Article 4 of the Child Protection Code, particularly with regard to all decisions taken by legislative, judicial and administrative authorities concerning the child.
- Section 3(1) of the Child Rights Act of Sierra Leone states that: ‘The fundamental principle to be applied in the interpretation of this Act shall be that the short-and long-term best interests of the child shall be a primary consideration in any decision or action that may affect the child or children, as a group’ [underlining added].

³⁰ Section 4(2).

2.3 Examples

Many countries include the best interests of the child as the paramount consideration in their domestic legislation, whilst adding non-exhaustive lists of factors that must be taken into account when making a determination regarding best interests. Section 5 of Botswana's Children's Act 8 of 2009 places an obligation on courts to consider the best interests of the child as their primary consideration, while Section 6 goes on to list the factors to be taken into consideration:³¹

5. *A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration.*
- (6. (1) *The following factors shall be taken into account in determining the best interests of the child –*
- (a) the need to protect the child from harm;*
 - (b) the capacity of the child's parents, other relative, guardian or other person to care for and protect the child;*
 - (c) the child's spiritual, physical, emotional and educational needs;*
 - (d) the child's age, maturity, sex, background, and language;*
 - (e) the child's cultural, ethnic or religious identity;*
 - (f) the likely effect on the child of any change in the child's circumstances;*
 - (g) the importance of stability and continuity in the child's living arrangements and the likely effect on the child of any change in, or disruption of, those arrangements;*
 - (h) any wishes or views expressed by the child, having regard to the child's age, maturity and level of understanding in determining the weight to be given to those wishes or views; and*
 - (i) any other factor which will ensure the general wellbeing of the child.*
- (2) *The provisions of subsection (1) shall not be construed as limiting the factors that may be taken into account in determining what is in the best interests of the child.*

³¹ This is similar to sections 7 and 9 of the South African Children's Act 38 of 2005.

There is no general principle regarding best interests in the Child Care, Protection and Justice Act of Malawi, but the principle is included in various sections. In relation to custody, Section 8(3) states 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.

In respect of child offenders, Section 89 provides that:

In addition to the provisions of the Criminal Procedure and Evidence Code or of any other written law relating to the arrest of a child, a police officer or any person arresting the child or the person who appears to be a child shall-

(a) have due regard to the observance of the principle of the best interests of the child as well as the general welfare of the child.

The Constitution of Mozambique states in Article 47(3) that 'all acts carried out by public entities or private institutions in respect of children shall take into account, primarily, the paramount interests of the child'.

The best interest of the child principle is also included in the new Constitution of Angola in 2010.³²

The South African Constitution entrenches the best interests of the child principle in even more emphatic terms than the CRC or the ACRWC:

28(2). A child's best interests are of paramount importance in every matter concerning the child.

³² UNICEF Detailed Angola Country Office Report2010http://www.unicef.org/infobycountry/files/Angola2010_final_edit.pdf last accessed on 26 September 2011.

Examples from case law

Several cases in different African countries have relied on the best interests principle as enshrined in international law and/or in domestic law to improve the situation of children.

Due to the emphatic nature of the Constitutional provision on children's best interests as the paramount consideration, South Africa has several judgements examining the ambit and limits of the best interests of the child principle:

S v M (Centre for Child Law as Amicus Curiae) examined the duty of the sentencing court in relation to children when the court is seized with the sentencing of a primary caregiver. The Constitutional Court was at pains to delineate the ambit of the best interests principle. It noted that the principle that the child's best interests is the paramount consideration in all matters affecting the child does not mean that the right cannot be limited. The Constitutional Court, per Sachs J, finds that:³³

The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.

In AD and another v DW and others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party) the court examined the best interests principle in relation to inter-country adoption and the rule of subsidiarity. The court stated the interrelationship between legal requirements and the best interests principle thus: ³⁴

Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.

³³ 2008 (3) SA 232 (CC) at paragraph 15.

³⁴ 2008 (3) SA 184 (CC) at paragraph 55.

*In Motlogelwa v Khan*³⁵ the High Court of Botswana recognised that the best interests of the child is the paramount consideration in custody disputes, even in the context of customary law. The matter of *Evance Moyo v Attorney General*³⁶ concerned the detention of children for indefinite periods ‘at the pleasure of the President’.

The High Court of Malawi stated that the CRC and ACRWC were binding on the state, and therefore that the principle that the best interest of the child must be a primary consideration was equally binding.

In Tunisia, in decision No. 7286 of 2 March 2001, the Court of Cassation held in substance that ‘the Tunisian legislature - in accordance with the provisions of the Convention on the Rights of the Child of 20 November 1989, which has been ratified by Tunisia – has considered the child’s best interest in matters regarding the award of care’, so that ‘Tunisian public policy is in no way disturbed by the foreign court’s decision to give care of the child to the foreign mother since the sole criterion that must prevail here is that of the best interest of the child.’³⁷

In the case of *Tselade Demessie v Kifle Dimessie*, the Cassation Bench of the Federal Supreme Court of Ethiopia acknowledged the principle of the best interest of the child and set a precedent in matters concerning children in Ethiopia. The court did this despite the debates as to whether the provisions of the CRC, which Ethiopia has ratified, are binding or not (since there is a view that it should first be published in the Negarit Gazette before it becomes binding). The court found that the principle of the best interests of the child is the main standard to be considered when deciding the issue of child custody and other relevant issues that affect the wellbeing of children.³⁸

3. Dignity

3.1 Basic concepts

3.1.1 The third general principle of child-friendly justice embodies the idea that children should be treated with care, sensitivity and respect throughout any procedure or case, with special attention for their wellbeing

and particular needs, and with full respect for their physical and psychological integrity. This treatment should be guaranteed, no matter the reason for their coming into contact with the judicial or non-judicial proceedings, and regardless of their legal status or capacity.

³⁵ 2006 2 BLR 147 HC.

³⁶ Constitutional Review, Constitutional Case no 12 of 2007, full text available at <http://www.southernafricalitigationcentre.org/uploads/Evance%20Moyo%20Judgement.pdf>.

³⁷ Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Under Article 44 of the convention; Third periodic report of the states parties due in 2004. Tunisia CRC/C/TUN/3 10 November 2008

³⁸ File number 23632, judgment of 7 November 2007. The Children’s Legal Protection Centre of the African Child Policy Forum represented the applicant in the matter. See <http://www.africanchildforum.org/site/index.php?option> accessed on 30 November 2011.



3.1.2 Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

legislation of most African countries, and some countries have provided for the respect of children's dignity in specific instances, while for others this is a Constitutional principle that applies to children's rights.

3.2 Contextual analysis

The respect for dignity of children is captured and emphasised in the children's

3.3 Examples

The Tanzanian Law of the Child Act provides in Section 9(1) that a child shall have the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents. Furthermore, Section 94(4) emphasizes dignity and states that the local government must have regard for the dignity of vulnerable children in order to allow them to develop their potential and self-reliance.

Kenya³⁹ and South Sudan⁴⁰ also provide for the respect of dignity of children and have specific provisions in relation to the protection of children with disabilities and other vulnerable children. The Child Act of South Sudan goes further and requires that all diversion programmes 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,⁴¹ while Section 29 thereof recognises and affords protection and dignified treatment for refugee children and displaced children.⁴²

Section 26(2) of the Child Rights Act of Sierra Leone states that 'every child has the right to life, dignity, respect, leisure, liberty, health, including immunisation against diseases, education and shelter from his parents'. Further, in Section 30, it states that 'no person shall treat a disabled child in an undignified manner'.

³⁹ See Sections 12;14 and 186(h) of the Children Act.

⁴⁰ See Sections 23(1); 27 and 117 of the Child Act.

⁴¹ Section 153(1).

⁴² Section 29 states that a refugee or displaced child is entitled to the protection of his or her rights and that the government shall ensure that he or she has access to assistance in the provision of basic services, and in tracing his or her parent in a manner consistent with his or her dignity and without discrimination.

The Children’s Act 8 of 2009 of Botswana protects children from cruel, inhuman or degrading treatment or punishment. However, there is an explicit proviso that this section does not prohibit corporal punishment. Disappointingly, corporal punishment is still a competent sentence for child offenders.⁴³

In September 2011, 15-year-old France Kalodi of Tsetsebjwe died at Nyangabwe Referral Hospital after complications his parents believe arose from the lashes he received at the local Kgotla. While the headman who sentenced the boy to four strokes on his bare back maintains he was within the law, the police and tribal authorities are in agreement that the offence and the age of the boy did not warrant such a heavy punishment. Tsetsebjwe village's Sub-Tribal Authority said in an interview that though he was yet to be officially briefed on the issue, customary law does not allow corporal punishment on juveniles and their cases should be referred to social welfare officers for counselling. He added that the offence was too light to warrant four strokes of the cane. ‘Again, an elderly person cannot administer corporal punishment on a small boy,’ he said. Botswana Police Officer Commanding Number 10 District Superintendent DiphetogoChibanne said he was aware of the case and that the post-mortem had been done. ‘No underage is suitable for corporal punishment especially on bare back,’ he said. The teenager had apparently slapped his schoolmate during a typical schoolboy disagreement, when they teased one another about their clothes.⁴⁴

The Children’s Protection and Welfare Act of Lesotho gives children the right to be protected from torture or other cruel, inhumane or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical, psychological, emotional and mental wellbeing of a child.⁴⁵

Examples from case law

In South Africa, children have the constitutional right to dignity as entrenched in Section 10 of the Constitution, as well as the constitutional right to be protected from maltreatment, neglect, abuse or degradation set out in Section 28(1)(d) of the Constitution. Corporal punishment as a sentence was abolished by the Constitutional Court in *S v Williams*,⁴⁶ and the ban on corporal punishment was also upheld in the case of *Christian Education SA v Minister of Education*.⁴⁷ In both of these cases the court described corporal punishment in these settings as being an infringement on the dignity of the child.

⁴³ Sections 27(5), 61 and 90 of the Children’s Act 8 of 2009.

⁴⁴ Modikwa O ‘Youth dies after flogging ‘ The Monitor 24 August 2011 available at <http://www.crin.org/resources/infodetail.asp?id=25915> accessed on 26 September 2011.

⁴⁵ Section 15(1).

⁴⁶ 1995 3 SA 632 (CC).

⁴⁷ 2000 (4) SA 757 (CC).



In the Namibian matter of *Ex Parte: Attorney-General, In re: CP by Organs of State*⁴⁸ the Supreme Court of Namibia found that the imposition of a sentence of corporal punishment on adults or children was inhuman and degrading punishment and therefore in conflict with the constitutional right to be protected from punishment or treatment that constitutes torture or is cruel, inhuman or degrading.⁴⁹ The court does not state clearly whether corporal punishment of children in schools is torture, cruel, inhuman or degrading, but does make a final finding that corporal punishment is fundamentally in conflict with the Constitution and should therefore be banned.⁵⁰ The Child Care and Protection Bill calls on any person who has control over the child to respect the child's physical integrity. The Act places an absolute prohibition on the administration of corporal punishment in places of safety, places of care like crèches and day care centres, children's homes, and educational centres. Any law that allows the imposition of corporal punishment by a court, including a traditional court, is declared invalid.⁵¹

The right of a child to have his or her dignity respected is eloquently set out in the South African case *S v M (Centre for Child Law as Amicus Curiae)*⁵²:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

4. Protection from discrimination

4.1 Basic concepts

- 4.1.1 The rights of children shall be secured without discrimination on any grounds.
- 4.1.2 Specific protection and assistance may need to be given to more vulnerable children.

- 4.1.3 Legislative provisions that ensure that children are not discriminated against when they come into contact with the child justice system are important in order to avoid children being denied their rights on grounds such as that of disability or being a refugee.

⁴⁸ 1991 (3) SA 78 (Nms).

⁴⁹ Article 8(2) of the Namibian Constitution.

⁵⁰ Ambunda LN and Mugadza WT, 'The protection of children's rights in Namibia: Law and policy', in Ruppel OC (ed), *Children's Rights in Namibia* (2009), Macmillan Education, Windhoek p 21.

⁵¹ Kangandjela LN and Mapaure C, 'Work in progress: The Child Care and Protection Act in Namibia', in Ruppel OC (ed), *Children's Rights in Namibia* (2009), Macmillan Education, Windhoek p 140.

⁵² 2008 (3) SA 232 (CC) paragraph 18.

4.2 Contextual analysis

Section 3 of the Children's Act of Ghana states that a person shall not discriminate against a child on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status, or any other status.

4.3 Examples

The Law of the Child of Tanzania provides that a child shall have a right to live free from any discrimination, and a person shall not discriminate against a child on the grounds of gender, race, religion, age, language, political opinion, disability, health status, custom, ethnic group, rural or urban background, birth, socio-economic status, or refugee status⁵³

Similar provisions are found in the laws of Kenya,⁵⁴ Uganda⁵⁵, and South Sudan.⁵⁶ Section 36 of the Child Act of South Sudan makes it the responsibility of all levels of government to implement the rights in the Children's Act, to protect a child from any form of discrimination, and to take positive action to promote children's rights.

The Botswana Children's Act⁵⁷ and the Lesotho Children's Protection and Welfare Act⁵⁸ both contain a general principle prohibiting discrimination on certain protected grounds. Protection from discrimination is visible in attempts in various countries to eradicate discrimination between children who are born in a marriage and children born outside of a marriage. Legislation in Namibia,⁵⁹ Mozambique⁶⁰, Swaziland⁶¹ and Tunisia⁶² declare that children should be treated equally, irrespective of the marital status of their parents.

⁵³ See section 5(1) and 5(2).

⁵⁴ Section 5 and 32(1)(h) of the Children's Act.

⁵⁵ Section 5(2) of the Children's Act.

⁵⁶ Sections 9(1); 15(3); 26(2)(b) and 93(1) of the Child Act.

⁵⁷ Section 7 of the Children's Act 8 of 2009 states that: '(a) no decision or action shall be taken whose result or likelihood is to discriminate against any child on the basis of sex, family, colour, race, ethnicity, place of origin, language, religion, economic status, parents, physical or mental status, or any other status'.

⁵⁸ Section 5 of the Children's Protection and Welfare Act states: 'A child shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status'.

⁵⁹ The Children's Status Act 6 of 2006.

⁶⁰ The Family Law of 2004.

⁶¹ Section 29(4) of the Constitution of Swaziland.

⁶² In an effort to remove the barriers and discrimination faced by children who have been abandoned or whose parentage is unknown, the Tunisian legislator adopted Act no 51 of 7 July 2003 supplementing Act No. 98-75 of 28 October 1998 relating to the granting of a patronymic family name to children of unknown parentage or abandoned children. The aim of the act is to make it easier for children who fall into these groups to establish their parentage using genetic fingerprinting (DNA). The Act also reaffirms the right of any abandoned child or any child whose parentage is unknown to a patronymic family name, thereby enabling that child to obtain any official documents and certificates and avoid the embarrassment and other discrimination associated with the absence of a family name.

Examples from case law

In a Tunisian judgement delivered on 2 December 2003 in case No. 53/16,189, the court of first instance of La Manouba expressly based its judgement establishing filiation on the basis of a DNA fingerprint test on the grounds that:

*Filiation is a child's right and should not be impaired by the form of relationship chosen by the child's parents. For this reason, filiation as defined in Article 68 of the Code of Personal Status must be interpreted broadly in accordance with Article 2, paragraph 2, of the Convention on the Rights of the Child, which was ratified by the Act of 29 November 1991 and which protects the child against all forms of discrimination or penalty based on the legal status of the child's parents; depriving a child of their right to filiation on the grounds that his or her parents are not joined in wedlock effectively penalizes the child and violates one of that child's fundamental rights, quite apart from the discrimination between children that would result from the artificial introduction of a difference between legitimate and natural filiation.*⁶³

*In Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)*⁶⁴ one of the issues that had to be decided by the South African Constitutional Court was whether customary law rules that gave rise to differentiation between children born in marriage and children born outside of marriage amounted to unfair discrimination. Section 9 of the Constitution of South Africa prohibits discrimination on the grounds of 'birth'; the court found that prohibiting discrimination on the grounds of 'birth' includes a prohibition of differentiation between children based on whether the child's parents were married or not at the time of the child's birth. The differentiation between these children was therefore found to be unfair discrimination.⁶⁵

5. Rule of Law

5.1 Basic concepts

5.1.1 The fifth general principle is that the rule of law principle should apply as fully to children as it does to adults. Elements of due process, such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the

right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults, and should not be denied or minimised on the basis of the child's best interests.

5.1.2 Children should have the right to access appropriate independent and effective complaints mechanisms.

⁶³ Committee on the rights of the child Consideration of reports submitted by states parties Under article 44 of the convention Third periodic report of the states parties due in 2004 of Tunisia CRC/C/TUN/3 10 November 2008.

⁶⁴ 2005 (1) SA 580 (CC).

⁶⁵ Skelton A, 'Girls' socio-economic rights in South Africa' 26(1) 2010, South African Journal on Human Rights 141-163. See also RM (Suing thro' next friend) JK Cradle (The Children's Fund) Millie and Gao v the Attorney-General Nairobi, Civil Case 1351 of 2002.

5.2 Contextual analysis

The rule of law principle links to numerous aspects that relate to access to justice, some of which are dealt with individually in this paper. African countries have recognised

the need to highlight some of these aspects and provide, for instance, that it is the responsibility of the governments to ensure that the rule of law prevails for children.

5.3 Examples

The Child Act of South Sudan requires all levels of government to undertake to provide effective redress for violation of its provisions, including through access to child-friendly, independent complaints procedures and competent courts.⁶⁶

The Kenyan Children's Act requires that the administering authority establish a written procedure for considering complaints made by or on behalf of children accommodated in care institutions, and that such procedure shall include a process for the informal resolution of a complaint.⁶⁷

The Children's Act 8 of 2009 of Botswana includes a Children's Bill of Rights set out at the beginning of the Act, and complements the fundamental rights a child has in terms of the Constitution of Botswana. Similarly, Section 28 of the Constitution of South Africa and Section 29 of the Constitution of Swaziland are mini bills of rights for children, in addition to all the other rights in the respective Constitutions.

In Namibia children are accorded all the rights in the Constitution. This includes the right to have their dignity and right to life respected and protected.

The Lesotho Children's Protection and Welfare Act allows the application of informal and traditional regimes that promote and protect children's rights, but only in so far as they are not contrary to the best interests of children. Where there is a conflict, then the provisions of the Children's Protection and Welfare Act apply.⁷⁰

⁶⁶ Section 36(2).

⁶⁷ Section 16(1) and (2) of the Thirteenth Schedule to the Children's Act.

⁶⁸ Part III section 9 to 26 of the Children's Act 8 of 2009.

⁶⁹ Ambunda LN and Mugadza WT, 'The protection of children's rights in Namibia: Law and policy', in Ruppel OC (ed), *Children's Rights in Namibia* (2009), Macmillan Education, Windhoek p 9 – 11.

⁷⁰ Article 1(4) et (5) de la loi sur la protection et le bien-être de l'enfant du Lesotho.

C. GENERAL ELEMENTS OF CHILD-FRIENDLY JUSTICE

1. Information and advice

1.1 Basic concepts

1.1.1 As soon as children are involved in the justice system or other administrative system, and throughout their cases, children and their parents/caregivers should be provided with information and advice. This information should cover:

- Their rights
- The system and procedural steps – i.e. what role the child will play
- Alternatives to justice processes and the consequences
- Ongoing information for victims about progress in investigations – i.e. whether charges are brought or arrests made, times and dates for court proceedings, and other relevant information and events
- What protective measures and/or services are available
- Any compensation the child may be entitled to, and how to access it.

1.1.2 Information and advice should be given to children in a manner adapted to their age and maturity, in a language that they can understand and which is gender and culture sensitive.

1.2 International law on information

1.2.1 The CRC provides in Article 42 that States Parties undertake to make the provisions of the Convention widely known, by appropriate and active means, to adults and children alike. With regard to juvenile justice, Article 40(2)(b)(ii) states that every child alleged as or accused of having infringed

the penal law has the right ‘to be informed promptly and directly of the charges against him or her’. This is the only specific reference to being informed in the context of the administration of juvenile justice.

1.2.2 The Beijing Rules (1985), in Rule 7.1, provide that children charged with crimes are to be notified of the charges against them; however, no further detail is given regarding this. According to rule 14.2, trials are to be conducted in ‘an atmosphere of understanding’, which might imply explanations being given about the processes to follow.

1.2.3 The JDLs, in Rule 22, provide that parents must be notified when children are admitted to a place of detention. Furthermore, a child who is admitted must be provided with the rules of the facility, a written description of their rights and obligations, and information about how to make complaints.

1.2.4 The Guidelines for Action on Children in the Criminal Justice System do not make mention of information for alleged child offenders, but do provide a specific mention of this for child victims, in Part III – ‘Plans concerned with child victims and witnesses’. Guideline 51(a) states that the responsiveness of judicial and administrative processes to the needs of child victims and witnesses should be facilitated by:

...informing child victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved.



1.2.5 The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Part VII, is entitled ‘The Right to be Informed’. Guideline 19 provides that child victims and witnesses, their parents or guardians and legal representatives should be promptly and adequately informed, from their first contact with the justice system and throughout that process, to the extent feasible and appropriate, about the following:

- Availability of services and how to access them
- The procedures for the criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, how questioning will be conducted during the investigation, and the trial
- Existing support mechanisms
- Specific places and times of hearings and other relevant events
- Availability of protective measures
- The existing mechanisms for review of decisions
- The relevant rights of child victims and witness.

1.2.6 Guideline 20 provides that child victims, parents or guardians and legal representatives should also be promptly and adequately informed of:

- Progress and disposition of the case, including apprehension, arrest, custodial statuses of the accused, pending charges, prosecutorial decisions and relevant post trial developments and outcomes of the case

- Existing opportunities to obtain reparation from the offender or from the state.

1.3 Contextual analysis

One of the frequent complaints heard from children and their parents is that they do not understand what is happening in their cases, and they often do not have a clear idea about what the options are. For children accused of crimes, this is exacerbated if they do not have legal representatives, and many do not. Children who are child victims and witnesses should be able to count on the Prosecutor to provide them with information, but if prosecutors are not specially trained they do not always do this. In addition, the need for information starts earlier than the court process – the point of first contact with the system is the police, and yet police officials often lack the knowledge and skills to deal with these cases properly, and do not always remember to give appropriate information. Easy-to-read booklets can be of great assistance to children and their parents or caregivers in helping them to understand what is happening and what to expect.

1.4 Examples

Legislative provisions that make it mandatory for professionals to inform parents and children may be a great starting point in ensuring uniformity in the treatment of children when they come in contact with the justice system. Most African countries have, contained in their juvenile justice legislation, provisions that require the police and other relevant professionals to provide children with information and advice from the moment that they are arrested.

The Children's Act of Kenya requires that every child accused of having infringed any law be informed promptly and directly of the charges against them.⁷¹

The Juvenile Justice Act⁷² of Ghana provides in Section 8 that:

(1) A police officer or the person effecting an arrest shall inform the juvenile of the reason for the arrest.

(2) Where the arrest is made under warrant, the police officer or person effecting the arrest under the authority of the warrant shall notify the juvenile of the content of the warrant and exhibit a copy of the warrant to the juvenile.

Legislative provisions similar to the aforementioned can be found in legislation from other countries such as Uganda⁷³ and Somaliland.⁷⁴

The Children's Act of Kenya goes further and states in Section 38(o) that:

The Director of Children's Services must provide care, guidance and other assistance for children who have been arrested or remanded in police custody or children's remand homes, and assist the children through court proceedings and children's hearings.

The Child Act of South Sudan⁷⁵ states in Section 17(1) that every child has a right to seek, receive and impart information and ideas of all kinds, provided it does not infringe upon on the rights of the others. This is a provision that can be enforced to ensure that children have access to information in relation to the justice system. Section 36(2)(t) makes it the responsibility of all government levels to disseminate information of children's rights in South Sudan.

Furthermore, Uganda⁷⁶, Ghana⁷⁷ and Somaliland⁷⁸ have provisions that require that the parents, guardian or relative of the child – and; at times a legal representative or social welfare officer – be notified of the arrest of the child, and that no statements may be taken from the child in the

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⁷¹ Section 186(a) of the Children's Act of 2001.

⁷² Act 653 of 2003.

⁷³ Section 89(4) of the Children's Act, Chapter 59, of Uganda.

⁷⁴ Section 9 of the Juvenile Justice Act No. 36/2007.

⁷⁵ Act 10 of 2008.

⁷⁶ Section 89(4) of the Children's Act requires that the police ensure that the parents or guardian of the child are present at the time of interview of the child by the police.

⁷⁷ Section 11 of the Children's Act requires that the parents, guardian or close relative of the child be notified of his or her arrest and makes clear that it is the duty of the police to trace them

⁷⁸ Section 51 of the Juvenile Justice Law No. 36/2007.

absence of one of the said persons. For instance, section 89(5) of the Children’s Act of Uganda states:

Where a parent or guardian cannot be immediately contacted, a probation office or social welfare officer or authorised person shall be informed as soon as possible after the child’s arrest so that he or she can attend the police interview.

In Malawi, the child and his or her parent, guardian or appropriate person must be provided with information at various stages of the process when a child is charged with committing an offence. Police officers must inform the child of his rights in relation to arrest, detention and reasons for arrest in a manner appropriate to the child’s age and understanding.⁷⁹ The legal representative appointed for the child must explain the rights and responsibilities of the child in relation to the proceedings, and allow the child to give instructions if the child is capable of doing so.⁸⁰ When a child is brought before a child justice court charged with an offence, the court has a duty to explain the substance of the alleged offence as soon as possible in a language suitable to the child’s age and understanding.⁸¹ Before sentencing but after a probation officer’s report has been compiled, the child and his parent, guardian or appropriate adult must be informed of the substance of the report, what the court finds to be important, and the recommendation of the correct punishment. The court may give the child an opportunity to produce evidence in relation to the report if the evidence is material.⁸²

In Sierra Leone, some of the principal duties of the Child Welfare Committee, which has child members, are to raise awareness of children’s rights, to educate villages and children about children’s rights, and to advise children.⁸³ In the event that a Child Panel or Family Court in Sierra Leone finds a child guilty of an offence, the child and the child’s guardian or parent must be informed of the child’s right to appeal, and the right to appeal must be fully explained.⁸⁴

⁷⁹ Section 90(a) of the Child Care, Protection and Justice Act of Malawi.

⁸⁰ *Ibid* section 128.

⁸¹ *Ibid* section 144.

⁸² *Ibid* section 144(15).

⁸³ Section 48 of the Child Rights Act of Sierra Leone.

⁸⁴ *Ibid* section 81(4).

In terms of Botswana's Children's Act 8 of 2009, the child's right to participate is inextricably linked to the child's right to information. In respect of the child's right to participate, Section 8(2) states as follows:

For the purpose of ensuring that the child is able to participate in the decision-making process, the child shall be given –

- (a) *adequate information, in a manner and language that the child understands, about –*
 - (i) *the decision to be made,*
 - (ii) *the reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,*
 - (iii) *the ways in which the child can participate in the decision-making process, and*
 - (iv) *any relevant complaint or review procedures;*
- ...
- (d) *adequate information regarding how the child's wishes and views will be taken into account;*
- (e) *adequate information about the decision made and a full explanation of the reasons for the decision...*

The importance of communication with the child in a language that the child understands is emphasised in section 86 of the Botswana Children's Act:

Before making an order for probation under section 85, the court shall explain to the offender in ordinary language, and in the language that the offender understands, the effect of the order and that if he or she fails to comply therewith or commits another offence while on probation, he or she will be liable to be sentenced for the original offence as well as any other penalty which the court may consider fit to impose.

Section 13 of the South African Children's Act is a general principle according children the right to information about health and healthcare:

- (1) *Every child has the right to–*
 - (a) *have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;*
 - (b) *have access to information regarding his or her health status;*
 - (c) *have access to information regarding the causes and treatment of his or her health status; and*
 - (d) *confidentiality regarding his or her health status and the health status of a parent, caregiver or family member, except when maintaining such confidentiality is not in the best interests of the child.*
- (2) *Information provided to children in terms of this subsection must be relevant and must be in a format accessible to children, giving due consideration to the needs of disabled children.*

2. Protection of privacy

2.1 Basic concepts

- 2.1.1 The privacy and personal information of children who are or have been involved in court proceedings or administrative proceedings should be protected in accordance with national law. This generally means that no information may be made available or published, particularly in the media, which reveals or could reveal the child's identity.
- 2.1.2 There should be limited access to all court records or documents containing personal and sensitive information about children, in particular in proceedings involving them.
- 2.1.3 Whenever appropriate, children being heard or giving evidence in judicial or administrative proceedings should preferably do so *in camera*. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence.
- 2.1.4 Professionals working with and for children should abide by the strict rules of confidentiality, except where there is a risk of harm to the child.

2.2 International law and privacy

- 2.2.1 The CRC, Article 16, states that no child shall be subject to arbitrary or unlawful interference with his or her privacy, and that the law should provide protection in this respect.
- 2.2.2 The ACRWC, Article 10, repeats the provisions of the CRC in very similar

terms. Moreover, in Article 17, which deals with the administration of juvenile justice, the ACRWC specifically provides that State Parties shall 'prohibit the press and the public from trial'.

- 2.2.3 The Beijing Rules, Rule 8.1, provide that a 'juvenile's right to privacy shall be expected at all stages in order to avoid harm being caused to her or him by undue publicity and/or by the process of labelling'. Rule 8.2 provides that in principle no information that could lead to the identification of a child offender may be published.
- 2.2.4 The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide that child victims and witnesses should have their privacy protected as a matter of primary importance. Information about the child's involvement in a justice process should be protected through maintaining confidentiality and not revealing identity. Measures that should be taken include excluding the media and the public from the courtroom during the child's testimony.
- 2.2.5 Children's right to privacy in the media is also recognised internationally in the guidelines on reporting on children of the International Federation of Journalists (IFJ). In particular the IFJ guidelines state that:

'...children have an absolute right to privacy, the only exceptions being those explicitly set out in these guidelines'.⁸⁵

⁸⁵ International Federation of Journalists, Putting children in the right: Guidelines for journalists and media professionals (2002). Available at <http://www.ifj.org/assets/docs/247/254/cf73bf7-c75e9fe.pdf>. Accessed on 8 September 2011.

2.2.6 The UNICEF Reporting guidelines to protect at-risk children⁸⁶ state as a principle that the guidelines

...are meant to support the best intentions of ethical reporters: serving the public interest without compromising the rights of children.

2.3 Contextual analysis

The concept of privacy in child-friendly justice focuses mainly on two issues: firstly, that courts dealing with cases that involve child offenders, child victims and witnesses, as well as children in the care system, should be closed to the public and media (held 'in camera'); and secondly, that there should be confidentiality of those proceedings, including rules to prevent the publication of any information that identifies or may identify the child.

The idea of holding courts behind 'closed doors' can be controversial because it runs contrary to the broadly established principle that justice must be seen to be done, and that open courts are guarantors of justice. However, most modern legal systems have long held that there are well-founded exceptions to this rule, notably where the victims or offenders are vulnerable. In some countries these rules are coming under pressure from media and freedom of

expression groups that wish to see more openness in these matters.

Most countries in Africa have provisions that protect children's privacy, even if they have not recently amended their laws. For example, Swaziland still relies on the Criminal Procedure and Evidence Act 67 of 1938. However, that Act does contain provisions that in charges relating to 'indecent acts' (i.e. sexual offences) the court can order that matter to 'be held with closed doors',⁸⁷ and there is a ban on publication, unless the magistrate, after consulting with the complainant, has consented to publication in writing.⁸⁸ Similarly, Swaziland's Maintenance Act 35 of 1970 prevents the publication of the name or address of any person under 18 who was involved in the proceedings or the name of the child's school or any other information likely to reveal his or her identity. Zimbabwe also has fairly old laws that provide some protection of privacy;⁸⁹ however, some older Zimbabwean laws are problematic, because although the public are not permitted in juvenile court, the law expressly allows 'bona fide representatives of newspapers and news agencies' to sit in the courtroom while child offenders are being tried.⁹⁰ These laws are in direct contradiction to article 10 of ACRWC, and should be reviewed.

⁸⁶ UNICEF *Reporting guidelines to protect at-risk children*. Available at http://unicef.org/media/media_tools_guidelines. Accessed on 9 September 2011.

⁸⁷ Section 172 of Act 67 of 1938.

⁸⁸ Section 66(6) of Act 67 of 1938.

⁸⁹ See also Zimbabwe's Children's Act (the name was amended from the Children's Protection and Adoption Act in 2001, but was significantly amended): Section (5) provides privacy protection for care and protection proceedings, and the section 195 of the Criminal Procedure and Evidence Act 5 provides privacy protection for child offenders.

⁹⁰ The Zambian Juveniles Act of 1956, section 119(2)(c), and the Malawian Children and Young Persons Act of 1969, section 7(2)(c), though the Malawi Act prohibits publication of identity of child offenders. The old 1969 Act of Malawi will be repealed by the Child (Care, Protection and Justice Act) which has been passed but not yet put into operation.

2.4 Examples

Of the countries that have passed new laws since the CRC came into force, many have included provisions for the protection of privacy. For example, Botswana's Children's Act 8 of 2009 creates a single forum called the children's court, which deals both with children in need of care and protection, and with children (between the ages of 14 and 18) in conflict with the law. With regard to the presence of persons at proceedings in a children's court, whether such proceedings involve children in need of care and protection or child offenders, section 39 provides as follows:

- (2) No person shall be present at any sitting of a children's court except –
- (a) officers and members of the court;
 - (b) the child concerned and his or her parents, other relatives or guardian;
 - (c) the social worker concerned in the case; and
 - (d) such other person as the court may specially authorise to be present.

The prohibition on the publication of information relating to the identity of children appearing before a children's court – including children accused of crime and child witnesses – is governed by Section 93. It is notable that the prohibition is also aimed at the publication of a matter that may cause a child emotional, psychological or 'other' harm. The provision reads as follows:

- (1) No person shall publish the name or address of any child before a children's court, or the name and address of any school which that child is or has been attending, any photograph of that child, or any matter likely to lead to the identification of that child or cause the child emotional, psychological or other harm, except with the written permission of the court, or insofar as is required by the provisions of this Act.
- (2) No person shall disclose or publish any information relating to the previous convictions, or records of finger, palm or foot prints of any child unless authorised under this Act or any other law to do so, or unless ordered by the court to do so.

Other countries that have new Acts with similar provisions to the Botswana laws are Lesotho,⁹¹ South Africa,⁹² Malawi,⁹³ and Zimbabwe⁹⁴. Namibia has a Bill containing similar provisions.

⁹¹ Children's Protection and Welfare Act, passed on June 2011, not yet in operation. Section 127(6), 127(19) and section 149 provide detailed rules for the protection of privacy.

⁹² Children's Act 38 of 2005, sections 66 and 74; Child Justice Act 75 of 2008, section 63(5); Maintenance Act 9 of 2003. The Criminal Procedure Act 51 of 1977 section 153(5) is also relevant.

⁹³ Child (Care Protection and Justice) Act, passed but not yet in operation. Section 56 deals with no media reporting. The Malawian Prevention of Domestic Violence Act 5 of 2006, Section 47 regulates who may be present at a hearing, and Section 50 prohibits publication on domestic violence proceedings.

⁹⁴ The Children's Act [Chapter 5:06], The Criminal Procedure and Evidence Act [Chapter 9:07].

In Somaliland the Juvenile Justice Law provides for respect for privacy of the child offender and non-publication of any information that may negatively affect the child, as well the protection of the records of child offenders.⁹⁵ Furthermore, there are limitations on the persons who may attend the preliminary hearing⁹⁶, and if the matter proceeds to trial, the court proceedings shall not be an open hearing.⁹⁷

The position is similar in Ghana,⁹⁸ Uganda,⁹⁹ South Sudan,¹⁰⁰ Tanzania¹⁰¹ and Ethiopia¹⁰². In Kenya, Section 76(5) of the Children's Act states that:

In any proceedings concerning a child, whether instituted under this Act, or under any written law, a child's name, identity, home or last place of residence or school, shall not, nor shall the particulars of the child's parents or relative, any photograph or any depiction of caricature of the child, be published or revealed whether in any publication or report (including any law report) or otherwise.

In terms of section 186(g) of the Children's Act of Kenya every child accused of having infringed any law shall have his privacy fully respected at all proceedings. The Fifth Schedule in relation to Child Offenders states in Rule 7 that the court has the power to clear the court where a person under the age of 18 years is to testify in relation to an offence against, or any conduct contrary to, decency or morality.

Article 120 of the Child Protection Code of Tunisia contains the following prohibition:

No one may publish the records of trials or judgements concerning children which emanate from the various juvenile courts provided for in this code, and which may be likely to impair the honour and dignity of the child and his or her family. Anyone who fails to comply with the provisions of this article shall be liable to imprisonment of 16 days to one year and a fine of 100 to 1,000 dinars, or one of these penalties.

Article 121 provides for the same penalty as that set out in Article 120 for:

...any person who impairs the privacy of a child or attempts to do so by publishing or disseminating information concerning the discussions in the juvenile court by means of books, the press, radio, television, the cinema or any other means; or publication by those means of documents or photographs which may inform the public as to the identity of the child, whether perpetrator or victim.

⁹⁵ Section 7.

⁹⁶ Section 60.

⁹⁷ Section 74.

⁹⁸ Section 3 of the Juvenile Justice Act.

⁹⁹ Sections 102(1) and (2) of the Children's Act. Section 16(1)(b) of the Children's Act states that proceedings in the Family and Children's Court shall be held in *camera*. Section 16(2) goes further and states that apart from members and officers of the court, parties to the case, their advocates, witnesses and other persons directly concerned in the case, the only persons who may be present in court are: parents or guardians of the child before the court; a probation and social welfare officer; and any other person whom the court specifically authorises to be present.

¹⁰⁰ Sections 180; 192 and 155(19) address the issues of privacy and non-publication.

¹⁰¹ Sections 33; 75(2); 99(1)(b) and 158(1)(d) of the Law of the Child Act of 2009.

¹⁰² Section 172 of the Criminal Procedure Code of Ethiopia, Proclamation 185/1961.

Example from case law

In South Africa the Constitutional Court dealt with a case where a media company wanted to have a section of the Divorce Act struck down as unconstitutional, because it did not allow the media to report any information at all about divorce cases. The Constitutional Court found that it was very important to protect the children of divorcing parents, and ordered that: ¹⁰³

Subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceedings before any court is prohibited.

3. Safety (special preventive measures)

3.1 Principes de base

- 3.1.1 In all judicial and non-judicial proceedings and other interventions children should be protected from harm, especially secondary victimisation.
- 3.1.2 Professionals working with children should, where necessary, be properly screened to ensure their suitability to work with children.
- 3.1.3 Special precautionary measures should apply to children when the alleged perpetrator is a parent or family member/caregiver.

3.2 International law and special measures for safety

- 3.2.1 Guideline 13 of the Guidelines on Justice for Child Victims and Witnesses provides that in order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and

thorough manner. Guideline 14 continues in the same vein, stating that all interactions should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child.

- 3.2.2 Guideline 112 of the Guidelines for Children in Alternative Care states that as a matter of good practice, all agencies and facilities should systematically ensure that, prior to employment, carers and other staff in direct contact with children undergo an appropriate and comprehensive assessment of their suitability to work with children. Similarly, in Guideline 82 of the JDLs, personnel working in a detention facility must be appointed through careful selection and recruitment processes, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity, as well as their personal suitability for the work.

3.3 Contextual analysis

It is a well-understood concept that children should not be subjected to secondary abuse by the system. Protection against this requires child-friendly procedures in interviewing

¹⁰³ Johncom Media Investments Limited v M (Media Monitoring Project as Amicus Curiae) Para [45].

children and ensuring that their dignity and safety is upheld throughout the justice processes. Personnel working with children must be carefully selected and trained. Where children are in any form of residential care, the risk of abuse is significantly increased, and thus the process of appointing staff needs to involve

a particularly rigorous training process. Where the abuser is in the home of the child, the child may be particularly at risk, and this often leads to removal. Some domestic violence or child protection legislation provides measures for the removal of perpetrators from the home, rather than the child.

3.4 Examples

South Africa has implemented various protective mechanisms to make testifying more child-friendly for victims of sexual offences and children affected by care and protection proceedings. Child care and protection proceedings in the Children's Court may require testimony from a child who was neglected or abused. Section 61(2) states that:

A child who is a party or a witness in a matter before a children's court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) if the court finds that this would be in the best interests of that child.

In addition, if the child's presence is necessary at court, the presiding officer may request that any person leave the room if it is in the best interests of the child and the proceedings must then be conducted, as far as possible, in a relaxed, non-adversarial atmosphere that is conducive to attaining the participation of the child.¹⁰⁴

Children testifying in the criminal court in sexual abuse matters are protected by the use of an intermediary and close-circuit television, which allows the child to testify in a separate room, avoiding direct confrontation with the accused and facilitating examination and cross-examination in a child-friendly manner that minimises secondary trauma.¹⁰⁵

The South African Children's Act 38 of 2005 and the Criminal Law (Sexual Offences and Related Matters Act) 32 of 2007 create registers to record the detail of persons who have committed child abuse and sexual offences respectively. Part 2 of Chapter 7 of the Children's Act establishes the National Child Protection Register. It has a Part A, which records all reports of abuse or deliberate

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¹⁰⁴ Section 60(2) and (3) of the Children's Act 38 of 2005.

¹⁰⁵ Section 170A(1) of the Criminal Procedure Act 51 of 1977, also discussed below.

neglect, all convictions for abuse or deliberate neglect, and all findings by a children's court that a child is in need of care and protection due to the child being abused or deliberately neglected.¹⁰⁶ Part B records the details of all persons who have been found unsuitable to work with children. Employers will routinely have to check the names of applicant employees against the register if the employee is going to work with children.¹⁰⁷

The National Register of Sexual Offenders will record the details of all persons who have been convicted of a sexual offence, including sexual offences against children.¹⁰⁸ It is not recommended, however, that countries establish two separate registers. The two registers are a duplication that leads to unnecessary costs and administrative burdening of child protection organisations. A further negative aspect of the National Register for Sex Offenders is that a child found guilty of a sexual offence must also be recorded on the register.

An important aspect of special protective measures is the creation of specialised units within the police who are trained to interact with child offenders, and especially child victims. In Tunisia, the Child Protection Code created Child Protections Officers who deal with all children who come into the system – offenders and victims.¹⁰⁹ In Lesotho, the Mounted Police Service established the Child and Gender Protection Unit. The Child and Gender Protection Unit provides a user friendly reporting environment and ensures confidentiality for child victims who come to the police station to report sexual offences;¹¹⁰ it has also acquired mobile offices that are separate from the police office, to facilitate more confidential and child-friendly interviews, which also encourages reporting of offences.

Angola has developed a National Strategy on Preventing and Responding to Violence Against Children.¹¹¹

¹⁰⁶ Section 114 of the Children's Act 38 of 2005.

¹⁰⁷ *Ibid* section 118 and 126.

¹⁰⁸ Chapter 6, sections 40 to 53 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁰⁹ Committee on the Rights of the Child Consideration of reports submitted by states parties Under article 44 of the convention Third periodic report of the states parties due in 2004 Tunisia CRC/C/TUN/3 10 November 2008.

¹¹⁰ See <http://www.letsema.org/organisation/child-and-gender-protection-unit-lmps/> as well as [www.unicef.org/evaluation/files/lesotho_2006\(2\).doc](http://www.unicef.org/evaluation/files/lesotho_2006(2).doc).

¹¹¹ UNICEF Detailed Angola Country Office Report 2010, available at http://www.unicef.org/infobycountry/files/Angola2010_final_edit.pdf last accessed on 26 September 2011.

Sections 91(7), (8) and (9) and 93 of the Children's Protection and Welfare Act of Lesotho contain special protective measures for children in the criminal justice system who may be in need of care and protection. The Act provides for their placement in places of safety, and conversion of criminal matters into Children's Court enquiries. Section 93 allows a probation officer to arrange the appropriate support and counselling services for a child in conflict with the law, thereby avoiding criminal proceedings.¹¹²

In respect of refugee and unaccompanied children, the Children's Act 8 of 2009 of Botswana stipulates that the state must provide social services that are necessary for the survival and sustenance of refugee and displaced children.¹¹³

4. Training of professionals

4.1 Basic concepts

- 4.1.1 All professionals working with and for children should receive the necessary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them.
- 4.1.2 Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability.

4.2 International law and training of professionals

- 4.2.1 The Beijing Rules provide several references to the need for special training of professionals – for example, Rule 6 requires the use of discretion by officials, and the commentary¹¹⁴ emphasises professional qualifications and expert training as a way of ensuring

that discretion is used judiciously. Rule 12 requires specialisation in the police, and the commentary requires specialised training for police, especially as they are the point of first contact with the system for the child offender. Rule 22 encapsulates the need for professionalism and training in the entire system, stating that:

...professional education, in-service training, refresher courses and other appropriate models of instruction shall be utilised to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.

- 4.2.2 With regard to children in detention, the JDLs provide in Guideline 85 that the relevant personnel should receive such training as will enable them to carry out their responsibilities effectively, in particular training in child psychology, child welfare, and the international human rights norms and standards pertaining to children.

¹¹² Section 50 of the South Africa's Child Justice Act 75 of 2008 has a similar provision referring matters to the proceedings under the Children's Act 38 of 2005 for a determination of whether the child is in need of care and protection.

¹¹³ Section 53.

¹¹⁴ The commentary to the Beijing Rules is part of the body of the rules and is a detailed guide to interpretation.

4.2.3 According to the Guidelines for Action for Children in the Criminal Justice System, with regard to child offenders, all persons who have contact with children in the criminal justice system should receive education and training in human rights, the principles and provisions of the CRC and other UN standards and norms pertaining to juvenile justice.¹¹⁵

4.2.4 With regard to child victims, the Guidelines for Action for Children in the Criminal Justice System state that police, lawyers, the judiciary and other court personnel should receive training in dealing with cases where children are victims. Furthermore, the Guidelines on Justice in Matters involving Child Victims and Witnesses, under chapter XIV, 'Implementation', provide that:

...adequate training, education and information should be made available to professionals working with child victims and witnesses, with a view to improving and sustaining specialised methods, approaches and attitudes, in order to protect and deal effectively and sensitively with child victims and witnesses.

The chapter goes on to provide a fairly detailed list of what should be included in the training.¹¹⁶

4.2.5 Personnel dealing with children in alternative care must be trained in the

rights of children without parental care, sensitivity regarding cultural, social, gender and religious issues, and how to deal with challenging behaviour.¹¹⁷

4.3 Contextual analysis

Training for officials who work with children is a key component of an effective, child-friendly system. It is fair to observe that even countries that have poor resources in terms of special courtrooms or facilities could nevertheless provide good services for children if the personnel who come into contact with those children are well trained. This relates not only to the original professional training, but also to continuing education, so that new knowledge, insights, methods and techniques can be shared.

In some countries there are training institutes that undertake this work, and/or organisations that hold regular seminars or conferences.

Training should, as far as possible, be multi-disciplinary, with different role players being trained together, or at the very least being trained to understand the disciplinary perspectives of their counterparts. This is linked to the disciplinary approach, which is dealt with elsewhere in this document.

¹¹⁵ Guidelines for Action, Guideline 24.

¹¹⁶ Guidelines for Action, Guidelines 40-42.

¹¹⁷ Guidelines on Children in Alternative Care, Guidelines 114 and 115.



4.4 Examples

Legislative provisions that provide for minimum standards for training of professionals who work with children ensure specialisation and go a long way to ensuring that there is uniformity in the services that the children receive. Specialised units with trained professionals who focus on matters of children and other vulnerable members of the community assist in ensuring that the justice system functions effectively. There are various examples of projects that have been undertaken, such as the “Chain Linked Initiative”¹¹⁸ in Uganda and the Domestic Violence and Victims Support Unit (DOVVSU)¹¹⁹ in Ghana. The latter is a specialised unit of the Ghana Police Services dealing with domestic violence. Both these initiatives are illustrations of how training and co-ordination can make a difference in ensuring that the child justice system is improved to the benefit of the children.¹²⁰

As part of the development of the Arrest Reception and Referral Centres in Zambia, officials working at such centres have received training in South Africa from persons involved at the One Stop Justice Centres (the Thutuzela Centres), and further training in Zambia. Training was provided to role players on a fairly wide and intensive basis, with the assumption that they would implement the training in the pilot projects.¹²¹

Development of guidelines on age assessment is a central aspect of the National Child Justice Strategy for Sierra Leone (2006) and the Government of Sierra Leone’s Justice Sector Reform Strategy and Investment Plan 2008 – 2011.¹²² The guidelines were approved by the Judiciary on 6 June 2011, and the announcement by the Chief Justice of Sierra Leone was followed by a two-day training session of magistrates in Juvenile Courts.¹²³

¹¹⁸ The aim of this project was to enhance the standard of the criminal justice system administered by the criminal justice agencies by ensuring that, amongst other things, the concerned professionals are better coordinated. See http://www.dpp.go.ug/brief_deputy.php accessed on 25/09/2011.

¹¹⁹ This unit handles matters concerning offences involving juveniles as well as a range of other family law-related matters concerning children. See http://www.ghanapolice.info/dvvsu/functions_dvvsu.htm.

¹²⁰ The Ghana Police Services have even gone as far as educating children on the Juvenile Justice Act to prevent children from engaging in criminal activities and ensure that they are aware of their rights. <http://www.ghananewsagency.org/details/Education/Ghana-Police-Service-embarks-on> accessed on 25 September 2011.

¹²¹ Muntingh L, Report on *Child Justice in Zambia with reference to UNICEF supported projects* (2005), UNICEF p 42.

¹²² Defence of Children International, *Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone*, Sierra Leone, Fall 2010 p 26.

¹²³ Bundu B, ‘In Sierra Leone, Judiciary Focuses on Age Assessment Awareness’, Times, 6 June 2011 http://news.sl/drwebsite/publish/article_200517988.shtml accessed on 21 September 2011.

Section 153 of the Law of the Child Act of Tanzania states that the Minister responsible for social welfare shall establish training centres for child care workers intending to work in approved residential homes, institutions and any day care centres.

The Children’s Act of Kenya has several provisions in relation to training of professionals who are to work with children. Section 32(2)(g) states that the National Council for Children’s Services is responsible for training, and shall prescribe the requirements and qualifications for authorised officers. Section 72(e) states that the Minister may make regulations for the training and remuneration of persons employed in children’s remand homes and rehabilitation schools. Furthermore, Section 20 of the Children’s (Charitable Children’s Institutions) Regulations of 2005 list the requirements that should be checked to confirm if the persons being employed to work with children are fit and of good standing.

5. Multidisciplinary approach

5.1 Basic concepts

- 5.1.1 Close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.
- 5.1.2 A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children, to provide any necessary support to those taking decisions, enabling them to serve children’s interests as best they can in any given case.
- 5.1.3 While implementing a multidisciplinary approach, professional rules on confidentiality should be respected.

5.2 International law and the multidisciplinary approach

- 5.2.1 The JDLs provide that within a facility for children there should be a range of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists.¹²⁴ Furthermore:

*...the administration should introduce forms of organisation and management that facilitate communications between different categories of staff.*¹²⁵
- 5.2.2 The Guidelines for Action on Children in the Criminal Justice System (with regard to both child offenders and child victims) emphasise a holistic approach to implementation through maximisation of resources and efforts, as well as the integration of services on an interdisciplinary basis.¹²⁶
- 5.2.3 The Guidelines on Justice in Matters involving Child Victims and Witnesses provide very clearly that:

¹²⁴ JDLs Rule 81.

¹²⁵ JDLs Rule 82.

¹²⁶ Guidelines for Action, Guideline 8.

Professionals should make every effort to adopt an interdisciplinary and co-operative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, and legal and social services. This approach may include protocols for different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.¹²⁷

- 5.2.4 According to the Guidelines on Children in Alternative Care, decisions on placement should be made by suitably qualified professionals in a multidisciplinary team.¹²⁸

5.3 Contextual analysis

There is broad recognition of the value of interdisciplinary approaches when working with children in the justice systems. A child might be dealt with by officials from several different government departments and professional disciplines. For example, a child victim may encounter police officials, medical practitioners, prosecutors, social workers, court preparations staff, an intermediary, a magistrate or a judge. Inter-sectoral co-operation is therefore very important in order to make sure that the children are assisted safely and smoothly through the system; that officials from different departments do not take different approaches; that children are not asked to tell their story many times over; and they are otherwise protected. Over and above that, it is well understood that issues facing children are multi-faceted, and that professionals working together will make better decisions.

5.4 Examples

The Juvenile Justice Law of Somaliland states that it is one of the duties of a probation officer to coordinate and co-operate with the Children Police, social workers, parents, victims and others who may be interested in any case involving children.¹²⁹

The Child Act of South Sudan states that the Ministry of Labour, Public Service and Human Resource Development shall in the course of investigations of any reasonable suspicion that a child is engaged in industrial undertaking, request medical officers, social workers and other professionals to provide expert information where necessary.¹³⁰

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¹²⁷ Guidelines on Justice for Child Victims and Witnesses of Crime, Guideline 43.

¹²⁸ Guidelines on Children in Alternative Care, Guideline 56.

¹²⁹ Section 22(b).

¹³⁰ Section 25(11).

In Tanzania there is a project underway to strengthen child protection systems and reduce violence against children. According to a UNICEF report the police, social welfare and education officers, magistrates and health workers have come together as a team and are creating a stronger system to protect children.¹³¹

In South Africa, the *Thuthuzela* Care Centres are one-stop facilities that have been introduced as a critical part of the country's anti-rape strategy, aiming to reduce secondary trauma for victims, improve conviction rates, and reduce the cycle time for finalising cases. The *Thuthuzela* project is led by the Sexual Offences and Community Affairs Unit (SOCA) of the National Prosecuting Authority (NPA), in partnership with various donors as a response to the urgent need for an integrated strategy for prevention, response and support for rape victims. Since its establishment, the SOCA Unit has been working to develop best practices and policies that seek to eradicate victimisation of women and children, while improving prosecution, particularly in the areas of sexual offences, maintenance, child justice and domestic violence.

Thuthuzela Care Centres are in operation in public hospitals in communities where the incidence of rape is particularly high. They are also linked to sexual offences courts, which are staffed by prosecutors, social workers, investigating officers, magistrates, health professionals, NGOs and police, and located in close proximity to the Centres. The Centres are managed by a top level inter-departmental team comprising representatives from the departments of justice, health, education, the treasury, correctional services, safety and security, local government, home affairs, and social development, as well as designated civil society organisations. *Thuthuzela's* integrated approach to rape care is one of respect, comfort, restoring dignity and ensuring justice for children, women and men who are victims of sexual violence. There are *Thuthuzela* Care Centres in Mamelodi, Soweto and Ntshongwe in Gauteng, Mafikeng in the North West, Mannenberg in the Western Cape, Umlazi and Durban in Kwa-Zulu Natal, Mthatha and East London in the Eastern Cape, and in Kimberley in the Northern Cape.¹³²

With regard to child offenders, the One-stop Child Justice Centre is an innovation in child justice in South Africa that prevents young people being pushed from service to service, and thereby getting lost in the system. The Child Justice Act 75 of 2008 envisages that One-stop Child Justice Centres will be established to streamline the entire justice process, from arrest to the formal court process.¹³³

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¹³¹ Martin J and Namfua J, 'Strengthening child protection systems to reduce violence against children in Tanzania', http://www.unicef.org/infobycountry/tanzania_58923.html accessed on 4 September 2011.

¹³² Information sheet provided by the National Prosecuting Authority of South Africa available at www.npa.gov.za/UploadedFiles/Thuthuzela%20Care%20Centres.pdf.

¹³³ Section 89 of the Child Justice Act 75 of 2008.



One of the stated objects of One-stop Child Justice Centres is to promote co-operation among government departments, and between government departments and the non-governmental sector, to ensure an integrated and holistic approach to the implementation of the Child Justice Act.¹³⁴ All the major services will be in one building – holding cells, assessment rooms, police services, probation services, a courtroom and rooms for presenting diversion programmes – so that parents and children will not need to travel. The Child Justice Act provides that the jurisdictional boundaries of these one-stop centres do not have to correspond with the boundaries of existing magistrates' courts.¹³⁵ The Mangaung One-stop Child Justice Centre in Bloemfontein and Nerina One-stop Child Justice Centre in Port Elizabeth are examples of centres that already exist.¹³⁶ The Child Justice Act provides that the ministries of Justice, Social Development, Safety and Security and Correctional Services will all be responsible for the provision of resources and services for the One-stop Centres.¹³⁷

In Zambia, the establishment of an Arrest, Reception and Referral Service (ARRS) was recommended as part of the 2000 Situational Analysis of child justice, based on the One-Stop Centre model adopted in South Africa. The One-Stop model was in fact preceded by a simplified form that would ensure that all arrested children in a city are brought from other police stations to one central police station. This essentially ensured more accurate monitoring and enabled the concentration of resources, through (for example) having a probation officer and family finders at one locality instead of spreading them over several police stations. This approach is suitable for urban areas, where distances are not excessive, and where there is a sufficient caseload to justify the concentration of resources in order to create efficiency and effectiveness. Training was provided to role players on a fairly wide and intensive basis, with the assumption that they would implement the training in the pilot projects, of which the ARRS was one.¹³⁸

The purpose of the ARRS is to limit children's exposure to the criminal justice system by efficient inter-sectoral case management at the arrest and reception phases, and through correct channelling. This is achieved by the centralisation of arrests and the treatment of children in line with the relevant standards, to ensure the expeditious handling of cases with the deliberate objective of avoiding detention in police cells.¹³⁹

¹³⁴ *Ibid* section 89(3).

¹³⁵ *Ibid* section 89(6).

¹³⁶ <http://www.childjustice.org.za/downloads/FactSheets/one%20stop%20fact%20sheet.pdf>.

¹³⁷ Section 89(2) of the Child Justice Act 75 of 2008.

¹³⁸ Muntingh L, *Report on Child Justice in Zambia with reference to UNICEF supported projects* (2005), UNICEF p 42.

¹³⁹ *Ibid* p 39.

6. Deprivation of liberty

6.1 Basic concepts

- 6.1.1 Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.
- 6.1.2 When deprivation of liberty is imposed, children should, as a rule, be detained separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.
- 6.1.3 In addition to the rights that detained adults have, children in particular should be kept in conditions that take account of their age.
- 6.1.4 The deprivation of liberty of unaccompanied minors (including those seeking asylum) and separated children should never be motivated by or based solely on the absence of residence status.

6.2 International law and deprivation of liberty

- 6.2.1 Article 37(b) of the United Nations Convention on the Rights of the Child sets a high standard:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention and imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

- 6.2.2 The Beijing Rules differentiate between detention at the pre-trial stage and at the sentencing stage. Chapter 13 of the Rules deal with detention of children pending trial, and require that such detention:

- Should be used only as a measure of last resort and for the shortest possible period of time
- Should, wherever possible, be replaced with alternative measures
- Must be separate from adults
- Must allow for necessary individual assistance – e.g. social, educational, psychological and medical help.

With regard to detention as a sentence, the Beijing Rules state that institutionalisation should be avoided to the greatest extent possible. Rule 19 states:

The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum period of time.

Rule 26.4 highlights the needs of girls:

Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

It is also significant that the Beijing Rules provides that children should have ‘frequent and early recourse to conditional release.’

- 6.2.3 The JDLs are premised on the same ideas, but remind us that children awaiting trial are presumed innocent

¹⁴⁰ Beijing Rules, Rule 28.1.

and should be treated as such, and their cases should be treated expeditiously.¹⁴¹ Detailed provisions are included in the JDLs about the treatment of children deprived of their liberty, in all aspects of their dealings with the justice system including admissions; registration; transfer; classification; physical environment and accommodation; education; vocational training and work; recreation; religion; medical care; notification of illness; injury or death; contact with the wider community; limitations of physical restraint; disciplinary procedures; inspections and complaints; and return to the community.¹⁴²

6.2.4 With regard to unaccompanied foreign children, Guideline 140 of the Guidelines for Children in Alternative Care states that such children ‘should, in principle, enjoy the same level of protection and care as national children in the country concerned’, and also makes the point that the child’s immigration status in the country should not in and of itself be reason for detention.

6.3 Contextual analysis

It is estimated that one million children are deprived of liberty worldwide.¹⁴³ In 2006, the United Nations Study on Violence Against Children found as follows:

Millions of children, particularly boys, spend substantial periods of their lives under the control and supervision of care authorities or justice systems, and

in institutions such as orphanages, children’s homes, police lock-ups, prisons, juvenile detention facilities and reform schools. These children are at risk of violence from staff and officials who are responsible for their wellbeing.¹⁴⁴

The over-utilisation of custodial measures is as much a problem in Africa as it is in other parts of the world. Many countries do not even have reliable data on how many children are deprived of liberty in their countries, or for how long they are kept so deprived. The UN Office on Drugs and Crime (UNODC) and UNICEF have developed 15 indicators for the measurement of juvenile justice, most of which deal with detention.¹⁴⁵

Good practice is indicated where countries have the following quantitative data:

- The number of children arrested within 12 months per 100,000 child population
- The number of children in detention per 100,000 child population
- The number of children in pre-trial detention per 100,000 child population
- Time spent in detention before sentence
- Time spent in detention after sentence
- Number of child deaths in detention over 12 months
- Percentage of children not wholly separated from adults
- Percentage of children in detention visited by family member in last three months
- Percentage of children receiving a custodial sentence

¹⁴¹ JDLs, Rule 17.

¹⁴² JDLs, Rules 19-80.

¹⁴³ Liefwaard T, *Deprivation of liberty of children in light of international human rights law and standards* (2008), Intersentia, School of Human Rights Research Series: Dordrecht, 1.

¹⁴⁴ Report of the independent expert for the United Nations study on violence against children, GA A/91/299 (UN Violence Study 2006).

¹⁴⁵ UNODC and UNICEF, *Manual for the measurement of juvenile justice indicators* (2007) United Nations: New York.

- Percentage of children who enter a pre-trial or pre-sentence diversion scheme
- Percentage of children released from detention after receiving aftercare.

Policy indicators include the presence of regular independent inspections and the existence of a complaints mechanism, a specialised juvenile justice system, and a national prevention plan.

Legislative provisions in prohibiting detention except as a last resort, and stipulating that it

should be for the shortest appropriate period of time, appear to be a norm in most African states. These principles apply in relation both to pre-trial detention and to sentencing after detention. This is definitely influenced by the provisions of the United Nations Convention on the Rights of the Child, and other international law instruments discussed above.

6.4 Examples

The Child Act of South Sudan provides in Section 144(a) that if a child is in detention in police custody, the child shall be brought promptly for assessment by the social worker in whose area of jurisdiction the arrest has taken place, and not later than 24 hours after arrest; provided that if by the expiry of this period of time a social worker cannot be practically traced, the Police officer must request the prosecutor to set the matter down for holding of a preliminary enquiry as soon as possible. Section 150(1) of the Act states that detention of a child in police custody, whether in a police cell, police vehicle, lock-up or any other place, shall be used as a measure of last resort and for a period not exceeding 24 hours. Section 150(2) states that a separate cell register shall be kept in which details regarding the detention in police cells of all persons under 18 years must be recorded. Section 150(3) states that the aforementioned register may be examined by a parent, guardian, legal representative, prosecutor, judge, social worker, health worker or any other person authorized by the police officer in charge of the police station to examine the register. Furthermore, Section 150(4) requires that the conditions and treatment in detention must take into account the child's age, and the child must be held separately from adults, and that boys must be held separately from girls.

Most other African countries, including Kenya¹⁴⁶, Uganda¹⁴⁷, Tanzania¹⁴⁸, Somaliland¹⁴⁹ and Ghana¹⁵⁰, have provisions similar to South Sudan. Some of these countries go further, and limit the period of detention for child offenders, both in remand and when being sentenced after a conviction.

¹⁴⁶ See sections 190 of the Children's Act and Rules 4(1), 4(4) and 6(1) of the Child Offender Rules in the Fifth Schedule to the Children's Act.

¹⁴⁷ Sections 89(1); 89(3); 89(6); 89(7) ; 91(4) and 91(6) of the Children's Act.

¹⁴⁸ Sections 101 and 102 of the Law of the Child Act.

¹⁴⁹ Sections 8; 9; 27; 31; 47 and 65 of the Juvenile Justice Law.

¹⁵⁰ Sections 14; 15 and 23 of the Juvenile Justice Act.

In Uganda, Section 91(5) of the Children's Act states that a child may not be remanded for more than six months in case of an offence punishable by death, and not for more than three months in case of other offences. Furthermore, Section 99(3) and (4) states that:

(3) Where, owing to its seriousness, a case is heard by a court superior to the family and children's court, the maximum period for re and for a child shall be 6 months, after which the child shall be released on bail.

(4) Where the case to which subsection (3) applies is not completed within 12 months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.

The Law of the Child Act of Tanzania has provisions that allow for alternatives to detention as a sentence for an offence.¹⁵¹ Section 116(1) states that:

Where a child is convicted of an offence other than homicide, the Juvenile Court may make an order discharging the offender conditionally on his entering into recognisance, to be of good behaviour during such period not exceeding 3 years as specified in the order. If the child has demonstrated good behaviour then that child shall be presumed to have served the sentence.

Section 119(2) of Tanzania's Law of the Child Act states that:

Where a child is convicted of any offence punishable with imprisonment, the court may, in addition or alternative:

- a) Discharge the child without an order;*
- b) Order the child to be repatriated to his home/district of origin within Tanzania;*
- c) Order the child to be handed over to the care of a fit person of institution named in the order, if the person or institution is willing to undertake such care.*

Zambian law sets the following basic requirements, as described in Sections 58 to 60 of the Juveniles Act, with regard to the arrest and detention of a child or young person:

- Detention should be avoided
- If detention cannot be avoided, children must be kept from adults, and girls must be placed under the care of a female officer

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¹⁵¹ Section 119 (1) outlaws imprisonment for children and 120(1) states that where a child is convicted of an offence which if committed by an adult would have been punishable by a custodial sentence, the court may order that the child be committed to custody at an approved school.

- The child should as far as possible be kept in a place of safety
- The officer in charge of the police station must show to the court why detention is required (S60) and why the child could not have been released on own recognizance or police bond.¹⁵²

Zambian law sets the following basic requirements for the remand of juveniles, in Sections 60, 61 and 64 of the Juveniles Act:

- They may be remanded to a place of safety but may under certain conditions (unruliness or impracticability) be remanded to a remand prison
- They may also be remanded to any other type of dwelling identified by the Commissioner
- Juveniles must appear before the court that gave the order for remand every 21 days.¹⁵³

Whilst Section 66(4)(a) of the Juveniles Act requires that a juvenile appear at least every 21 days before the court to extend the warrant of his/her detention, this is clearly not reflected in reality. In Mukobeko, a 17-year-old boy (charged with burglary and theft) was found to have been in custody for 21 months but had appeared in court only twice. At the same prison another boy, aged 16 years and charged with assault, had appeared in court once since his arrest seven months ago. At Ndola Remand prison another boy (aged 13 years) was found who had been charged with 'espionage'. He had been in custody from January 2001 until May 2005. In short, at all the remand prisons visited children were found to have been held for excessively long periods and in violation of the provisions of 66(4)(a) of the Juveniles Act, rendering their detention illegal.¹⁵⁴

In Tunisia, Section 94 of the Child Protection Code¹⁵⁵ contains a prohibition against holding a child younger than 15 years old, and who is accused of an offence, on remand.

The general rule in Sierra Leone is to release the child who is in conflict with the law into the care of a parent, guardian or responsible person. However, there are difficulties with the proviso that the child may be held in detention pre-trial if 'the officer has reason to believe that the release of such a person would defeat the ends of justice'.¹⁵⁶

In Malawi, a child may not be detained prior to the preliminary enquiry and before a finding has been made against a child unless: the Director of Public Prosecution has satisfied the magistrate that it is a serious crime and there is sufficient evidence to prosecute; it is necessary in the interests of the

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¹⁵² Muntingh L., Report on Child Justice in Zambia with reference to UNICEF supported projects (2005), UNICEF p 23.

¹⁵³ *Ibid* p 28.

¹⁵⁴ *Ibid* p 29.

¹⁵⁵ Committee on the rights of the child Consideration of reports submitted by states parties Under article 44 of the convention Third periodic report of the states parties due in 2004 Tunisia CRC/C/TUN/3 10 November 2008.

¹⁵⁶ Defence for Children International, Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone, Sierra Leone, Fall 2010 p 40.

child to remove the child from undesirable circumstances; or the prosecutor has reason to believe that release will defeat the ends of justice. The child may only be held in a safety home and must be brought before a magistrate for preliminary enquiry within 48 hours, failing which the child must be released. If (i) detention in a safety home is not practicable; (ii) the child is of such character he or she cannot be safely held in a safety home; (iii) there is a mental or physical health condition which makes it inadvisable to detain the child in a safety home; or (iv) the detention is not in the best interests of the child, then the officer-in-charge of the police station responsible for the child may apply for an alternative order, which may be any of the following: parenting order; hospital order; home confinement order; or reformatory centre order.¹⁵⁷

Under the terms of the Child Justice Act 75 of 2008 of South Africa, alternatives to pre-trial detention include the issue of a written notice or summons.¹⁵⁸ A child may be arrested for more serious offences, but in cases of a minor offence then a child may only be arrested if there are compelling reasons for the arrest.¹⁵⁹ If a child is arrested, then the police official who arrested the child must refer the child to a probation officer for assessment immediately, but not later than 24 hours after the arrest. The police official must inform the child's parents, a guardian or an appropriate adult of the child's arrest. If the police official cannot refer the child to a probation officer or cannot reach the child's parents, a guardian or an appropriate adult, then the police official must provide a written report at the preliminary enquiry.¹⁶⁰ Irrespective of whether there has been assessment of the child or not, a child who remains in custody must be brought before the magistrate's court within 48 hours of arrest.¹⁶¹

Section 21(1) of the Child Justice Act requires that during pre-trial proceedings, preference be given to releasing the child. The police should release the child on written notice into the care of a parent, guardian or appropriate adult, while the prosecutor may authorise the release of a child on bail in certain circumstances.¹⁶² At the preliminary enquiry, the magistrate may release the child into the care of a parent, guardian or appropriate adult or, in respect of less serious offences, release the child on his or her own recognisance. Otherwise the child may be released on bail.¹⁶³ If detention cannot be avoided, then the least restrictive options must be given preference, such as placement in a child and youth care centre.¹⁶⁴ Prior to the preliminary enquiry, a child who is younger than 14 but older than 10 must be detained in a child and youth care centre. A child who is 14 years or older must

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¹⁵⁷ Section 95 and 96 of the Child Care, Protection and Justice Act of Malawi.

¹⁵⁸ Sections 18 and 19 of the Child Justice Act 75 of 2008.

¹⁵⁹ *Ibid* at section 20(1). More serious offences are set out in Schedule 2 and 3 to the Child Justice Act, whilst minor offences for which a child should not get arrested are set out in Schedule 1.

¹⁶⁰ Section 20(3) and (4) of the Child Justice Act 75 of 2008.

¹⁶¹ *Ibid* at section 20(5).

¹⁶² *Ibid* at section 21(2).

¹⁶³ *Ibid* at section 21(3).

¹⁶⁴ *Ibid* at section 26.

preferably be detained in a child and youth care centre, but if placement in a child and youth care centre is not available, or if the child committed a very serious offence, then the child may be detained in a police cell or lock-up.¹⁶⁵ If the magistrate decides at the preliminary enquiry that the child must be detained, then placement in a child and youth care centre must be preferred. The child may only be placed in prison awaiting trial if: a bail application has been postponed; the bail conditions have not been complied with; the child is older than 14; the child is accused of committing a very serious offence; the detention is necessary in the interests of justice; and there is a likelihood that the child, if convicted, could be sentenced to imprisonment.¹⁶⁶

7. The minimum age of criminal capacity should be determined by law and should not be set too low

7.1 International law and minimum age of criminal responsibility

- 7.1.1 Article 40(3) of the CRC requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. This important requirement is reiterated by the ACRWC. The Beijing Rules add to this principle by stating that the beginning of the age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.¹⁶⁸
- 7.1.2 The United Nations Committee on the Rights of the Child (the body responsible for monitoring the implementation of the UNCRC) has continuously expressed its

concern with regard to the vast international differences in setting a minimum age for penal responsibility.¹⁶⁹ As a result of these concerns, the definitive guide to implementing effective child justice was released by the Committee on the Rights of the Child in the form of General Comment No. 10 of 2007: Children’s Rights in Juvenile Justice (‘General Comment No 10’). General Comment No. 10 elaborates on the nature of the obligations of States Parties as expressed in Article 37 and Article 40 of the UNCRC, and the implementation of these obligations at national level. It also addresses the minimum age of criminal responsibility. In this particular regard, the obligation is clearly stated and based on universal wisdom: a fixed minimum age of criminal responsibility of not lower than 12 years is established and it is recommended that States Parties should progressively raise the minimum age where possible.¹⁷⁰ General Comment No. 10 provides that

¹⁶⁵ *Ibid* at section 27.

¹⁶⁶ *Ibid* at section 30.

¹⁶⁷ Article 4 of the African Charter provides that ‘[t]here shall be a minimum age below which children shall be presumed not have the capacity to infringe the penal law’.

¹⁶⁸ Rule 4.1

¹⁶⁹ An assessment of the many Reports and Concluding Observations of the Committee on the Rights of the Child makes the foundation of this submission plain.

¹⁷⁰ General Comment No. 10 at paragraph 32.

any age below 12 years is unacceptably low. The inference can therefore be made that such a low age is also in contravention of the CRC. This aspect of the General Comment was an important milestone, as it put an end to the question of an international standard for an appropriate minimum age of criminal responsibility.¹⁷¹

7.2 Contextual analysis

The minimum age of criminal capacity varies widely between African states. Some of these differences arise from the historical context of colonially inherited law, with

former British colonial systems leaving a legacy of lower ages of criminal capacity – around seven or eight – whilst those influenced by Portuguese or French law generally having higher ages of criminal capacity, of around 14 years.

7.3 Examples

Various African countries have reviewed their minimum ages of criminal capacity since the adoption of the CRC in 1989. These reviews have resulted in higher minimum ages of criminal capacity, in line with the provisions of the CRC.

African countries with the minimum age of criminal responsibility below the recommended age of 12 years¹⁷²

COUNTRY	MINIMUM AGE OF CRIMINAL RESPONSIBILITY
1. Cameroon	10
2. Cote d'Ivoire	10
3. Ethiopia	9
4. Eritrea	9
5. Kenya	8
6. Lesotho	10
7. Malawi	10
8. Mauritania	7
9. Namibia	7
10. Seychelles	7
11. Somalia	10
12. South Africa	10
13. Swaziland	7
14. Tanzania	10
15. Zambia	8
16. Zimbabwe	7

¹⁷¹ Skelton A and Badenhorst C, *The criminal capacity of children in South Africa: International developments and consideration of a review*, (2011) Child Justice Alliance.

¹⁷² See http://www.africanchildforum.org/site/index.php?option=com_content&view=article (accessed on 30 November 2011). In some of these countries the principle/presumption of *doli incapax* is applicable and serves to ensure that, despite the lower age of criminal capacity, only children who have been proven to have criminal capacity are prosecuted for offences.

Examples of presumptions of lack of criminal capacity

The Child Care Act of South Sudan states in Section 138(2) that there is a rebuttable presumption that a child who is not less than 12 years but younger than 14 years of age is incapable of committing an offence because the child does not have the capacity to know that the act or omission concerned was wrong. Under the terms of Section 138(3), subject to Section 138(2), no prosecution for a criminal offence may be instituted against a child aged between 12 and 14 years unless a judge is satisfied that the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation. The enquiry to establish criminal responsibility must be conducted by a Judge, and there must be proof beyond reasonable doubt that the child does have the said responsibility.¹⁷³

In Somaliland, Section 10(2) of the Juvenile Justice Law states that a child of between 15 and 18 years of age may be liable for criminal responsibility in accordance with the Penal Code, but not full criminal responsibility.

In terms of the Penal Code of Kenya, when a child is between eight and 12 years of age, the court must first establish whether the child understood the consequences of his or her actions, and this will be the determining factor as to whether or not to prosecute.¹⁷⁴

The South African Child Justice Act 75 of 2008 sets the minimum age of criminal capacity at 10 years, but the presumption of *doli incapax* applies in relation to children between the age of 10 and 14 years.¹⁷⁵ Sections 10 and 11 of the Child Justice Act provide for the process that the prosecutor must undertake in relation to the decision whether or not to prosecute a child between the ages of 10 and 14 years, as well as the determination of whether or not a child has criminal capacity.¹⁷⁶ There must be proof beyond reasonable doubt that the child has criminal capacity, and it is the duty of the state to prove this.

Challenges arise when the age of a child offender is in dispute, and this is an important factor that needs to be resolved conclusively before prosecution proceeds. Section 64 of the Juvenile Justice Law of Somaliland states that where there is uncertainty in respect of the age of the child offender, the Judge must determine it in the preliminary hearing, with the help of a medical doctor. Similarly, in Ghana¹⁷⁷ and South Sudan, the Juvenile Justice Act and the Child Act provide the procedure to determine age of a person before a court, where such a person appears to be a juvenile.¹⁷⁸

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¹⁷³ Sections 138(4) and 138(5) of the Child Act.

¹⁷⁴ Chapter 63 of 2009 at section 14(1) and (2).

¹⁷⁵ Sections 4 and 7.

¹⁷⁶ See Section 40, which provides that a probation officer must complete an assessment report on certain issues, which include the determination of the criminal capacity, or lack thereof, of a child between the age of 10 and 14 years.

¹⁷⁷ See Section 19(1). Section 19(3) states that where the court has made an order, with the assistance of a medical officer, in relation to the age of a person, such an order shall not be invalidated by subsequent proof to the contrary, and will remain valid for purposes of the matter.

¹⁷⁸ See Section 19(1) of the Juvenile Justice Act and Sections 161-164 of the Child Act of South Sudan. Section 19(3) of the Juvenile Justice Act states that where the court has made an order, with the assistance of a medical officer, in relation to the age of a person, such an order shall not be invalidated by subsequent proof to the contrary, and will remain valid for purposes of the matter. See section.

In Namibia, the age of criminal capacity is still set, in terms of Roman-Dutch common law, at 7 years, whilst the presumption is that a child aged between 7 and 14 is *doli incapax*. However, the Child Justice Act raises criminal capacity from 7 to 10 years of age, and retains the rebuttable presumption that a child aged between 10 and 14 lacks criminal capacity. A child of between 10 and 14 may only be prosecuted after an assessment has been done, and only on authorisation from the Prosecutor General.¹⁷⁹

As many African countries are still struggling to attain registration of the births of all children, guidelines to estimate the correct age of a child are essential to issues related to capacity. Several countries have included guidelines and rules on age assessment in their legislation. South Africa,¹⁸⁰ Zimbabwe¹⁸¹ and Malawi¹⁸² have all detailed provisions on the determination of age, while presiding officers in Sierra Leone recently received training on guidelines to assess the age of children that were approved by the Chief Justice and the Judiciary in June 2011.

¹⁷⁹ Clause 9, Child Justice Bill Namibia.

¹⁸⁰ Sections 12 to 16 of the Child Justice Act 75 of 2008.

¹⁸¹ Section 82 of the Children's Act.

¹⁸² Part IV, Sections 122 to 125 of the Child Care, Protection and Justice Act.

D. CHILD-FRIENDLY JUSTICE BEFORE JUDICIAL PROCEEDINGS

1. Alternatives to judicial proceedings

1.1 Basic concepts

- 1.1.1 Alternatives to judicial proceedings, such as mediation, diversion and alternative dispute resolution, should be encouraged where these may best serve the child's best interests, and must not be an obstacle to access to justice.
- 1.1.2 Where there is a choice between these options and the formal system, children should be assisted in making an informed choice.
- 1.1.3 Traditional and customary law options may also be considered, provided children's rights are protected in such processes
- 1.1.4 All alternatives to court proceedings should guarantee basic legal safeguards.

1.2 International law and alternatives to judicial proceedings

- 1.2.1 Article 40(3)(b) of the CRC provides that whenever appropriate and desirable, measures for dealing with children in conflict with the law without resorting to judicial proceedings should be used, provided that human rights and legal safeguards are fully respected in doing so.

1.2.2 More detail about diversion of child offenders is provided for in Rule 11 of the Beijing Rules, including the fact that 'efforts shall be made to provide for community programmes' for diversion. The Guidelines for Action on Children in the Criminal Justice System recommend that states undertake a review of existing procedures and, where possible, that the alternatives to the criminal justice process should be introduced.¹⁸³

1.2.3 Two other international instruments not specific to children are also of relevance to alternative measures. The first of these is the United Nations Standard Minimum Rules for Non-Custodial Measures (also known as the Tokyo Rules)¹⁸⁴, which provide details on legal safeguards and on measures being taken at the pre-trial, trial and sentencing stages. The second relevant instrument is the Basic Principles on the use of Restorative Justice Programmes in Criminal Matters.¹⁸⁵ Restorative justice is defined as:

...any process in which the victim and the offenders, and, where appropriate, any other individuals or community members affected by a crime, participate actively together in the resolution of matters arising from the crime, generally with the help of a facilitator.'

Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

¹⁸³ Guidelines for Action for Children in Criminal Justice, Guideline 15.

¹⁸⁴ General Assembly Resolution 45/110.

¹⁸⁵ Economic and Social Council Resolution 2002/12.



1.3 Contextual analysis

Alternative measures, or diversion, at the pre-trial phase have come to be seen internationally as an integral component of a good juvenile justice system— though this approach is still in its infancy in Africa.¹⁸⁶ Diversion has the multiple advantages of preventing the child from coming too deeply into contact with the criminal justice system, avoiding pre-trial detention, avoiding a criminal record, linking the child offender to services that deal directly with his or her needs, providing opportunities for victim and community participation, and encouraging children to take responsibility.

Restorative justice is a worldwide movement that views justice in a different way, and much of the early work in restorative justice has been done with children in the criminal justice system.¹⁸⁷ Restorative justice processes can be used at any stage of the justice process, and have proved to be useful in diversion prior to trial in appropriate cases. Restorative

justice also provides a link with traditional justice processes. Tshehla observed in the *South African Journal on Criminal Justice* that ‘there is a resounding resonance between restorative justice and justice as practiced by Africans through community courts and chief’s courts’.¹⁸⁸

From this background we may see emerging formal diversion processes linked to accredited programmes, formal diversion referrals to restorative justice processes facilitated by practitioners, and informal diversions to traditional justice processes. In the two former instances, adherence to the protection of legal rights is a relatively simple process. Informal diversion to traditional justice processes may require discussion and negotiation.

Law reform trends in African countries since the CRC show that customary law practices are in some instances being modified, and then codified as part of the new legal system.

¹⁸⁶ Odongo G, ‘The impact of international law on juvenile justice’ in J Sloth-Nielsen (ed) *Children’s rights in Africa* (2008), 153.

¹⁸⁷ Skelton A, ‘Restorative justice in child justice systems in Africa’ in J Sloth-Nielsen (ed) *Children’s rights in Africa* (2008), 130.

¹⁸⁸ Tshehla B, ‘The restorative justice bug bites the South African criminal justice system’ (2004) *South African Journal on Criminal Justice* 1 at 16. See also Skelton A, ‘Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa’ (2007), *Acta Juridica* 228.

1.4 Examples

In Uganda, the Children's Act introduced the community or village court system, which can informally resolve cases pertaining to assault, theft, criminal trespass and malicious injury to property. The outcomes can include measures for reconciliation, compensation, restitution, apology or caution. Diversion can also happen at police station level in respect of certain offences, and there is a further opportunity at the Family and Children's Court level, where the magistrate can use his or her powers to involve parties in alternative dispute resolution.¹⁸⁹

The Child Act of South Sudan has detailed provisions on alternative measures for child offenders. Section 154 provides for restorative justice processes, which include family conference,¹⁹⁰ victim-offender mediation,¹⁹¹ and any other restorative justice processes. Diversion is dealt with in Section 158 of the Act, which details the purpose of diversion, and Section 159, which provides for the standard to which a diversion programme must adhere. More important is Section 160, which details the circumstances under which a child may be diverted. In terms of this provision:

- (1) *A child suspected of having committed an offence may only be referred for diversion by a Social Worker, Public Attorney, Judge or a police officer if—*
 - (a) *such a child acknowledges responsibility for the alleged offence and consents to diversion;*
 - (b) *there are reasons to believe that there is sufficient evidence for the matter to proceed to trial;*
 - (c) *there is no risk of infringement of the child's procedural rights; and*
 - (d) *the child has a fixed address.*
- (2) *Where circumstances as referred to in subsection (1), above, exist, diversion must be considered as a matter of first resort to institutionalization of children being a measure of last resort.*

In Somaliland, the Juvenile Justice Law also provides for diversion as an alternative to other sentences for children.¹⁹² According to Section 69, a child must be considered for diversion if the crime committed is punishable with imprisonment for a period of not less than 10 years, the child voluntarily acknowledges responsibility, and there is insufficient evidence to prosecute.¹⁹³ The Juvenile Justice Act of Ghana also provides for diversion as an option.¹⁹⁴

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¹⁸⁹ Sloth-Nielsen J and Gallinetti J *Child Justice in Africa: A guide to good practice* (2004) 67.

¹⁹⁰ Section 155 details how this process should be conducted.

¹⁹¹ More details about this process appear in section 156.

¹⁹² Section 67 provides for the different definitions of diversion.

¹⁹³ Further details regarding diversion appear at sections 68; 70; 71; 72 and 73.

¹⁹⁴ Section 25 to 27.



Other countries have endeavoured, without the existence of legislative provisions, to pilot diversion programmes as an alternative to the detention of children. In Kenya, with the assistance of Save the Children Sweden, a diversion project was established and implemented in fourteen areas of the country.¹⁹⁵ The Diversion Project for Children in Conflict seeks to ensure the protection of children from inappropriate institutionalisation, to demonstrate a viable alternative to custodial care, and, in a way, to influence the practices and policies of key government and non-governmental agencies at regional and national levels.¹⁹⁶

According to a UNICEF report, diversion has also been implemented in Nigeria, but here there are many challenges that hamper the proper implementation of diversion programmes, including a lack of understanding of restorative justice; a lack of training; a lack of personnel and facilities; and a lack of funding.¹⁹⁷

Division 5 of the Child Care, Protection and Justice Act of Malawi sets out a framework for diversion that is aimed at preventing the child's entry into the criminal justice system. Diversion can only occur if the child admits responsibility for the alleged offence; the child understands his or her right to remain silent; there is sufficient evidence to prosecute the child; the diversion process has been explained to the child and his parent, guardian or appropriate adult; and – if such a person is available – if that person consents to the diversion.¹⁹⁸ Section 116 regulates the establishment of Child Panels, which will develop and administer diversion programmes. Every diversion programme must comply with the minimum norms and standards for diversion as set out in Section 114 of the Act. Each magisterial district must have a Child Panel consisting of a member from the faith community, local government, chiefs, teachers and health workers. Section 118 includes victim-offender mediation or restorative justice processes as diversion options, which will be facilitated by probation officers.

The Child Rights Act of Sierra Leone provides two forums for informal or quasi-judicial resolution of disputes before matters are escalated to the Family Courts. Section 47 requires that Child Welfare Committees be established in each village. Child Welfare Committees oversee the general wellbeing of children, including through deciding on appropriate foster parents for children in need of care, counselling and advising a child alleged to have committed a minor misdemeanour,

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¹⁹⁵ See <http://www.youthalive.org/justice.html> accessed on 29.09.2011.

¹⁹⁶ *Supra*.

¹⁹⁷ UNICEF 'Profiles of Existing Diversion Programmes in Nigeria, September 2006, available at www.unicef.org/nigeria/ng_publications_diversion.pdf. accessed on 29.09.2011.

¹⁹⁸ Section 112 of the Child Care, Protection and Justice Act of Malawi.

providing advice to parents about the best short- and long-term interests of the child, and mediating maintenance matters and any other complaints or concerns raised by an adult or child about the welfare of a child in the village. The Act stipulates that there must be a girl child and a boy child in every committee as full members.¹⁹⁹

Section 71 regulates the establishment of Child Panels in each district, the function of which is explicitly to mediate any criminal or civil matter concerning a child. A Child Panel may mediate in any civil matter concerned with the rights of the child and parental duties.²⁰⁰ When there is a complaint that a child committed an offence, a Child Panel shall seek to facilitate reconciliation between the child and any person offended by the action of the child. A child appearing before a Child Panel must be cautioned as to the implications of his action, and to the fact that similar behaviour may subject him to the juvenile justice system. The Child Panel may impose a community guidance order on a child with the consent of the parties concerned in the matter, which means placing the child under the guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of his or her reform. Finally, a Child Panel may in the course of mediation propose an apology, restitution to the offended person, or service by the child to the offended person.²⁰¹

Part XIII of the Children's Protection and Welfare Bill of Namibia details the restorative justice and diversion options available to deal with a child in conflict with the law, and provides for, among other things, family group conferencing,²⁰² open village healing circles²⁰³, and victim-offender mediation. The chapter creates Village Child Justice Committees that are responsible for facilitating all restorative justice processes at the village level. In respect of all matters civil and criminal, Article 14 of the Child Protection Code provides as follows:

The aim of this Code is to encourage mediation, imposition of penalties and non-discrimination, and to involve departments and establishments whose remit includes children in the process of taking decisions and choosing measures compatible with the best interest of the child.

¹⁹⁹ Section 47 to 54 of the Child Rights Act of Sierra Leone.

²⁰⁰ *Ibid* Section 74.

²⁰¹ *Ibid* Section 75.

²⁰² Section 127.

²⁰³ Section 128

²⁰⁴ Section 129.

²⁰⁵ Section 124 and 125.

The Child Protection Code of Tunisia provides for alternative forms of dispute resolution to avoid the child entering the criminal justice system, but also provides safeguards to ensure the child is not overly burdened or disproportionately punished. The Child Protection Officer assigned to the child’s case may at any time during the proceedings attempt mediation.²⁰⁶ Article 116 of the Child Protection Code provides as follows:

The request for mediation shall be presented to the Child Protection Officer responsible for reaching a settlement between the various parties concerned. The mediation instrument shall be drawn up in a document signed and submitted to the competent court, which shall approve it and render it enforceable to the extent that it does not prejudice public policy and morality. The court may revise the settlement decision on the basis of the best interest of the child where it considers that the decision is not sufficiently balanced, or is in danger of overburdening the child.

The fact that a country does not have formal legislation regulating diversion does not prohibit the initiation of pilot projects or programmes. For example, diversion and restorative justice processes are now included and regulated in the South African Child Justice Act 75 of 2008. Despite the fact that the Child Justice Act only came into operation on 1 April 2010, diversion and restorative justice processes have been used in South Africa since the 1990s, when family group conferencing and victim offender conferencing projects were started as diversion options for child offenders.²⁰⁷ Similarly, in Namibia, the Prosecutor General delegated the power to divert a child offender to prosecutors countrywide. Caution must be used, though, as the lack of formal regulation or recognition of diversion may lead to ‘highly discretionary diversion’.²⁰⁸

²⁰⁶ Section 113 to 117 of the Tunisia Child Protection Code.

²⁰⁷ Skelton AM, ‘Restorative Justice in Child Justice Systems in Africa’ in Sloth Nielsen J (ed), Children’s Rights in Africa (2008), Ashgate p 134 – 138; and Odongo G, ‘The Impact of International Law on Juvenile Justice’, in Sloth Nielsen J (ed), Children’s Rights in Africa (2008), Ashgate p 154.

²⁰⁸ *Ibid.*

The South African Children's Act 38 of 2005 encourages mediation and conciliation in civil matters between parents before parents resort to litigation. As a general principle, Section 6(4)(a) states that:

In any matter concerning a child—

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided;

In respect of care and contact disputes in particular, Section 33(2) states that:

If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

In addition, Part 3 of Chapter 4 of the Children's Act, dealing with the Children's Court, provides several alternative dispute forums, such as lay forum hearings, family group conferences and pre-trial meetings, to try and settle matters out of court.

E. CHILDREN AND THE POLICE

1. Police should ensure that child-friendly processes are followed from apprehension/arrest through to the conclusion of the investigation.

1.1 Basic concepts

- 1.1.1 The police official is usually the first official with whom a child in conflict with the law will come into contact. The police official must treat the child with dignity and in a manner appropriate to their age and maturity.
- 1.1.2 The police official must explain to the child what his or her rights are and what the next steps of the legal process will be. This must be done in child-friendly language, and, as far as possible, in the child's vernacular.
- 1.1.3 The parents of the child must be notified without delay that the child is in police custody, and must be asked to come to the police station.
- 1.1.4 There should be a mechanism at the police station for the release of the child into the care of the parent or guardian, at least in the case of minor offences or where the child poses no risk to the community.
- 1.1.5 A child who has been taken into custody should not be questioned in respect of the crime or asked to sign a statement about the crime except in the presence of the child's lawyer or parent, or, if no parent is available, a suitable adult whom the child trusts.

1.1.6 Police must ensure that children are not detained together with adults, and that girls are detained separately from boys, with the exception of children being held together with their parents.

1.1.7 Police officials must respect the privacy and vulnerability of child victims and witnesses, and ensure that further harm or trauma due to the investigation is minimised.

1.2 International law, children and the police

1.2.1 Rule 10.1 of the Beijing Rules (1985) provides that a child's parents or guardian shall be notified immediately of the apprehension of a child, or, where this is not possible, within the shortest possible time thereafter. Rule 10.3 states that contact between police and a child offender shall be managed in such a way as to respect the legal status of the child, promote the wellbeing of the child, and avoid harm to him or her, with due regard to the circumstances of the case. Rule 12.1 indicates that in order best to fulfil their functions, police officers who frequently or exclusively deal with child offenders shall be specially instructed and trained, and in large cities, special police units should be established for that purpose.

1.2.2 The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes do not have provisions that deal specifically with the role of the police, but offer strongly worded guidelines that ensure: that all professionals working with children ensure that children are



treated in a caring and sensitive manner throughout the process; that children are treated as individuals with their own needs, wishes and feelings; that interference in the child's private lives is kept to a minimum; that further hardship is to be avoided through interviews being conducted by trained professionals; and that all interactions with the child are to be conducted in a child-sensitive manner and in a suitable environment, using language the child understands.²⁰⁹ Guideline 19 states that child victims and witnesses, their parents, and their legal representatives must – from the point of first contact with the justice process and throughout it – be promptly and accurately informed of all relevant information pertaining to the case.

1.3 Contextual analysis

Specialisation in the police is not easy to achieve in developing countries. With child

offenders, it is difficult to know which police official will encounter a child suspect, and thus there is little option but to train all police officials about how to deal appropriately with child suspects (though placing specialised units or dedicated officers at police station level is entirely possible). Specialisation is more feasible when training officers to deal with child victims; and when dealing with sexual offence cases, specialisation is highly advisable.

1.4 Examples

Historically, legislation has not distinguished between police treatment of adults and children. In Namibia, the provisions of the Criminal Procedure Act 51 of 1977 apply to children and adults alike. The Namibian Child Justice Bill aims to limit the power of the police to arrest and detain children. The trend is to include detailed guidelines for the police on how children who come into the criminal justice system, as victim or as offender, must be treated.²¹⁰

Section 90 of the Malawi Child Care, Protection and Justice Act states:

90. A police officer or any person effecting the arrest of a child shall ensure that–

- a) the child has been informed of his or her rights in relation to the arrest or detention and the reasons for the arrest in a matter appropriate to the age and understanding of the child;*
- b) there is no harassment or physical abuse of the child;*
- c) the child is provided with medical attention where necessary;*
- d) there is no use of handcuffs, except if the child is handcuffed to the arresting police officer or the person effecting the arrest;*

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²⁰⁹ Guideline on Justice for Child Victims and Witnesses of Crime, Guidelines 10-14.

²¹⁰ Shulz S, 'Restorative justice: The Child Justice Act', in Ruppel OC (ed), *Children's Rights in Namibia* (2009), Macmillan Education, Windhoek p 310.



- e) *the child is not mixed with adults;*
- f) *the child is provided with nutritious food;*
- g) *child is accompanied by a parent, guardian or appropriate adult as far as it is practicable to do so;*
- h) *a parent, guardian or appropriate person is informed immediately after the arrest if such parent, guardian or appropriate person was not present at the time of the arrest;*
- i) *in serious offences, the child is provided with legal representation; and*
- j) *the child has been provided with counselling services where possible.*

Under the terms of Sections 91 to 97 of the Child Care, Protection and Justice Act, the officer in charge of a police station has specific duties in respect of a child offender to ensure the child is referred to a probation officer for assessment, and to ensure the child's attendance at the preliminary enquiry. Furthermore, Section 98 of the Child Care, Protection and Justice Act 22 of 2010 provides that the officer in charge of the police station must release the child on bail if the child cannot be brought before a child justice court for preliminary enquiry within 48 hours, unless: the crime is homicide or an offence punishable with a sentence of imprisonment exceeding 7 years; the child must be removed from undesirable circumstances; or release will defeat the ends of justice.

Of particular interest in the Malawi Child Care, Protection and Justice Act is that the officer in charge of the police station has the power to caution and discharge a child offender with or without conditions. This may only happen if the offence committed was not serious, if there is sufficient evidence to prosecute the child, and if the child voluntarily admits responsibility for the offence.²¹¹

Section 57 of the Child Rights Act of 2007 of Sierra Leone establishes the Family Support Unit (FSU) of the Sierra Leone Police as the division responsible for dealing with alleged juvenile offenders and child victims. The vision of the FSU is to create a violence-free society by eradicating or minimizing the incidence of sexual and domestic violence, child abuse and child offending in Sierra Leone.²¹²

²¹¹ Section 94 of the Child Care, Protection and Justice Act 22 of 2010.

²¹² Defence for Children International, *Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone*, Sierra Leone, Fall 2010 p 31.

Section 18 of the South African Child Justice Act 75 of 2008 requires the police officers who interact with child offenders to hand the children a written warning. As far as possible this must be done in the presence of their parents, failing which the warning must be given to the child and a copy served to the parent as soon as possible.

When handing a written notice to the child, parent, appropriate adult or guardian the police official must:

- (a) (i) *inform them of the nature of the allegation against the child;*
- (ii) *inform them of the child's rights;*
- (iii) *explain to them the immediate procedures to be followed in terms of this Act;*
- (iv) *warn the child to appear at the preliminary enquiry on the date, and at the time and place specified in the written notice and to remain in attendance; and*
- (v) *warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary enquiry on the date and at the time and place specified in the written notice and to remain in attendance; and*
- (b) *immediately but not later than 24 hours after handing the written notice to the child, notify the probation officer concerned.*

These duties are set out in even more detail in the Regulations to the Child Justice Act. Regulations 16, 17 and 18 set out the duties of the police described in section 18 in minute detail. Regulation 16 is discussed above, in the section on access to information.

The South African Minister of Police has issued National Instruction 2 of 2010 to ensure that police members treat children in conflict with the law in accordance with the child justice system. The National Instruction provides greater clarity and guidance on new concepts in the Child Justice Act. In respect of the treatment of child offenders it states as follows:

(2) Treatment of a child suspected of having committed an offence

- (a) *offence, the member must, if circumstances permit, introduce himself or herself to the child and, if a parent, guardian or an appropriate adult is present, to such person.*
- (b) *The member must explain to the child that he or she is being suspected of having committed the offence. The member must explain this to the child in a language that he or she understands, preferably in the mother tongue of the child, using plain and simple vocabulary to assist the child to have a better understanding of the child justice system and the procedure that will be followed in his or her case. The child must understand that this is a very serious matter.*
- (c) *The member must realise that the child may be overwhelmed and scared in the presence of the Police and must therefore patiently explain the nature of the offence and the procedure that will be followed in his or her case. The member must give enough detail about the matters and allow sufficient time so that the child can absorb the information. The member must encourage the child to ask questions and respond to the questions and satisfy himself or herself that the child understands the information and explanation given. The member may elicit responses from the child by asking questions in order to ensure that he or she understands the information.*

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- (d) A member must not humiliate or intimidate a child and must at all times treat and communicate with the child in a manner which is appropriate to the age, maturity and stage of development of the child. The younger the child, the more patient and understanding the member must be while communicating with the child. The level of schooling of the child and the child's ability to read and write are also relevant when considering what would be an appropriate manner in which to treat and communicate with the child.
- (e) The member must take steps to protect the privacy and dignity of the child and must ensure that discussions with the child and his or her parent or guardian or an appropriate adult (whether at the police station or at the crime scene) take place in private, out of sight and hearing of other persons.²¹³

In addition, the Minister of Police also issued a National Instruction on Sexual Offences, setting out the manner in which child victims of sexual abuse must be treated by the police. When a child victim reports a sexual offence, a member of the Family and Child Services unit must be contacted to investigate the matter. A police officer must secure the child's safety, explain the necessity of a medical examination to the child, and explain the procedure and the child's rights to the child and the parent, guardian or appropriate adult.²¹⁴ The National Instruction also provides the guidelines for taking the statement of a child victim.²¹⁵

Countries that have not embarked on law reform have instituted pilot projects and special programmes relating to the reception and treatment of child offenders when they first come into contact with the police. In Angola, UNICRI initiated a programme, with the assistance of the Italian government, to support the Angolan Ministry of Justice in establishing a child-oriented juvenile justice system, on one hand offering a range of alternative and educational measures at the pre-trial, trial and post-trial stages, and on the other establishing a sound child protection system.²¹⁶

In Zambia, police are still operating under the extremely outdated 1953 Juveniles Act, which provides almost no indication of how the police must deal with child offenders. Zambian law sets the following

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²¹³ National Instruction on Children in Conflict with the Law, South African Government Gazette No.3350B, 2 September 2010.

²¹⁴ Instruction 9, 10 and 19 of the National Instruction on Sexual Offences, Government Gazette No 31330, November 2008.

²¹⁵ Annexure F to the National Instruction on Sexual Offences, Government Gazette No 31330, November 2008.

²¹⁶ Sloth-Nielsen J and Gallinetti J, *Child Justice in Africa* (2004), Community Law Centre p 155.

basic requirements, as described in sections 58 to 60 of the Juveniles Act, with regard to the arrest and detention of a child or young person immediately after arrest:

- Detention should be avoided unless the police officer believes release will defeat the ends of justice
- If detention cannot be avoided, children must be kept from adults, and girls must be placed under the care of a female officer
- The child should as far as possible be kept in a place of safety
- The officer in charge of the police station must show to the court why detention is required (Section 60), and why the child could not have been released on own recognizance or police bond.

However, it is reported that these provisions are widely disregarded, and that police officers overuse the proviso that release may defeat the ends of justice: children are routinely held in police cells and not in places of safety.²¹⁷ In July 2001, the Inspector General of Police issued orders that designated staff members to the handling of children's cases, and also designated three police stations as Arrest Reception and Referral Centres.²¹⁸

In Lesotho, the Lesotho Mounted Police Service established the Child and Gender Protection Unit. The Unit provides a user-friendly reporting environment and ensures confidentiality for child victims who come to the police station to report sexual offences.²¹⁹ They also do education work at schools to inform children of their rights.

The Law of the Child Act of Tanzania makes it the responsibility of the police to investigate all cases of breach or violation of the rights of the child within their area of local government authority.²²⁰ Section 101 states that where a child is apprehended, with or without a warrant, and cannot be brought immediately before a Juvenile Court, the officer in charge of the police station to which he is brought shall—

- unless the charge is one of homicide or any offence punishable with imprisonment for a term exceeding seven years;*
- unless it is necessary in the interest of that child to remove him from association with any undesirable person; or*

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²¹⁷ Muntingh L, Report on Child Justice in Zambia with reference to UNICEF supported projects (2005), UNICEF p 23.

²¹⁸ *Ibid* page 43.

²¹⁹ See <http://www.letsema.org/organisation/child-and-gender-protection-unit-lmps/> as well as [www.unicef.org/evaluation/files/lesotho_2006\(2\).doc](http://www.unicef.org/evaluation/files/lesotho_2006(2).doc).

²²⁰ Section 94(1).

(c) unless the officer has reason to believe that the release of that child would defeat the ends of justice,

(d) release such child on a recognisance being entered into by himself or by his parent, guardian, relative or without sureties.

Under the terms of Section 102 the police officer shall make arrangements for preventing a child in custody – as far as practicable – from associating with an adult charged with an offence, unless the adult is a relative.

The Children's Act of Uganda requires that the police ensure that the parent or guardian of a child that has been arrested is present at the time of the police interview.²²¹ Section 89(5) requires that the police inform a probations officer, social welfare officer or authorized person when a parent or guardian cannot be immediately contacted, as soon as possible after the child's arrest, so that he or she can attend the police interview. Section 89(2) provides for the police to be able to dispose of matters concerning child offenders without formal proceedings. The section states that:

The police shall be empowered to dispose of cases at their discretion without recourse to formal hearings in accordance with the criteria to be laid down by the Inspector General of the Police.

The Child Act of South Sudan contains detailed provisions as to how and when a child may be arrested. Section 139 states as follows:

- 1) *The police shall arrest a child only if there is reasonable suspicion that the child has committed a serious crime and no alternative to arrest can be found.*
- 2) *The effect of arrest, for the purposes of this Act, is that a child arrested is in lawful custody until lawfully discharged or released from such custody.*
- 3) *The purpose of arrest is to allow for a preliminary enquiry into a case.*
- 4) *An arrest shall be made with due regard to the dignity, wellbeing and special status of the child.*
- 5) *Subject to the provision of subsection (4) above, in effecting arrest, the police officer arresting the child shall use the minimum force which is reasonably necessary and proportional in the circumstances.*
- 6) *The police officer arresting or attempting to arrest a child under this section is not justified in using deadly force that is intended or is likely to cause death or serious bodily harm to such a child.*

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²²¹ Section 89(4).

- (7) Where a police officer uses deadly force against a child, he or she must prove that—
- a) the force is immediately necessary for the purposes of protecting himself or herself, any person lawfully assisting him or her, or any other person from eminent death or serious bodily harm;
 - b) there is a substantial risk that the suspect will cause eminent death or serious bodily harm if the arrest is delayed; or
 - c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause serious bodily harm.
- 8) Upon the arrest of a child, his or her parents or guardians shall immediately be notified of such arrest.

Section 141 of the Child Act of South Sudan provides for alternatives to arrest of a child, and stipulates the duties of the police under the circumstances that the alternatives are used:

- 1) Alternatives to arrest shall include the following —
 - (a) requesting the child in a language that the child understands to accompany the policeman or policewoman to the place where an assessment can be made;
 - (b) written notification to the child and, if available, the parents, guardian or family of that child to appear for an assessment at a place and on a date and at a time specified in the written notice;
 - (c) the issuance of a citation by a policeman or policewoman at the place of arrest, to be noted in the case diary of the police officer concerned, informing the child to appear for an assessment at a specified date, time and place; provided that, the police officer must as soon as is reasonably possible notify the Social Worker of the issuance of such citation;
 - (d) accompanying the child to his or her home, where a written notice can be given to the child and parents, guardian or family;
 - (e) opening a case diary for the purposes of consideration by the Public Prosecution Attorney as to whether the matter should be set down for the holding of a preliminary enquiry or whether the child should be charged; and
 - (f) summoning the child to appear at assessment at a place on a date and time specified in the summon upon application by an attorney to the Court.
- 2) Where an alternative to arrest has been effected, a child must be required to appear for an assessment within twenty four hours of such alternative having been carried out, or in the case of the issuing of summons, within 24 hours of the summons being served on the child.

The Juvenile Justice Law of Somaliland provides for special police to attend to matters concerning child offenders and child victims. This force is called the Children's Police.²²² Under the terms of Section 47, a child under the age of 15 years shall not be arrested for an offence unless his safety requires it, and where a child is arrested for security reasons, his or her parents or guardian shall be notified as soon as possible. Furthermore, Section 52 requires that the police immediately report an arrest of a child to the Office of the Attorney General and the competent Children's court, and should such report not be made within 24 hours of the arrest of the child, the Children's Police must, at the preliminary hearing, provide a written report explaining such a failure.

The Juvenile Justice Act of Ghana provides in Section 12(1) for the police to be able to issue a caution instead of arresting a juvenile if it is in the best interests of the juvenile. However if an arrest has to be effected, Section 4 states that :

- (1) *An arrest of a juvenile shall be made by touching the body of the juvenile unless the juvenile submits to custody by word or action.*
- (2) *Where the circumstances require, the person effecting the arrest may forcibly confine the juvenile but the use of force shall be reasonable in the circumstances.*
- (3) *Not with standing subsection (2), an arrest shall be made with due regard to the dignity and wellbeing of the juvenile and minimum force shall be used by the person effecting the arrest.*

Section 5 makes provision for the arrest of the child without a warrant under the following circumstances:

- (2) *A police officer may arrest a juvenile without warrant where the juvenile*
 - (a) *commits an offence in the presence of the officer;*
 - (b) *obstructs a police officer in the execution of police duties;*
 - (c) *has escaped or attempts to escape from lawful custody;*
 - (d) *is in possession of any implement adapted or intended to be used for the unlawful entry of a building without reasonable explanation for the possession.*
- (3) *A police officer may arrest without warrant a juvenile upon reasonable grounds of suspicion that the juvenile*
 - (a) *has committed an offence;*
 - (b) *is about to commit an offence where,*
 - (i) *there is no other way of preventing the commission of the offence; or*
 - (ii) *the surroundings indicate that an offence could be committed; and*
 - (c) *is wilfully obstructing the police officer in the execution of police duties.*

²²² Section 23 of the Juvenile Justice Law of Somaliland.

F. CHILD-FRIENDLY JUSTICE DURING JUDICIAL PROCEEDINGS

1. Access to court and the judicial process

1.1 Basic concepts

- 1.1.1 As bearers of rights, children should have recourse to remedies effectively to exercise their rights or act upon violations of their rights. The domestic law should facilitate, where appropriate, the possibility of access to court for children who have sufficient understanding of their rights, and of the use of remedies to protect these rights, based on adequate legal advice.
- 1.1.2 Any obstacles to access to court, such as the child's lack of capacity to litigate or the cost of the proceedings or the lack of legal counsel, should as far as possible be ameliorated by the law.
- 1.1.3 Prescription laws/statutes of limitations should not be a complete bar to young people who have recently reached majority from taking cases relating to when they were children, and the relevant laws should accordingly be reviewed.

1.2 International law and children's access to court

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children observes that:

Access to justice, though increasingly recognised as an important strategy for protection the rights of vulnerable groups, and thus for fighting poverty, rarely takes children into account.

Thus the Secretary-General states that work on justice for children is to be integrated into the framework for strengthening the rule of law, and specifies the following:

*A public and civil society that contributes to strengthening the rule of law and holds public officials and institutions accountable, should target children's participation in such efforts in order to ensure that children are involved from the onset in identifying legal matters that are important to them.*²²³

1.3 Contextual analysis

Around the world, children have taken cases to court, assisted by adults, to protect or advance their rights. Examples at the international level include the following cases brought to the European Court of Human Rights: Anthony Tyrer, a 15-year-old boy who took a case against the United Kingdom, complaining that a court on the Isle of Man had sentenced him to corporal punishment²²⁴; and Naim Bouamar,¹⁷ who took Belgium to court because he had been held in an adult prison.²²⁵ In some

²²³ UN Guidance note of the Secretary-General (2008) Guideline B.4.

²²⁴ *Tyrer v United Kingdom*, judgment of 25 April 1978, Series A, no 26.

²²⁵ *Bouamar v Belgium*, judgment on 29 February, 1988, Series A, no 129. See also more recent judgments in cases brought by children: *Selcuk v Turkey* no 21768/02, 10 January 2006 and *DG v Ireland* no 39474/98, 16 May 2002 ECHR 2002-III.



instances, cases have been brought to the European Court by parents, on behalf of their children.

In Africa, there have also been complaints brought to regional bodies on behalf of children.

The African Committee of Experts on the Rights and Welfare of the Child received a communication from the Institute for Human Rights and Development and the Open Society Justice Initiative regarding the discrimination of Kenya against Nubian children. The Committee had its first ever

hearing on the merits of a communication on 22 March 2011. In its landmark decision, issued on 25 March 2011, the Committee found that Kenya was violating the rights of the Nubian child to non-discrimination, nationality, and protection against statelessness. According to the Committee, Kenya fell foul of Articles 3, 6(3) and 6(4) of the ACRWC.²²⁶

There have also been developments in child rights litigation at national level in some African countries. Skelton has described 'a fledgling child rights jurisprudence in Eastern and Southern Africa'.²²⁷

1.4 Examples

The general rules applicable to the jurisdiction of courts should never be an absolute bar preventing access to justice. Article 74 of the Child Protection Code of Tunisia provides as follows:

The territorial jurisdiction of the court to be seized shall be determined by the habitual place of residence of the child, his parents or legal guardian or by the scene of the offence or by the location where he has been placed, whether on a temporary or permanent basis. The court so seized may divest itself of jurisdiction in favour of another court of the same order, where the interest of the child so requires.

Section 37(2) of the Child Rights Act 2007 of Sierra Leone states that any person, including a child, concerned about the welfare of children or any child in the community may communicate his concern to a Village Child Welfare Committee. The Child Protection Act also allows the child to approach the Family Court to request a variation or termination of previous orders made by the Family Court or to obtain an order confirming parentage of a child.²²⁸

Section 9 of the Child Care, Protection and Justice Act 22 of 2010 of Malawi empowers a child to claim maintenance in his or her own name. A further provision of the Malawi act that facilitates better access to justice is that guardianship may be dealt with at the level of the Children's Court. Division 3 of the Child Care, Protection and Justice Act allows the Children's Court to hear guardianship matters.

In Zimbabwe, guardianship disputes between biological parents remain within the exclusive jurisdiction of the High Court. However, when a child is orphaned and no testamentary guardian is appointed, then guardianship may be decided by the Children's Court.²²⁹

²²⁶ Report available at <http://www.ihrda.org/2011/03/kenya-violates-african-children%E2%80%99s-charter-as> accessed on 29/09/2011.

²²⁷ Skelton A 'The development of a fledgling child-rights jurisprudence in Eastern and Southern Africa' (2009) 9(2) *African Human Rights Law Journal* 482.

²²⁸ Section 68 and 83 of the Child Protection Act of 2007.

²²⁹ Section 9 of the Guardianship of Minors Act, Chapter 5.08 of the Laws of Zimbabwe.



In Lesotho, the Children's Court may appoint a guardian on an application by any person in situations where the child's parents are no longer living or cannot be found and the child has no guardian and there is no other person having parental responsibility for him/her; or where the parents of the child are no longer living together.²³⁰

Legislation may also directly state that children have capacity and standing to approach the courts. Under the terms of Section 37(12) of the Lesotho's Children's Protection and Welfare Act, a child may apply to the Children's Court to amend, vary or revoke any order made by the Children's Court. A child may also apply for an order confirming parentage.²³¹

Similarly, the South African Children's Act 38 of 2005 states that as follows²³²:

14. Access to court.—*Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.*

15. Enforcement of rights.—*(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*

(2) The persons who may approach a court, are:

- (a) A child who is affected by or involved in the matter to be adjudicated;*
- (b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons; and*
- (d) anyone acting in the public interest.*

²³⁰ Section 211 of the Children's Protection and Welfare Act, enacted on 8 June 2011.

²³¹ *Ibid* at Section 202(1)(a).

²³² There are several sections in the South African Children's Act 38 of 2005 that clearly state that children have a right to take matters to court such as applications to amend, vary or terminate parental responsibilities and rights agreements and parenting plans in terms of Sections 22 and 34 respectively.

Examples in case law

In the case of *Motlogelwa v Khan*²³³, the High Court of Botswana made reference to the CRC and the ACRWC in relation to a case where custody was in dispute and the best interests of the child was considered to be the paramount principle, even in the context of customary law.

In *RM and Another v Attorney General*²³⁴ the child, assisted by the children's rights organisation CRADLE, brought an application to the High Court in Nairobi, Kenya to have the statutory differentiation between children born in a marriage and children born outside the marriage declared unlawful, as it breached the principle of non-discrimination entrenched in Kenya's Constitution and the international and regional children's rights instruments. Although the case did not succeed, the reason for failure was not based on the lack of standing of the child or the organisation.

In South Africa, the matter of *Minister for Education v Pillay*²³⁵ dealt with a child's right to wear traditional jewellery as a way of expressing and exercising her culture and religion. The wearing of a nose stud was not allowed in the school's code of conduct, and the school refused to make an exception for the child. The child's mother brought the case in her own name on behalf of the child. The Constitutional Court found that it would have been preferable if the child brought the case in her own name. The Constitutional Court of South Africa stated as follows:

*Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In **Christian Education South Africa v Minister of Education** this court held in the context of a case concerning children that their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.*

²³³ 2006 2 BLR 147 HC.

²³⁴ *RM (suing thro' next friend) JK Cradle (The Children's Fund) Millie and Gao v the Attorney General Nairobi*, Civil Case 1351 of 2002.

²³⁵ 2008 (1) SA 474 (CC) 494E-G paragraphe [56].

2. Legal representation

2.1 Basic concepts

- 2.1.1 Children facing court proceedings as offenders or in civil proceedings should have access to free legal aid.
- 2.1.2 Children should have the right to their own, separate legal assistance where there is, or could be, a conflict of interest with their parents. This could be through a curator/guardian *ad litem*, or through an independent legal representative for the child.
- 2.1.3 Children should be considered to be fully-fledged clients, and lawyers representing their interests must ascertain the views and wishes of the child, provide the child with appropriate legal advice regarding the possible impact of those views and wishes, and thereafter make the views and wishes known to the court.

2.2 International law and legal representation of children

- 2.2.1 The Beijing Rules (1985) (Rule 15.1) provide that:

Throughout the proceedings the juvenile shall have the rights to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

- 2.2.2 With regard to children in the care and protection system, Guideline 56 of the

Guidelines for Children in Alternative Care provides as follows:

Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceeding.

2.3 Contextual analysis

Legal representation is a very important protection for children as child offenders, and ideally also for other children who are or may be deprived of their liberty, such as children in need of care and protection, or unaccompanied foreign children. Such assistance should be provided by the legal aid system.

There is growing awareness of the need for children to be legally represented in Family Law matters where there may be a conflict of interest between the child and the parent or caregiver.

The discussion of access to justice earlier in this document indicates the importance of children being able to access legal representation to be able to bring cases to advance or protect their rights. Civil society organisations and lawyers acting *pro bono* will often provide this kind of service.

2.4 Examples

Botswana's Children's Act 8 of 2009 states:

95. (1) A party in a matter before a children's court may appoint a legal representative of his or her own choice and at his or her own expense.

(2) The State shall provide counsel to represent any person involved in proceedings before a children's court if that person cannot afford the cost of legal representation.

Lesotho's Children's Protection and Welfare Act is expansive in that it allows legal representation for the child in any legal proceedings, and provides details on how the legal representative must conduct the representation. Sections 151 and 152 provide that:

151. (1) A child has a right to legal representation in any legal proceedings.

(2) A legal representative appearing on behalf of a child under this Act must-

(a) allow the child to give independent instruction on the manner in which the case is to be conducted;

(b) clearly explain the child's rights and responsibilities in relation to any proceedings under this Act and which the child is involved to him/her in language which he/she can understand;

(c) encourage informed decision-making by explaining possible options and the consequences of decisions;

(d) promote diversion where appropriate whilst ensuring that the child is not unduly influenced to acknowledge guilt;

(e) ensure that all time periods or delays throughout the case are kept to the minimum and that remands are limited in number and period of time between each remand;

(f) ensure that the child is able to communicate in his/her language, and in cases where the legal representative does not speak the same language as the child, ensure that an interpreter is used who should also be apprised of these principles; and

(g) become acquainted with the local options for diversion and alternative sentencing.

152 (4) Where a child exercises his/her right to have a legal representative appointed at state expense, a social worker, police officer, probation officer or prosecutor or officer presiding in the Children's Court must request the Legal Aid to represent the child.

In terms of Section 28(1)(h) of the South African Constitution, every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child if substantial injustice would otherwise result. In the matter of *Legal Aid Board v R and Another*²³⁶, the High Court found that Section 28(1)(h) of the Constitution meant that Legal Aid South Africa could assign legal representation to a child without consulting the parent or guardian in matters where it would be appropriate to have a separate legal representative for the child. In high conflict disputes between parents who are litigating about the care and custody of a child, there may be a conflict of interests between the interests of the child and the interests of the parents, and it is therefore necessary that a legal representative be appointed by a neutral body, and that such legal representative must remain uninfluenced by the parents. It is therefore appropriate that an independent body that provides legal representation at state expense appoints a legal representative for the child without consultation with or approval from the parent.

Under the terms of the Child Care, Protection and Justice Act of Malawi, the Magistrate must not only inform children about the right to legal representation, but must also discuss the availability of legal representation at state expense, and must assist the child and his parent, guardian or appropriate adult in obtaining the legal representation. In general, Section 126 of the Child Care, Protection and Justice Act allows the child, parent, guardian or appropriate adult to appoint a legal representative of choice, but then the duty to pay legal fees rests with the parent, guardian or appropriate adult. The child must be allowed to give instructions in the language of their choice, with an interpreter if necessary.

In a criminal matter, if the parent, guardian or appropriate adult cannot afford to instruct a legal representative, the state must provide a legal representative at state expense if the child is remanded in detention pending trial; if it is likely that the child is going to be deprived of his/her liberty as a punishment; or if it is in the best interest of the child in the opinion of the enquiry magistrate. The magistrate presiding over the preliminary enquiry must request legal aid immediately when it becomes necessary, and must refer the matter him or herself. In care and protection proceedings, if a legal representative has not been appointed for a child by the parent, guardian or appropriate adult, a legal representative must be provided at state expense if, in the opinion of the court, it is in the best interests of the child, and the parent, guardian or appropriate adult cannot afford the services of a legal representative.²³⁷

Section 3(5) of the Children and Young Persons Act 44 of Sierra Leone affords children the basic right to have an advocate present in the courtroom during their trial; however, there is no provision in domestic law for the right to receive free legal representation.²³⁸ Under the terms of the Child Rights Act, Section 81 states that 'a child shall have a right to legal representation at a Family Court'.

²³⁶ 2009 (2) SA 262 (D).

²³⁷ Section 127 of the Child Care, Protection and Justice Act of Malawi.

²³⁸ Defence of Children International, *Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone*, Sierra Leone, Fall 2010 p 46.

The Law of the Child Act of Tanzania ensures in Section 99(f) that a child has a right to next of kin and representation by an advocate in a juvenile court. The Child Act of South Sudan also incorporates the child's right to legal representation, and states in Section 175(3) that it must be explained to a child in his or her own language that he or she may choose a legal representative at his or her own expense, or the child will be provided with legal representation by the Ministry of Legal Affairs and Constitutional Development.

Under the terms of the Children's Act of Uganda a child has a right to legal representation in the Family and Children's Court.²³⁹

Section 175(3)(b)(vi) of the Child Act of South Sudan provides for the right to legal representation for a child offender, and states that it is the social worker's responsibility to inform the child of the right to be provided with legal representation by the Ministry of Legal Affairs and Constitutional Development.

In Kenya, section 186(b) of the Children's Act requires if that a child accused of having infringed any law is unable to obtain legal assistance, he or she must be provided with government assistance in preparation and presentation of his or her defence. Furthermore, the Children (Practices and Procedure Parental Responsibility) Regulations of 2002 state that a child shall be afforded legal representation out of public funds for a matter concerning contested parental responsibility.²⁴⁰

Section 77 of the Children's Act of Kenya states that 'where a child is brought before a court in proceedings under the Children's Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.' Furthermore, Section 79 states that, where a child is not represented by an advocate, a court may appoint a guardian *ad litem* for the purposes of the proceedings and to safeguard the interest of the child. Section 160 of the Children's Act states that, in matters concerning adoption, the court shall appoint a guardian *ad litem* for the child pending the hearing and determination of the application.

²³⁹ Section 16(1)(e) of the Children's Act of Uganda.

²⁴⁰ Regulation 17.

Section 174 of the Criminal Procedure Code of Ethiopia²⁴¹ states that the court shall appoint an advocate to assist the young person accused of an offence where no parent, guardian or other person *in loco parentis* appears to represent the young person; or where the young person is charged with an offence punishable with rigorous imprisonment exceeding ten years, or with death.

The Juvenile Justice Law of Somaliland provides in Section 9 that a child that is deprived of liberty has a right to have legal counsel and to communicate with his or her legal advisers freely.

The Children's Act of Ghana states that a child has a right to legal representation at a family tribunal, and shall have a right to give an account and express an opinion at a family tribunal.²⁴² The Juvenile Justice Act of Ghana provides in Section 22 that a juvenile has a right to have a parent, guardian, close relative or probation officer present at the proceedings, as well as the right to legal representation, which includes the right to Legal Aid.²⁴³

3. Right to be heard and express views

3.1 Basic concepts

3.1.1 Courts and other forums should respect the right of children to be heard. The means used for this purpose should be adapted to the child's level of understanding and ability to communicate, and should take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

3.1.2 Due weight should be given to the child's views and wishes, in accordance with his or her age and maturity.

3.1.3 The right to be heard is a right of the child, not a duty of the child.

3.1.4 A child should not be precluded from being heard solely on the basis of

age. Whenever a child takes the initiative to be heard in a case that affects him or her, the court or forum should not, unless it is in the child's best interests, refuse to hear the child, and the court or forum should listen to his or her views and wishes on matters concerning him or her in the case.

3.1.5 Children should be provided with all necessary information on how to use the right to be heard effectively. However, it should be explained to them that their right to be heard and to have their views taken into consideration will not necessarily determine the final decision of the court or forum.

3.1.6 Judgements and court rulings affecting children should be explained to them in language that they can understand.

²⁴¹ Proclamation 185/1961.

²⁴² Sections 38(1) and (2) of the Children's Act of Ghana. Under the terms of Section 35 a family tribunal shall have jurisdiction in matters concerning parentage, custody, access and maintenance of children, and shall exercise any other powers as are conferred on it by this Act or under any other enactment.

²⁴³ Section 22(b)-(d) of the Juvenile Justice Act of Ghana.

3.2 International law on the child’s right to participate in judicial proceedings

- 3.2.1 Article 12(2) of the CRC explicitly provides for the child to be given the opportunity to be heard in any judicial or administrative proceedings that affect them, either directly or through a legal representative or an appropriate body. Article 4.2 of the ACRWC contains similar wording, but adds that the child may be heard as a party to the proceedings.
- 3.2.2 The Guidelines on Justice for Child Victims and Witnesses sets out, in chapter VIII, a heading relating to ‘The right to be heard and to express views and concerns’. Guideline 21 states that professionals must ensure that child victims are consulted on relevant issues, and that child victims and witnesses are enabled to express freely their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to testify, and their feelings about the outcome of the process.
- 3.2.3 The Guidelines for Children in Alternative Care (Guideline 6) state that decision-making on alternative care should take place through a judicial, administrative or other adequate and recognized procedure. The decision should be based on rigorous assessment on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians.

3.2.4 Article 13 of the Hague Convention on Civil Aspects of International Child Abduction creates an exception to the general rule of peremptory return of the child where the judicial or administrative body finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child’s views.

3.3 Contextual analysis

Participating in judicial proceedings is one of the most dynamic opportunities for children to participate. As their capacities evolve, they should be invited to play an increasing role in such processes, and their views and wishes should be given more weight. There is no specific age in international law at which a child is considered of sufficient age and maturity to participate in proceedings: this is a flexible standard, should be decided on a case-by-case basis, and as a general rule a child who is willing to participate should be permitted to do so. The court can decide after hearing the views and wishes of a child how much weight to place on them (and should have received training in this regard). Children sometimes do not want to participate, particularly where they feel torn by conflicting interests and are afraid. Unless their testimony is vital to the conviction of a perpetrator, or vital to their own defence, they should not be forced to testify against their will, and even then only when professionals have weighed their best interests.

There are many ways in which children can participate. While criminal trials offer few alternatives to giving testimony in a courtroom, the atmosphere can be made

child-friendly, and procedures can be modified to protect witnesses. Civil proceedings sometimes allow a child to be represented by a legal representative without the child being present at court,

which can be positive if the child does not want direct participation but still wants his or her views and wishes to be known to the court.

3.4 Examples

The Constitution of Mozambique sets out the rights of children in Section 47. One of the rights explicitly included is that ‘children may express their opinion freely on issues that relate to them according to their age and maturity’.

The general principles of the Lesotho Child Protection and Welfare Act include the child’s right to express his/her opinion freely, and to have that opinion taken into account in any matter or procedure affecting them. The opinion of the child shall be given due weight in accordance with the age and maturity of the child.²⁴⁴

Furthermore, in custody and access disputes, the views of the child are an essential factor in determining what would be in the child’s best interests.²⁴⁵ An area in which it is of particular importance to obtain the views of the child is the consideration of an application for the adoption of the child.

Section 59(4) of the Child Protection and Welfare Act of Lesotho ensures that the child’s views are taken into account in adoption proceedings, in that a child that is ten years or older must consent to his own adoption, and in the event that the child is younger than ten, then his/her opinion shall be taken into consideration.²⁴⁶

Section 19(2) of the Children’s Act 5 of 2006 of Zimbabwe states that:

19(2) A court holding an enquiry in terms of subsection (1)—

(a) may hold such enquiry in the absence of the child or young person;

(b) may order the child or young person to be removed during the whole or part of such enquiry;

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²⁴⁴ Section 13 of the Children’s Protection and Welfare Act of Lesotho.

²⁴⁵ Ibid Section 205(3) and (4)(c). The Child Care, Protection and Justice Act 22 of 2010 of Malawi contains the following similar provision:

8(4) Child custody application:

In addition to the matters under subsection (3), a child justice court shall consider

(a) the views of the child;

²⁴⁶ Similarly, Section 233 of the South African Children’s Act 38 of 2005 states that:

A child may be adopted only if consent for the adoption has been given by (c) the child, if the child is (i) 10 years of age or older; or (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent.

(c) shall order the child or young person to be removed during any part of such enquiry when his presence becomes unnecessary and undesirable.

(d) shall, wherever it is possible and appropriate to do so, seek the opinion of the child or young person on the matter under enquiry.

The above section applies in terms of the Children’s Courts. A more unusual example is to be found in the Zimbabwe High Court Rules, 1971, as amended:

276. In a case which affects the custody of a child the judge hearing the case may, if he thinks fit, interview the child concerned privately in his chambers.

Section 31 of the Child Rights Act of Sierra Leone emphatically states that ‘no person shall deprive a child capable of forming views of the right to express an opinion, to be listened to and to participate in decisions which affect his welfare, the opinion of the child being given due weight in accordance with the age and maturity of the child’. In addition, Section 73(5) provides that a Child Panel shall permit a child to express his opinion and participate in any decision that affects the child’s welfare commensurate with the level of understanding of the child concerned. A similar provision applies in respect of Family Court, where the child shall have a right to give an account and express an opinion.²⁴⁷

The right to participate and express views can only be respected when children are armed with the correct information to ensure that the child understands the proceedings, and if there are procedural measures allowing the child an opportunity to express his or her views. In order to allow the child to participate effectively, the Children’s Act 8 of 2009 of Botswana goes further than just stating that the child has a right to participate. In Section 8(2) it states that:

(2) For the purpose of ensuring that the child is able to participate in the decision-making process, the child shall be given –

- (a) adequate information, in a manner and language that the child understands, about –*
 - (i) the decision to be made,*
 - (ii) the reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,*
 - (iii) the ways in which the child can participate in the decision-making process, and*
 - (iv) any relevant complaint or review procedures;*
- (b) the opportunity to express the child’s wishes and views freely, according to the child’s age, maturity and level of understanding;*

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²⁴⁷ Articles 81(2) de la Sierra Leone pour les droits des enfants.



- (c) any assistance that is necessary for the child to express those wishes and views;
- (d) adequate information regarding how the child's wishes and views will be taken into account;
- (e) adequate information about the decision made and a full explanation of the reasons for the decision; and
- (f) an opportunity to respond to the decision made.

Article 10 of the Child Protection Code of Tunisia, which falls within the general principles of that Code (Title 1) provides:

The present code guarantees the child the right freely to express his or her views which should be taken into consideration in accordance with his or her age and degree of maturity. To that end the child will be given a special opportunity to express his or her views and to be heard in all legal procedures and with regard to all social and educational measures concerning his or her situation.

That provision has, since its entry into force, been implemented several times, through the intervention of the Child Protection Officers, the family court, the juvenile court, and the juvenile tribunal. Indeed, Article 35 requires the Child Protection Officer and the family court, in the event of a notification, to listen to the child and to take his or her views into consideration. Article 90 calls on the juvenile court to hold discussions with all parties concerned, in the child's presence, on the procedures to be taken, with the child having a free hand, commensurate with his or her degree of maturity, to discuss such measures.²⁴⁸

The Children's Act of Uganda provides for the right of a child in care to express his or her views, and states in Section 12(3) that in relation to foster care, the probation officer's report shall also include the views and feelings of the child concerning the placement; and where there are problems they shall be discussed and resolved openly with the foster family. Section 47(5) provides that the views and wishes of a child must be taken into consideration in adoption proceedings if, in the view of the court, the child is able to understand the proceedings. Furthermore, where the child is 14 years or older, the consent of such a child must be obtained unless it is impossible for him or her to express his or her wishes.²⁴⁹ General Principle 3 of the First Schedule to the Children's Act requires that the court or any other person shall have to seek out the ascertainable wishes and feelings of the child in any matter concerned with the child, which shall be considered in light of his or her age and understanding.

²⁴⁸ Committee on the rights of the child Consideration of reports submitted by states parties Under article 44 of the convention Third periodic report of the states parties due in 2004 Tunisia CRC/C/TUN/3 10 November 2008.

²⁴⁹ Section 47 of the Children's Act of Uganda.

In Kenya, Section 4(4) of the Children’s Act states that:

...in any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion and the opinion shall be taken into account as may be appropriate , taking into account the child’s age and the degree of maturity.

Furthermore, Section 76(3)(a) requires the court to have particular regard to the ascertainable feelings and wishes of the child concerned, with reference to the child’s age and understanding, before making an order in relation to a child.

Section 17(2) of the Child Act of South Sudan provides that:

Every child has the right to express his or her opinion freely and to have the opinion taken into account in any matter or procedure affecting him or her.

Section 17(3) states that the opinion of every child shall be given due weight in accordance with his or her age and maturity.

The Law of the Child Act of Sudan includes in Section 11 that a child shall have the right of opinion, and no person shall deprive a child capable of forming views of the right to express an opinion, to be listened to, and to participate in decisions that affect his or her wellbeing.

The Hague Convention on the Civil Aspects of International Child Abduction includes as acceptable grounds to refuse the return of the child to his or her country of habitual residence the possibility that the child may object to the return.²⁵⁰ In order to provide the child with an opportunity to raise his or her objections and to have a mechanism through which the child may be heard, the Children’s Act 38 of 2005 of South Africa provides as follows:

278. Powers of court–

(3) The court must, in considering an application in terms of this Chapter for the return of a child, afford that child the opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child.

279. Legal representation—A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction.

²⁵⁰ Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction.



4. Avoiding undue delay

4.1 Basic concepts

- 4.1.1 In all proceedings involving children, the urgency principle should be applied to provide a speedy response and to protect the best interests of the child, while also respecting the rule of law.
- 4.1.2 In family law cases (for example custody or parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on the family relations.
- 4.1.3 When necessary, judicial authorities should consider the possibility of taking provisional decisions, to be monitored for a certain period of time, for later review in any case of non-compliance.
- 4.1.4 In accordance with the law, judicial authorities should have the possibility to take decisions which are immediately enforceable in cases where this would be in the best interests of the child.

4.2 International law and avoidance of undue delay

- 4.2.1 The UNCRC provides in Article 37 that a child deprived of liberty shall have prompt access to legal assistance, and in Article 40(b) the child's right 'to have the matter determined without delay by a competent and impartial authority or judicial body'. The ACRWC, article 17, states that children will be informed promptly of charges against them, and

'shall have the matter determined as speedily as possible'.

- 4.2.2 The Beijing Rules, Rule 10.2, emphasise that when a child has been apprehended, the issue of release will be considered without delay.
- 4.2.3 The Guidelines on Justice in Matters involving Child Victims and Witnesses, in Guideline 30(c), directs that professionals should:

...ensure that the trial take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited.

- 4.2.4 The Hague Convention on the Civil Aspects of International Child Abduction is based on the notion of 'prompt return' of a child who has been unlawfully taken to or retained in a country that is not the child's habitual residence. The proceedings should commence within one year of the unlawful abduction. Expeditionness is a key principle and all Hague Convention matters should be considered urgent.²⁵¹

4.3 Contextual analysis

Time passes slower for children than it does for adults, and a child caught up in judicial proceedings for a year or two will feel the burden of that delay acutely. Children want to get on with their lives and return to

²⁵¹ Du Toit C, 'The Hague Convention on the Civil Aspects of International Child Abduction', in T Boezaart (ed), Child Law in South Africa (2009), Juta: Claremont.

normality.²⁵² It is self evident that delay of proceedings involving children deprived of their liberty is particularly egregious, and these cases must be prioritised on a court's roll.

Child victims and witnesses will have their anxiety prolonged if there is a long delay between the incident and the trial, particularly as therapy may be delayed. Furthermore, the child may forget the details of the incident, and may have difficulty in testimony due to delay. Children caught up in care and protection or family law proceedings also suffer from delay, and

in this instance one caregiver may gain advantage over another prospective caregiver through the delay.

In care and protection proceedings, the concept of permanency also plays a role in determining how long processes can be allowed to drag on. Although matters pertaining to the care of children must be thoroughly investigated and sincere attempts at reunification must be made, there comes a time at which the child needs a permanent solution, and this should be recognised by the law.²⁵³

4.4 Examples

One of the cornerstone provisions of the South African Children's Act 38 of 2005 is Section 6(4)(b), which states as follows:

In any matter concerning a child—

(b) a delay in any action or decision to be taken must be avoided as far as possible.

De même, l'article 146 de la Loi du Lesotho sur la protection et le bien-être de l'enfant demande au tribunal pour enfants ou à tout autre tribunal agissant en vertu des dispositions de la présente loi, de finaliser tous les procès des enfants accusés aussi rapidement que possible et les tribunaux doivent de même s'assurer que les détentions provisoires soient limitées en nombre et en durée entre les renvois. Un tribunal autre que le tribunal pour enfants statuant en vertu des dispositions de la présente loi doit s'assurer que la priorité soit accordée aux procès des enfants accusés dans les rôles de ce tribunal.

²⁵² Turkovic K 'Elements for European guidelines on child-friendly justice with particular focus on children's access and place in criminal justice system', in Council of Europe, *Compilation of texts related to child-friendly justice* (2009), Directorate General of Human Rights and Legal Affairs: Strasbourg. Page 36: '[W]e are well aware of the negative effects delays have on children. They cause anxiety, children cannot 'move on' with their lives, therapy may be delayed, there is an effect on the child's memory'.

²⁵³ For a discussion of permanency planning see Gallinetti J and Loffel J, 'Foster care', in Davel CJ and Skelton AM (eds), *Commentary on the Child Care Act* [Revision service 2, 2010], Juta: Claremont, 12-25 to 12-27.

Generally, delay is avoided by stating clearly in legislation that children's cases may only be remanded for a short, specified period of time:

Section 107 of the Malawi Child Care, Protection and Justice Act states that the Child Justice Court may adjourn for a maximum of 7 days.

Section 155 of the South African Children's Act 38 of 2005 allows an adjournment of 14 days in care and protection matters. In criminal matters, a child justice court must conclude all trials of children as speedily as possible, and must ensure that postponements in terms of this Act are limited in number and in duration. If a child is in detention in prison, a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 14 days at a time. If the child is in detention in a child and youth care centre, a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 30 days at a time. Finally, if the child is not detained awaiting trial, then a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 60 days at a time.²⁵⁴

Section 171(3) of the Child Act of South Sudan states that each case involving a child shall be prioritized and handled as expeditiously as possible from the outset, without any unnecessary delays.

The Law of the Child Act of Tanzania states in Section 103 that the police officer shall not bring a child to the court unless an investigation has been completed or the offence requires committal proceedings. Section 103(2) requires that where a child is brought before the Juvenile Court for any offence other than homicide, the case shall be disposed by that court on that day.

The Children's Act of Uganda requires that every case be dealt with expeditiously and without unnecessary delay.²⁵⁵ General Principle 2 of the First Schedule to the Children's Act obliges any court of law to consider the general principle that any delay in determining the question before it is likely to be prejudicial to the welfare of the child. In relation to matters concerning children who are accused of having infringed the law, Section 99(2) states as follows:

...where a case of a child appearing before the Family and Children's Court is not completed within three months after the child's plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

²⁵⁴ Section 66 of the Child Justice Act 75 of 2008.

²⁵⁵ Section 99(1) of the Children's Act of Uganda.

The Children’s Act of Ghana states in Section 19 that:

- (3) *If after investigation it is determined that the child has been abused or is in need of immediate care and protection, the Department shall direct a probation officer or social welfare officer accompanied by the police to remove the child to a place of safety for a period of not more than seven days.*
- (4) *The child shall be brought before a family tribunal by the probation officer or social welfare officer before the expiry of the seven day period for an order to be made.*

The Juvenile Justice Law of Somaliland requires that any child deprived of liberty has the right to a prompt appearance before the court.²⁵⁶ In terms of Section 53, an arrested child shall be brought to a competent Children’s Court within 48 hours, and, where the 48 hours expire on a day that is not a court day, the child shall be brought before the court on the next first court day. Section 66 of the Juvenile Justice Law also states that the children’s judge may postpone the proceedings of a preliminary hearing for a period not exceeding 48 hours if it is not against the interests of the child to do so.

Rule 12(1) of the Child Offender Rules²⁵⁷ of Kenya states that matters concerning children in conflict with the law should be handled expeditiously. Furthermore, matters in the Children’s Courts must be finalised within three (3) months of plea, failing which they will be dismissed and the child will not be liable. In relation to serious cases before courts superior to the Children’s Court, the maximum period for remand is six (6) months, after which the child shall be released on bail. In the event that the matter is not completed within twelve (12) months from date of plea, the case will be dismissed and the child shall be discharged without any further proceedings.

Section 63(2) of the Children’s Act of Kenya emphasises that a child shall be brought before court without delay. However, it does not indicate a specific time frame within which this must take place. Section 76(2) of the Children’s Act, which is one of the general principles with regard to proceedings in the Children’s Court, states that a court shall have regard to the general principle that any delay in determining the question before it is likely to be prejudicial to the child. In relation to children in need of care and protection, Section 120 of the Children’s Act states that the authorised officer must bring the matter before the Children’s Court without delay. Section 186(c) of the Children’s Act also requires that a matter concerning a child accused of having infringed any law be determined without delay.

²⁵⁶ Section 9 of the Juvenile Justice Act of Somaliland.

²⁵⁷ Fifth Schedule to the Children’s Act of Kenya.

5. Organisation of the proceedings, child-friendly environment and child-friendly language

5.1 Basic concepts

- 5.1.1 In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have.
- 5.1.2 Cases involving children should be dealt with in non-intimidating and child-sensitive settings.
- 5.1.3 Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved.
- 5.1.4 Language appropriate to children's age and level of understanding should be used.
- 5.1.5 When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity.
- 5.1.6 Children should be allowed to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person.
- 5.1.7 Child-friendly interview methods, such as video or audio recording or pre-trial hearings *in camera*, should be used, and laws should be reviewed to allow these to be considered admissible evidence.
- 5.1.8 Children should be protected, as far as possible, against images or information that could be harmful to their welfare. In deciding on disclosure to the child of images or information that could possibly be harmful to them, the judge should seek advice from other professionals, such as psychologists and social workers.
- 5.1.9 Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.
- 5.1.10 As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.
- 5.1.11 As far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law, for care and protection proceedings, and for cases involving child victims and witnesses.
- 5.1.12 Special measures and necessary adaptations should be made for children with disabilities.

5.2 International law and child-friendly proceedings

5.2.1 The UNCRC provides that, as a general rule, the parents of child offenders must be permitted to be present at their court appearances.²⁵⁸ The Beijing Rules state that:

*...the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express himself or herself freely.*²⁵⁹

5.2.2 The Guidelines on Justice in Matters involving Child Victims and Witnesses provide detailed procedures for how children can be protected from hardship during the justice process, including court preparation and continuity planning, avoidance of delay, child-sensitive procedures such as modified court rooms, and recesses during testimony.²⁶⁰ Where possible within the domestic law, children should testify out of sight of the perpetrator, and should be protected during cross-examination.²⁶¹

5.3 Contextual analysis

Court proceedings can be daunting and confusing for adults, and much more so for children. At a workshop entitled *A child-friendly justice system: Protecting children during civil/criminal proceedings* that was held in Toledo, USA on March 2009, various principles and actions were identified in order to adapt legal systems to children, with a particular emphasis on the role of the courts. It was noted that these improvements should apply to all children, whether victims, witnesses or perpetrators. Many of the basic concepts listed previously in this paper were included in the recommendations.²⁶² While physical arrangement of the courtroom, waiting rooms and other rooms where children meet with professionals can be made more child-friendly through furnishing and colour and the discarding of official court robes, the 'atmosphere of understanding' is most likely to be created by well-trained professionals who know how to talk and listen to children.

²⁵⁸ CRC Article 40(2)(b)(iii).

²⁵⁹ Beijing Rules, Rule 14.2.

²⁶⁰ Guidelines on Justice for Child Victims and Witnesses, Guideline 30.

²⁶¹ *Ibid* Guideline 31.

²⁶² Jaffe P 'Feedback on Workshop no 3 on "A child-friendly justice system: Protecting children during civil/criminal proceedings' ' in Council of Europe *Compilation of texts related to child-friendly justice (2009)* Directorate General of Human Rights and Legal Affairs: Strasbourg, at page 92.

5.4 Examples

Several sections of the Malawi Child Care, Protection and Justice Act place emphasis on the fact that professionals must deal appropriately with children.

Section 88 reminds officials that they are dealing with a child when dealing with child offenders or children in need of care and protection, and stipulates that they must take steps to remove such children from undesirable environments and make sure the children are placed in circumstances where there is provision of nutrition, education and training. Officials must also remember to comply with the rights of all children as set out in the CRC.

The guidelines for the police for arrest set out in Section 90 include protection from abuse, the provision of medical services, a prohibition on the use of handcuffs and detention of a child with adults, and insurance that the police contact the parent or guardian or appropriate adult immediately after arrest.

Children are often not able to afford bail, and Section 98(2) ensures that monetary payments are not a bar to obtaining bail. Similarly, no child may be excluded from a diversion option on account of an inability to pay a fee or charge required for such a programme.²⁶³

Where there is an adult co-accused, the adult co-accused may not be present at the preliminary enquiry. As a general rule the child must be tried separately from the adult, in the child justice court, unless there are compelling reasons for joinder, and then there must be a formal application for joinder. If the application is successful then the matter is transferred to the court in which the adult is tried.²⁶⁴

Section 145 sets out the requirements that must be complied with to ensure that the child justice court is child-friendly during criminal and care and protection proceedings. This includes the requirements that the proceedings must be informal, no technical language should be used, court personnel and legal representatives should not wear professional uniforms or robes, and the court must take regular breaks.

²⁶³ Section 114 of the Child Care, Protection and Justice Act of Malawi.

²⁶⁴ Section 106(1) and Section 136 of the Child Care, Protection and Justice Act of Malawi.

The Child and Gender Protection Unit of the Lesotho Mounted Police Service have acquired mobile offices that are separate from the police office, to facilitate more confidential and child-friendly interviews, which also encourages reporting of offences.²⁶⁵

In respect of the conduct of proceedings in children’s court, the Children’s Protection and Welfare Act has the following provisions:

142 (2) All proceedings conducted in the Children's Court must be held in camera and the privacy of the child concerned and other child witnesses, subject to the provisions of section 149, must be protected at all times.

...(5) The children must be permitted to speak in their own language with the assistance, where necessary, of an interpreter and the presiding officer must ensure that they are addressed in language that they understand.

...(8) In cases involving children in conflict with the law, no handcuffs, leg-irons or other restraints may be used when a child appears in the Children's Court, unless an imminent danger exists that the safety of any person may be endangered if such restraints are not used.

Domestic legislation in Sierra Leone does not expressly recognize the child’s right to an interpreter. However, Section 8 of the Children and Young Persons Act 44 gives juveniles the right to have the substance of the alleged offence explained to them in ‘simple language’.²⁶⁶

Section 3(1) of the Children and Young Persons Act 44 provides for a separate juvenile court, except where the child or young person is jointly charged with an adult. Under this provision, children who are jointly charged with adults lose any special consideration for their rights, except concerning sentencing. Section 53 of the Child Rights Act requires that the proceedings of a child welfare committee investigating whether a child is in need of care and protection must be informal and must involve the child in looking for solutions, in accordance with the child’s age and ability. Sections 76 to 82 of the Child Rights Act regulate the establishment of Family Courts specialising in the care and protection of children and providing a child-friendly environment in which to hold the enquiries.

²⁶⁵ See <http://www.letsema.org/organisation/child-and-gender-protection-unit-lmps/> as well as [www.unicef.org/evaluation/files/lesotho_2006\(2\).doc](http://www.unicef.org/evaluation/files/lesotho_2006(2).doc).

²⁶⁶ Defence for Children International, *Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone*, Sierra Leone, Fall 2010, p 49 – 50.

The Child Act of South Sudan has detailed provisions aimed at protecting a child accused of committing an offence, and ensuring a child-friendly process for such a child. Section 172 states that:

- (1) *Every child accused of committing an offence or involved in legal proceedings in any manner; such a child reporting an offence or reporting himself or herself as a victim of an offence shall be subject to the following considerations—*
 - (a) *shall be presumed innocent until duly proved guilty according to law;*
 - (b) *shall be informed at the time of arrest in a language that he or she understands and in detail of the charge against him or her, and if appropriate, through his or her parents or guardians;*
 - (c) *shall be entitled to the assistance of a free interpreter if he or she cannot understand the language used;*
 - (d) *shall not be compelled to give testimony or confess guilt;*
 - (e) *shall be interviewed only in the presence of a parent, guardian or other authorized person;*
 - (f) *shall have access to legal counsel for the preparation and presentation of his or her defence;*
 - (g) *shall have the right to defend himself or herself in person under conditions of equality;*
 - (h) *shall have the matter determined, where a case has not been diverted by a Court, in the presence of legal counsel and according to the principles of a fair and just trial;*
 - (i) *shall have the matter determined in his or her presence and in the presence of parents or guardians unless the presence of parents or guardians would be detrimental to the case;*
 - (j) *shall have the chance to examine hostile witnesses on his or her behalf under conditions of equality; and*
 - (k) *may have any decisions and measures imposed in consequence thereof reviewed by a higher independent and impartial authority or judicial body in accordance with the law.*
- (2) *No confession or admission of a child may be admitted as evidence in a Court where such confession or admission was made to a police officer unless a legal counsel or a parent or guardian of such a child was present at the time.*
- (3) *No evidence obtained at an identification parade may be admitted as evidence in a Court unless a legal counsel, parent or guardian was present at the time.*

The Child Act of South Sudan goes further and requires that in an investigation for an accused child:

...every case involving a child shall be determined in an individualized manner with due investigation into the background and circumstances in which the child is living, the intellectual, emotional, psychological and social development of a child, the material situation of his or her family, and the conditions under which an offence was committed.²⁶⁷

The Law of the Child Act of Tanzania states in Section 20 that one of the duties of the social welfare officer is to advise and counsel the child and his or her family, and to take all necessary steps to ensure that the child is not subject to harm. Section 108(2) of the Law of the Child Act allows the parents, guardian, relatives or social welfare officer attending to the child to assist the accused child in the conduct of his case, and in particular in the examination and cross-examination of witnesses, with prior consent of the court.

The Children (Charitable Children's Institutions) Regulations of 2005 to the Children's Act of Kenya state in Regulation 25 that institutions must be child-friendly. In particular, section 74 states that:

A Children's Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held, and no person shall be present at any sitting of a Children's Court except –

- (a) members and officers of the court;*
- (b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;*
- (c) parents or guardians of any child brought before the court;*
- (d) bona fide registered representatives of newspapers or news agencies;*
- (e) such other persons as the court may specially authorise to be present.*

Section 188 of the Children's Act states that the Children's Court shall have a setting that is child-friendly.

In Uganda, Section 16(1)(c) of the Children's Act states that proceedings in the Children and Family Court shall be as informal as possible, and shall be conducted by enquiry rather than by exposing a child to adversarial proceedings.

In terms of Section 22 of the Juvenile Justice Act of Ghana, a juvenile court must, at the commencement of proceedings, inform the child in a language that the child understands of the right to remain silent; the right to have a parent, guardian, probation officer or close relative present at the proceedings; the right to legal representation; and the right to legal aid.

Continued to next page...

²⁶⁷ Section 173 of the Children's Act of Sudan.



The Juvenile Justice Law of Somaliland also affords special consideration for children who are mentally disabled or unable to speak and who are deprived of their liberty. In terms of Section 9, such children shall have the right to have an expert to explain their needs and requirements.

Section 175 of the Criminal Procedure Code of Ethiopia states that where any evidence or comments are to be given or made which it is undesirable that the young person should hear, he or she shall be removed from the chambers while such comments or evidence are being given or made. Section 176(2) requires that the proceedings shall be conducted in an informal manner.

6. Evidence/ statements by children

6.1 Principes fondamentaux

- 6.1.1 Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals and, as far as possible, in an environment where the child feels comfortable.
- 6.1.2 When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.
- 6.1.3 The number of interviews should be as limited as possible, and their length should be adapted to the child's age and attention span.
- 6.1.4 Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, with regard to their age, maturity and level of understanding and any communication difficulties they may have.
- 6.1.5 Audio-visual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.
- 6.1.6 Direct contact, confrontation or interaction between a child victim or witness and alleged perpetrators should, as a general rule, be avoided unless it is requested by the child victim or witness.
- 6.1.7 Children should have the opportunity to give evidence in criminal cases not in the presence of the alleged perpetrator.
- 6.1.8 Rules on children giving evidence should be made less strict, such as through removing the requirement for oath or other similar declarations, or instituting other child-friendly procedural measures. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.
- 6.1.9 Interview and evidence protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.
- 6.1.10 With regard to the best interests and wellbeing of children, it should be possible for a judge to allow a child not to testify.

6.2 International law and evidence/statements of children

- 6.2.1 The CRC, in Article 2(b)(iv), declares that a child alleged as or accused of having infringed the penal law shall not be compelled to give testimony or to confess guilt, and shall have the right to examine or have examined adverse witnesses, and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.
- 6.2.2 The Guidelines on Justice in Matters involving Child Victims and Witnesses includes a number of provisions aimed at protecting children from hardship during the justice process. Guideline 31(a) aims to limit the number of interviews, statements and hearings through special procedures in the collection of evidence, such as the use of video recording. Guideline 31(b) directs professionals to ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect to the rights of the defence, from being cross-examined by the alleged perpetrator. It goes on to state that child victims and witnesses should be interviewed, and examination in court should be out of sight of the alleged perpetrators. Separate waiting rooms and private interview rooms should be provided at court.

6.3 Contextual analysis

With regard to child offenders, there is surprisingly little guidance in international law about special measures for their protection during the taking of statements and testifying in court. The UNODC draft model law on Juvenile Justice²⁶⁸ provides detailed protection in relation to the presence of a parent or a responsible adult during a police interview, the conditions for the interview (such as only during daytime), access to toilet and washing facilities, provision of food and water, and a rule that there should be no coercive interrogation. The protections required for the physical searching of a child, as well as the taking of intimate and non-intimate samples for evidence, are also included.

There appears to be a growing trend internationally towards creating mechanisms for the collecting of evidence and the leading of testimony with regard to child victims and witnesses. The European Court of Human Rights has noted that confronting the accused person can be a very difficult ordeal for a child victim, and has agreed that measures should be taken to protect victims, provided they are compatible with the appropriate and effective exercise of the rights of the defence.²⁶⁹ However, in subsequent cases, the court has found fault with processes where child victims were interviewed by police but the defendant's lawyers were not permitted to see the video or to put questions to the child.²⁷⁰ At the previously mentioned 2009 Toledo workshop 'A child-friendly justice system: Protecting child during civil/criminal proceedings', many of the protections listed in the

²⁶⁸ A draft Model Law on Juvenile Justice was drafted for the UNODC by Carolyn Hamilton, and was subjected to comment at an expert group meeting held in Vienna, 28-30 March 2011.

²⁶⁹ *S.N. v Sweden no 34209/96*, ECHR 2002-V.

²⁷⁰ *Bocos-Cuesta v the Netherlands no 54789/00*, 10 Nov 2005; *W.S. v Poland no 21508/02*, 19 June 2007.

'basic concepts' sections of this paper were supported, although there was some concern about whether audio or visual recording of interviews would be sufficient to validate

children's statements in court. In 2006 only 13 Member States of the Council of Europe allowed videotaped evidence.²⁷¹

6.4 Examples

The Namibian Combating of Rape Act 8 of 2000 includes protective provisions for children who are victims of rape and sexual abuse. Section 5 abolishes the cautionary rule in respect of a child's evidence.

The High Court of Namibia vulnerable witness project was initiated in October 2007 in the High Court in Windhoek. Section 158A of the Criminal Procedure Act was added through legislative amendment in 2003 and defines vulnerable witnesses, including children under 18 and/or persons against whom an offence of a sexual or indecent nature has been committed. On application by any party, including the witness, the court may order that special arrangements are made for the giving of evidence by the vulnerable witness, which may include rearrangement of the furniture in the courtroom, the presence of a support person, and/or giving evidence in a separate room via electronic media. The project entails the opening of a specially designed and well-equipped courtroom hearing cases involving vulnerable witnesses, which includes close-circuit cameras. The separate room is specially designed to put children at ease: the child can see the judge and hear all the legal representatives in the courtroom, and can be viewed by everyone present in the courtroom.²⁷²

The Lesotho Children's Protection and Welfare Act contains specific protective provisions to protect child victims when testifying:

Section 142(12): The presiding officer must protect a child offender and other child witnesses from hostile or intimidating cross-examination where such cross-examination is regarded by the presiding officer as being prejudicial to the wellbeing of the child or the fairness of the proceedings.

Section 150(1) Whenever proceedings involving children are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he/she testifies at such proceedings, the court may, subject to subsection (5), appoint a competent person as an intermediary in order to enable such witness to give evidence through an intermediary.²⁷³

²⁷¹ Turkovic K (2009) p 36.

²⁷² Silungwe AM, 'High Court of Namibia Vulnerable Witnesses Project', in Ruppel OC (ed), *Children's Rights in Namibia* (2009), Macmillan Education, Windhoek p 327 – 330.

²⁷³ Section 84 of the Children's Act 8 of 2009 of Botswana contains a similar provision, which states that the presiding officer in a children's court shall ensure that a child testifying or being cross-examined in any case before the court shall not do so in the presence of the perpetrator of the offence.

Section 170A(1) of the Criminal Procedure Act of South Africa ('Evidence through intermediaries'): states as follows:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

The correct constitutional interpretation and implementation of this section was considered in the matter of *Director of Public Prosecutions (DPP), Transvaal v Minister for Justice and Constitutional Development and Others*.²⁷⁴ In the Court's view, the object of this subsection is to protect child complainants in sexual offence cases, and other child witnesses, from undergoing undue mental stress and suffering that may be caused by testifying in court. The phrase 'undue mental stress and suffering' is not defined in the Criminal Procedure Act, and has been given a narrow interpretation by some courts. Providing for an intermediary through whom a child may give evidence, as the subsection does, is precisely intended to reduce to the minimum the degree of stress, and to create an atmosphere that allows a child to speak freely about the events that happened. Courts have come to accept that the giving of evidence in sexual offence cases exposes complainants to further trauma. It is this secondary trauma that Section 170A(1) seeks to prevent. This object is consistent with the principle that the best interests of children are of paramount importance in criminal trials involving child witnesses, and is therefore consistent with Section 28(2) of the Constitution.

It is important to note that the Court interpreted Section 170A(1) as not requiring that the child should first be exposed to undue mental stress or suffering before an intermediary may be appointed. Such an interpretation would be at odds with the objectives of both the subsection and Section 28(2) and also of Article 3(1) of the UN Convention on the Rights of the Child. What the subsection actually requires is that a child will be assessed prior to testifying in court to determine whether an intermediary is needed. Should the assessment reveal that an intermediary is required, the state must arrange for an intermediary to be present in court when the accused goes to trial. At the commencement of the trial, the state must then apply under section 170A(1) for the appointment of an intermediary. According to the Constitutional Court, this is the procedure that should be followed in all matters involving child complainants in sexual offence cases, and 'should become a standard pre-occupation of all criminal courts dealing with child complainants in all sexual offence cases'. In applying the best interests principle, judicial officers must consider how the child's rights and interests are, or will be, affected if the child testifies without the aid of an intermediary. If the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child in giving evidence. According to paragraph 19(e) of the UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, a court is obliged to draw the attention of the parent or guardian of the child victim to the availability of protective measures.

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²⁷⁴ 2009 (4) SA 222 (CC).



Moreover, the enquiry into the need for an intermediary should not be approached on the basis of a civil trial, which attracts a burden of proof. It is an enquiry that is conducted on behalf of the interests of a person who is not a party to the proceedings but who holds Constitutional rights (i.e. the child). What is required of the judicial officer is to consider whether, on the evidence presented and viewed in the light of the objectives of the Constitution and of Section 170A(1), it is in the best interests of the child that an intermediary be appointed.

Section 170A(1) gives judicial officers discretion whether to appoint intermediaries. The exercise of judicial discretion in the appointment of an intermediary allows a judicial officer to assess 'the individual needs, wishes and feelings' of each child and this, according to the Constitutional Court, conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child. In exercising the discretion, due regard must be given to the objective of Section 170A(1), which is to protect a child from undue stress or suffering that may arise from testifying in court.

Section 42(8) of the Children's Act of South Africa provides for the protection of children in proceedings in the Children's Court. It states that:

(8) The Children's Court hearing must, as far as practicable, be held in a room which-

- (a) is furnished and designed in a manner aimed at putting children at ease;*
- (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;*
- (c) is not ordinarily used for the adjudication of criminal matters; and*
- (d) is accessible to disabled persons and persons with special needs.*

The Children's Act further calls for the enactment of Rules that must be designed to avoid adversarial procedures, including rules concerning the appropriate questioning techniques for: children in general; children with intellectual or psychiatric difficulties; children with hearing or other physical disabilities that complicate communication; traumatised children; and very young children.²⁷⁵

The Law of the Child Act of Tanzania provides in Section 115(1) that where in any case or matter a child is called as a witness who does not, in the opinion of the court, understand the nature of the oath, the evidence may be received if in the opinion of the court, which opinion shall be recorded in the proceedings, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth. Section 115(2) allows the court, where it is satisfied and notwithstanding any rule or law of practice to the contrary, to convict an accused child on evidence received in terms of subsections (1), (3) and (4). Section 115(1) states that:

...where in any cause or matter a child called as a witness does not, in the opinion of court, understand the nature of an oath, the evidence may be received if in the opinion of the court, which opinion shall be recorded in the proceedings, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth.

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²⁷⁵ See Section 52.

Furthermore, section 115(3) states that:

Notwithstanding the provisions of this section, where in criminal proceedings involving sexual offences the only independent evidence is that of the child or victim of the sexual offence, the court shall receive the evidence and may after assessing the credibility of the child or victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict for reasons to be recorded in the proceedings, if the court is satisfied that the child is telling nothing but the truth.

Section 137 of the Child Act of South Sudan states that a child witness and victim shall be afforded protection where necessary, including protection from intimidation. Contrary to the liberal provision of the Law of the Child Act of Tanzania, Section 126 of the Code of Evidence Act 2 of 2006 of South Sudan provides that evidence of a child of seven years or younger is inadmissible on behalf of the prosecution in proceedings against an accused, and that an accused shall not be convicted on such evidence unless it is corroborated by other material evidence implicating him or her thereof.

The Juvenile Justice Law of Somaliland states that:

...it is not admissible to ask a child hostile questions during cross-examination and where the cross-examination is prejudicial to the well being of the child and against the fairness of the proceedings²⁷⁶.

Section 81 provides for the protection of a child offender who has an adult co-accused, and provides as follows:

81.1 Where a child and an adult are alleged to have committed the same offence, they are to be tried separately unless it is in the interests of justice.

81.2 The Children Court may upon request of the prosecution of the defense council or on its own motion order for joint trials.

81.3 The joint trial shall be held in the Children's Court.

²⁷⁶ Section 79 of the juvenile Justice Act of Somaliland.

G. CHILD-FRIENDLY JUSTICE AFTER JUDICIAL PROCEEDINGS

1.1 Basic concepts

- 1.1.1 The child's lawyer, guardian ad litem or legal representative (or other suitable professional in the case of child victim or witness) should communicate and explain the decision or judgment to the child in a language adapted to the child's level of understanding, and should give the necessary information on possible measures that could be taken, such as appeals.
- 1.1.2 National authorities should take all necessary steps to facilitate the execution of judicial decisions/rulings involving and affecting children without delay.
- 1.1.3 When a decision has not been enforced, children should be informed, possibly through their lawyer, guardian ad litem or legal representative, of available remedies.
- 1.1.4 Implementation of judgments by force should be a measure of last resort in family cases when children are involved.
- 1.1.5 After judgments in highly conflictual proceedings, guidance and support from specialised services should be offered, ideally free of charge, to children and their families.
- 1.1.6 Particular health care and appropriate social and therapeutic intervention programmes or measures for child victims of abuse should be provided, ideally free of charge, and children and their caregivers should be promptly and adequately informed of the availability of such services.
- 1.1.7 The child's lawyer, guardian or legal representative should have a mandate to take all necessary steps to claim for damages during or after criminal proceedings in which the child was a victim. Where appropriate, the costs could be covered by the state and recovered from the perpetrator. Victim compensation schemes should be considered.
- 1.1.8 Measures and sanctions for children in conflict with the law should always be constructive and individualised responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental wellbeing and development, and the circumstances of the case. Corporal punishment as a sentence should be outlawed.
- 1.1.9 If sentenced to a custodial sentence, which should be a last resort and for the shortest possible period of time, the conditions of prisoners aged below 18 years must take account of their age. Their right to education, vocational training, employment, rehabilitation and reintegration should also be guaranteed.
- 1.1.10 In order to promote reintegration into society, and in accordance with national law, criminal records of children should be non-disclosable on reaching the age of majority. Exceptions for the disclosure of such information can be permitted in cases of serious offences, and for reasons of public safety, such as when employment with children is concerned.

1.2 International law and child-friendly justice after proceedings

- 1.2.1 The CRC provides, in Article 40(2)(v), that if a child is found to have infringed the penal law, then he or she has a right to have that decision (as well as any decision on ‘measures’ or sentence) reviewed by a higher, competent, independent and impartial authority. Article 37(d) states that a child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty, and to a prompt decision on any action.
- 1.2.2 Rule 21.1 of the Beijing Rules states that the records of child offenders shall be kept strictly confidential and closed to third parties. Rule 21.3 provides that records of child offenders shall not be used in adult proceedings in subsequent cases.
- 1.2.3 When it comes to sentencing, Article 37 of the CRC is clear that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years. The UN Committee on the Rights of the Child General Comment No 10 has extended this to include all forms of life imprisonment, and clearly includes corporal punishment (as a sentence or in detention facilities) as cruel, inhuman or degrading treatment.
- 1.2.4 With regard to child victims and witnesses, the right to be informed

includes, at Guideline 20 of the Guideline on Justice for Child Victims and Witnesses of Crime, the right to be informed about prosecutorial decisions and about any post-trial development and the outcome of the case. Furthermore, the child victims and their parents must be informed about existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings, or through other processes. Chapter XIII of the Guidelines deals specifically with reparation, with Guideline 35 stating that child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Guideline 36 gives the go-ahead for restorative justice processes, provided that the proceedings are child-sensitive and respect the Guidelines. Finally, reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes, or damages ordered by courts in civil proceedings.

1.3 Contextual analysis

Child offenders who are convicted and sentenced should have the opportunity to take their cases to appeal and review. Many legal aid systems are weak when it comes to taking matters to appeal. Automatic review of the custodial sentences of child offenders should be considered.

Systems should be sought that allow for records to fall away automatically or to remain non-disclosable, and exceptions to this rule should be kept to a minimum. Sex offender registers add a further risk, and should not apply to crimes committed by child offenders, and particularly not to statutory rape.

With regard to sentences of children, African

countries must still work harder to reduce custodial sentences, although it is positive that many countries have capped the length of time for which a child may be sentenced. Nevertheless, some countries have sentences such as life imprisonment, or 'detainment at the President's pleasure'. In the European Court of Human Rights, this latter kind of indeterminate sentence was found by the majority not to be a violation of Article 3 of the European Convention.²⁷⁷ However, the court was not unanimous and the majority decision has been criticised.²⁷⁸ Corporal punishment has been done away with in many African states, but there remain a number of states in which this sentence is still on the statute book, and is still being utilised.

Whilst it is positive that international law recognises the possible use of restorative justice, this must always be in keeping with the Guidelines on Justice for Child Victims and Witnesses of Crime. In the African context there are practices pertaining to the payment of damages for sexual violation of girls, for girls becoming pregnant, for the abduction of girls for purposes of marriage, etc.;²⁷⁹ care should be taken to ensure that such practices do not result in girls being treated as 'belongings' that can be paid for if damaged. Nevertheless, the positive values and restorative intention of such practices should be examined, and girls' views about such practices should be canvassed.²⁸⁰

²⁷⁷ *V. v the United Kingdom judgment of 16 Dec 1999, no24888/94; T. v the United Kingdom judgment of 16 Dec 1999 no 24724/94.*

²⁷⁸ Council of Europe expert, Schmahl S, 'Existing International and European Standards: Meeting the needs of children', in Council of Europe, *Compilation of texts related to child-friendly justice* (2009), Directorate General of Human Rights and Legal Affairs: Strasbourg. The dissenting judgments in the case were penned by judges Pastor Ridreuejo, Ress, Makarczyk, Tulkens and Butkevych, who found that a sentence of detention for an indefinite period entails an enormous amount of stress and anxiety for any person.

²⁷⁹ Mwambene L and Sloth-Nielsen J, 'Benign accommodation? Ukhutwala, forced marriage and the South African Children's Act'. Conference paper presented at the Miller du Toit conference, March 2011.

²⁸⁰ Sloth-Nielsen J and Mezmur B, 'Surveying the research landscape to promote children's legal rights in an African context', 2007 *African Human Rights Law Journal*, 330, 335-336. This piece observes that 'human rights documents continually recognise that culture is an area that must be protected. However, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike a necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.'

1.4 Examples

Various countries have incorporated the principle that a probation officer's report must be obtained prior to sentencing a child.

Section 16 of the Children and Young Persons Act 44 of Sierra Leone explicitly incorporates the principle of the best interest of the child and the norms of international law, requiring that the court obtain 'information as to the character, antecedents, home life, occupation and health of a young person as may enable it to deal with the case in the best interests of the child or young person.'

In terms of section 155 of the Lesotho Children's Protection and Welfare Act, a Children's Court may not impose a sentence with a residential element on a child without having obtained a pre-sentence report.

Section 71(1) of the Child Justice Act 75 of 2008 of South Africa states:

- (a) *A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.*
- (b) *A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act or imprisonment, unless a pre-sentence report has first been obtained.*

As a general rule, the Malawi Child Care, Protection and Justice Act 22 of 2010 protects the child from labelling and stigmatization after a guilty finding, and promotes re-integration of the child into his or her community.²⁸¹ Section 86 states that:

The words 'finding of guilty' 'conviction' and 'sentence' shall not be used in respect of any child in proceedings in a child justice court or any other court, but in pronouncing the conviction against the child, the court shall record that the child is found to be responsible for the offence charged and, instead of sentencing the child, the court shall proceed to make an order upon such a finding in accordance with this Act.

Section 140 of the Child Care, Protection and Justice Act declares very boldly that:

...no child shall be imprisoned for any offence. Children who are found guilty of very grave offences must be sentenced to a reformatory.

²⁸¹ In terms of Section 101 of the Uganda Children's Act, the words 'conviction' and 'sentence' shall not be used in reference to a child appearing before a family court, and instead the words 'proof of an offence against a child' and 'order' shall be substituted for 'conviction' and 'sentence' respectively. A similar provision appears in Section 189 of the Children's Act of Kenya.

The court may refuse to make a finding against the child on condition that the parent or guardian pays compensation, damages, or costs, or provides security for the good behaviour of the child. However, the court may not impose a fine or compensatory damages or costs to be paid by the parents if the parent or guardian cannot afford to pay the fine, as this leads to the indefinite detention of children until the family can come up with the money. An alternative sentence should be imposed.²⁸²

Section 146(1) of the Child Care, Protection and Justice Act lists the various sentencing options available to the court, ranging from least restrictive to most restrictive. The list of competent sentences does not exclude the possibility of sending the child on a diversion programme. The child justice court must refer the sentencing of a child to the High Court for an order committing the child to a reformatory or diversion programme. Section 146(2) provides that no child under 14 may be sentenced to reformatory unless there is no fit person willing to undertake the care of the child or the court is satisfied the child cannot be dealt with otherwise.

Section 149 provides a general right of review and appeal to the High Court of Malawi against decisions made in the child justice court.

Corporal punishment is still a lawful sentence in Botswana²⁸³ and Zimbabwe²⁸⁴. Corporal punishment was recently banned in Lesotho, through Section 166(2) of the Children's Protection and Welfare Act:

No sentence of corporal punishment or any form of punishment that is cruel, inhumane or degrading may be imposed on a child.

In Kenya, the Children's Act states in Section 191(2) that no child offender shall be subjected to corporal punishment. Section 94(9) of the Children's Act of Uganda also prohibits the imposition of corporal punishment.

Similarly, corporal punishment in all its forms was banned in Tunisia. Article 319 of the Penal Code, as amended on 26 July 2010, makes it unlawful to use corporal punishment as a disciplinary measure in penal institutions and alternative care settings. Corporal punishment is also not available as a sentence in the Penal Code, Code of Child Protection or the Code of Criminal Procedure.²⁸⁵

Corporal punishment is unlawful as a sentence in Angola under the Criminal Code, the Court for Minors Act, and the Code of Procedure for the Court for Minors. It was banned in Chad under Act 07/PR/99 Concerning Criminal Procedure for Children 13-18. In Mozambique, Section 40 of the Law for the Promotion and Protection of the Rights of the Child makes corporal punishment unlawful as a sentence, and Section 64 explicitly prohibits corporal punishment as a disciplinary measure in child detention facilities.

²⁸² Section 1472 of the Child Care, Protection and Justice Act of Malawi.

²⁸³ Section 27(5) of the Children's Act 8 of 2009.

²⁸⁴ Section 7(6) of the Children's Act [Chapter 5:06] of Zimbabwe.

²⁸⁵ www.endcorporalpunishment.org/pages/progress/reports/ accessed on 22 September 2011.

Section 21 of the Child Act of South Sudan outlaws corporal punishment:

Every child has the right to be protected from torture, cruel; inhuman or degrading treatment or punishment, and in particular—

- (a) no child shall be sentenced to capital punishment or life imprisonment;*
- (b) no child shall be subjected to corporal punishment by chiefs, police teachers, prison guards or any other person in any place or institution, including schools, prisons and reformatories; and*
- (c) no child shall be subjected to a group punishment by chiefs, police, teachers, prison guards or any other person in any place or institution, including schools, prisons and reformatories.*

Examples in case law

Corporal punishment as a sentence was found unconstitutional by the South African Constitutional Court in *S v Williams*²⁸⁶ where the court, per Langa J, stated:

The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings²⁸⁷...

One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.²⁸⁸

Although the Juveniles Act of Zambia still refers to corporal punishment as a competent sentence for children, corporal punishment as a sentence in general was declared unconstitutional in the matter of *Banda v The People*. Article 15 of the Zambian Constitution protects people from torture, ill treatment and punishment that is cruel, inhuman and degrading. The court found that corporal punishment is in direct contradiction with this right, and declared it unconstitutional as a sentence for a criminal offence. The Zambia Civic Education Association has reported that corporal punishment is no longer imposed on children as a sentence.²⁹⁰

²⁸⁶ 1995 (3) SA 632 (CC).

²⁸⁷ At paragraph 45.

²⁸⁸ At paragraph 47.

²⁸⁹ (2002) AHRLR 260 (ZaHC 1999).

²⁹⁰ *Human Rights Violations in Zambia, Part III: Childs Rights' Situation, Shadow Report to the UN Human Rights Committee, OMCT (World Organisation Against Torture), July 2007.*



An unforeseen consequence of sentencing a child to reform school is very often that the child spends too long in detention while awaiting transfer to the designated school. The case of *S v Z and 23 others*²⁹¹ illustrates this problem as it occurred in the South African system. This case led to the development of an inter-sectoral protocol on the transfer and transport of children who have been sentenced to reform school, which is now included in the Child Justice Act National Policy Framework.²⁹²

The Lesotho Children's Protection and Welfare Act contains a similar provision in Section 166(3):

A child who has been sentenced to attend an approved school may not be detained in prison whilst awaiting designation of the place where the sentence will be served.

The imposition of prescribed minimum sentences on children was found unconstitutional in two countries:

In *Masinga v Director of Public Prosecution and others*²⁹³ the High Court of Swaziland found minimum sentences inconsistent with the Constitution of Swaziland, and in particular with the child's right to freedom from cruel, inhuman or degrading treatment or punishment.

In *Centre for Child Law v Minister of Justice and Constitutional Development and others*,²⁹⁴ the South African Constitutional Court found that prescribed minimum sentences violated children's right to detention as a measure of last resort and for the shortest appropriate time, and therefore declared the application of minimum sentences to any person below the age of 18 to be invalid.

²⁹¹ 2004 (1) SACR 400 (EC).

²⁹² Department of Justice and Constitutional Development, Child Justice Act, National Policy Framework, Government Gazette No 33461, 13 August 2010. See also Section 93 of the Child Justice Act 75 of 2008.

²⁹³ [2011] SZHC 58.

²⁹⁴ 2009 (6) SA 632 (CC).

2. Promoting other child-friendly actions

2.1 Basic ideas to be promoted

- 2.1.1.1 Increase research into all aspects of child-friendly justice
- 2.1.2 Exchange practice and promote co-operation in the field of child-friendly justice regionally and internationally.
- 2.1.3 Set up, or maintain and reinforce where necessary, information offices for children's rights, possibly linked to bar associations, welfare services, (children's) ombudsmen, non-governmental organisations (NGOs), etc.
- 2.1.4 Facilitate children's access to courts and complaint mechanisms, and further recognise and facilitate the role of NGOs and other independent bodies or institutions (such as children's ombudsmen) in supporting children's effective access to courts and independent complaint mechanisms, both at national and international level.
- 2.1.5 Consider the establishment of specialised services for children's cases.
- 2.1.6 Develop and facilitate the use by children and others acting on their behalf of the complaints mechanism under the African Charter on the Rights and Welfare of the Child, for the pursuit of justice and protection of rights when domestic remedies do not exist or have been exhausted.
- 2.1.7 Set up child-friendly, multi-agency and interdisciplinary centres for child victims and witnesses where children can be interviewed and medically examined for forensic purposes, comprehensively assessed, and given all relevant therapeutic services by appropriate professionals.

- 2.1.8 Set up specialised and accessible support and information services – such as electronic consultation, help lines and local community services– free of charge.
- 2.1.9 Ensure that all concerned professionals working in contact with children in justice systems receive appropriate support and training, and practical guidance, in order that they guarantee and implement adequately the rights of children, in particular while assessing children's best interests in all types of procedures involving or affecting children.

2.2 International law and the promotion of child-friendly ideas

- 2.2.1 The ACRWC includes, in Article 44, a 'communications' mechanism. This declares that the African Committee of Experts may receive communication from any person, group or non-governmental organisation recognised by the AU, by a member state, or by the UN. Any such communication can relate to any aspect of the ACRWC. The Committee also has the power to investigate matters. This communications mechanism sets a good example. Recent efforts to establish a communications mechanism as an optional protocol to the CRC, though broadly successful, failed to measure up to the standard set by the ACRWC mechanism, because the mechanism established does not include means by which to make collective complaints.

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2.3 Contextual analysis

The selected targets for the promotion of child-friendly ideas are systemic in nature. Good practice, such as training of personnel and one-stop service centres, is promoted. Similarly, the idea of children having access to justice, through being able to take cases, or to have cases taken on their behalf, to the courts in their own countries, is a new idea in African nations.

There are, however, some signs of a growing understanding of the importance of litigation and court judgements in the promotion of children's rights, both internationally and in Africa.²⁹⁵

At a regional level, the Lilongwe Declaration includes many ideas for the promotion of child-friendly justice in the region. These are as follows:

- Promote, encourage, support and facilitate the domestication of international agreements, legal reforms and the formulation of appropriate and adequate legislation, policies, protocols and strategies aimed at promoting justice for children.
- Promote an enabling framework for cooperation, on an agency-to-agency basis, towards sharing technical expertise in the improvement of access to age appropriate and empathetic justice systems for children in African countries

in line and in compliance with the best interests of the child.

- Promote inter-sectoral work in each country on costing, budgeting and implementation planning to support more efficient, effective and adequately resourced systems for justice for children.
- Develop inter-sectoral aligned information management systems in relation to justice for children.
- Enhance capacity for research, data capturing, intra-agency data sharing, and monitoring and evaluation of the processes and systems that support justice for children.
- Strengthen human resources to support child-friendly delivery of justice for children by attracting, appointing and retaining adequate and appropriately skilled personnel.
- Establish and strengthen national and international partnerships, and pledge continuously to forge and strengthen collaboration with all sectors of Civil Society, as well as inter-governmental organisations and development partners.
- Promote the design and development of an accessible repository of good practices for the region, to facilitate sharing of successful strategies and lessons learnt on processes and mechanisms for the implementation, strengthening and promotion of justice for children in the Eastern and Southern African Region .
- Communicate throughout the region through accessible mechanisms to exchange ideas, legal and policy frameworks, protocols, strategies, costing models, and procedural models.

²⁹⁵ See *A guide to strategic litigation* at <http://www.crin.org/Law/StrategicLitigation/index.asp>, and 'Strategic Impact Litigation on Children's Rights: Report on the Eastern and Southern Africa Workshop' at www.centreforchildlaw.co.za both accessed on 30 November 2011.

2.4 Examples

A central aspect of both the *National Child Justice Strategy for Sierra Leone* (2006) and the Government of Sierra Leone's *Justice Sector Reform Strategy and Investment Plan 2008–2011* is the development of guidelines on age assessment.²⁹⁶ The guidelines were approved by the Judiciary on 6 June 2011. The announcement of the Guidelines by the Chief Justice of Sierra Leone was followed by a two-day training session for magistrates in Juvenile Courts.²⁹⁷

In Zambia, the 2000 Situational Analysis of child justice recommended, among other things, the establishment of an Arrest, Reception and Referral Service (ARRS) based on the One-Stop Centre model adopted in South Africa. The One-Stop model was in fact preceded by a simplified form that would ensure that all arrested children in a city are brought to one central police station from other police stations. This essentially ensured more accurate monitoring and enabled the concentration of resources, such as through deploying a probation officer and family finders at one locality instead of attempting to spread them over several police stations. This approach is suitable for urban areas where distances are not excessive and where there is a sufficient caseload to justify the concentration of resources in order to create efficiency and effectiveness. Training was provided to role players on a fairly wide and intensive basis, with the assumption that they would implement the training in pilot projects, of which the ARRS was one.²⁹⁸

The purpose of the ARRS is to limit children's exposure to the criminal justice system by efficient inter-sectoral case management at the arrest and reception phases, and by correct channelling. This is achieved by the centralisation of arrests and the treatment of children in line with the relevant standards, to ensure the expeditious handling of cases with the deliberate objective of avoiding detention in police cells.²⁹⁹

²⁹⁶ *Beyond the Law: Assessing the realities of juvenile justice in Sierra Leone* Defence of Children International – Sierra Leone, Fall 2010, p26.

²⁹⁷ Bundu B, 'In Sierra Leone, Judiciary Focuses on Age Assessment Awareness', Times, 6 June 2011 http://news.sl/drwebsite/publish/article_200517988.shtml accessed on 21 September 2011.

²⁹⁸ Page 42.

²⁹⁹ Muntingh L, Report on Child Justice in Zambia with reference to UNICEF supported projects (2005), UNICEF p 39.

3. Monitoring and assessment

3.1 Basic concepts

- 3.1.1 Review domestic legislation, policies and practices to ensure the necessary reforms to implement child-friendly justice.
- 3.2.2 Ratify speedily, if this is not yet done, the ACRWC and the Hague Conventions.
- 3.3.3 Maintain or establish a framework to measure compliance with child-friendly justice guidelines that includes the executive, the legislature and, where appropriate, the judiciary.
- 3.4.4 Ensure that civil society – in particular organisations, institutions and bodies that aim to promote and to protect the rights of the child and to provide access to justice for children – participate fully in the monitoring process.

3.2 International law and monitoring and assessment of child-friendly justice

- 3.2.1 The 2008 UN Guidance note of the Secretary-General: UN Approach to Justice for Children discusses how ‘justice for children’ efforts are to be integrated into the framework for strengthening the rule of law. This framework includes institutions of justice, governance, security and human rights, including programmes to promote integrity and accountability, and monitoring bodies. The note also stresses a public and civil society that contributes to strengthening the rule of

law and which holds public officials and institutions accountable, with children’s participation.

- 3.2.2 At a regional level, the Lilongwe Declaration recommended that countries in the Eastern and Southern African region should:

...enhance capacity for research, data capturing, intra-agency data sharing, monitoring and evaluation of the processes and systems that support justice for children.

3.3 Examples

The South African Child Justice Act contains interesting provisions in respect of the minimum age of criminal capacity. Section seven raises the age of criminal capacity from 7 to 10 years. However, in order to provide time to consider the recommendations from the Committee on the Rights of the Child that the age of criminal capacity should be raised to 12, Section 8 provides as follows:

8. In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).³⁰⁰

³⁰⁰ Efforts to use this opportunity are already underway. See Skelton A and Badenhorst C, *Criminal capacity of children in South Africa: International developments and considerations for a review* (2011), Child Justice Alliance. A workshop on the issue was held by the Child Justice Alliance in May 2011.

Examples in case law

An example of how courts may monitor and followup on judgements where the decision requires that the State remedy systemic defects can be found in the South African matter of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*.³⁰¹ The South African Constitutional Court acknowledged serious concerns as far as the administration of justice in the sphere of sexual offences is concerned. Particular concerns were:

- The unavailability of intermediaries and the subsequent postponement of cases
- The question of whether the number of sexual offences courts were sufficient to meet the demands of the criminal justice system
- The facilities required to permit the use of intermediaries
- The apparent inadequate training of intermediaries and prosecutors to deal with children.

The Constitutional Court found that there were constitutional issues at stake because children involved in sexual offence cases are among the most vulnerable members of society; and, even though they are not parties to the proceedings, they have the right to have their best interests considered as of paramount importance. Compliance with the Constitution requires not only that laws be enacted to give effect to the rights in the Constitution, but also requires these rights to be implemented. The Constitutional Court concluded that failure to implement laws that protect Constitutional rights is a violation of the Constitution.

The Constitutional Court therefore handed down a supervisory order, calling upon the Director-General for the Department of Justice and Constitutional Development to furnish the following information to the Constitutional Court within a period of 90 days of the date of the order:

- A list of regional courts with an indication of the number of intermediaries at its disposal as well as the number required
- The steps being taken to supplement the number of intermediaries where they were found to be insufficient
- A list of regional courts with an indication of which courts have facilities such as separate rooms from which children may testify, closed circuit television, and one-way mirrors
- The steps being taken to provide regional courts with those facilities where they were absent.

The Minister did provide the requested information to the Court, and monitoring of compliance is ongoing.

³⁰¹ 2009 (4) SA 222 (CC).

An overview of case law and legislative examples from various countries shows that the majority of African countries have incorporated the basic principles of the CRC and the ACRWC into domestic law. The table in the Executive Summary shows the extent to which African countries have embarked on law reform to harmonise child law and to move towards increasingly child-friendly justice. Thus far, the emphasis has been on children in the criminal justice system, but there is also significant development in the field of child care and protection. The extent to which children's rights are protected in legislation shows that rule of law applies to children and that they enjoy the protection of law.

The case law and legislative examples outlined in this paper show that the majority of African countries have to some extent included the fundamental principles of child-friendly justice in law and practice. The trend in respect of the fundamental principles is to have a general overarching statement that the child has a right to – for instance – participate, and to reiterate at the appropriate stages the right and the duty of office bearers to ensure the child has an opportunity to participate.

The best interests of the child principle appears to have been incorporated in legislation in most, if not all, African states. There are differences in the wording and weight attached to the best interests of the child, but there appears to be uniformity in recognising that in every matter concerning the child the best interests of that child are the determining factor.

The fundamental principles of dignity and non-discrimination are linked to the rights of children with disabilities and to children's right to life and development. There are several examples in new laws that indicate a move to eradicate all forms of

discrimination against girl children and children with disabilities. There is also focused attention on establishing procedures to register births and estimate age in order to avoid any unfair discrimination.

The prohibition of corporal punishment is incorporated into legislation in the context of children's right to dignity, and the majority of countries seem to have banned corporal punishment in institutional settings. It must also be pointed out, however, that some countries still use corporal punishment as a sentence, and there are alarming reports of abuse in this regard. Only a very small minority of African countries have banned corporal punishment by parents.

An analysis of legislation and law reform aimed at incorporating the general elements of child-friendly justice shows that despite significant progress, there are still some glaring deficiencies in respect of providing the child and parent with sufficient information at every stage of the process, and protecting the child's privacy. Archaic legislation allowing the media access to children's criminal and care and protection hearings must be reviewed and brought in line with the CRC and the ACRWC. Another area in which there has not been sufficient development is the establishment of trained specialised units to work with children, such as specialised reception or one-stop centres for child offenders and child victims, wherein the child enters the system with the protection and assistance of a multi-disciplinary team of professionals.

Legislative provisions in prohibiting detention, except as a last resort, and for the shortest appropriate period of time, appear to be the norm in most African states. These principles apply in relation to both pre-trial detention and sentencing

after detention. However, the over-utilisation of custodial measures remains a problem in Africa, as it does in the rest of the world.

Various African countries have reviewed their minimum ages of criminal capacity since the adoption of the CRC in 1989. These reviews have resulted in higher minimum ages of criminal capacity in line with the provisions of the CRC. The minimum age of criminal capacity still varies widely between African states, and it may be an area in which African states could move towards harmonisation.

In respect of child-friendly justice measures before judicial proceedings commence, it is clear that alternatives to court processes, such as diversion, have dominated law reform, although they are still fairly novel in Africa. There are emerging formal diversion processes regulated by legislation and linked to accredited programmes, as well as informal diversion processes as part of restorative and traditional justice processes. In respect of child care and protection or custody disputes, there has been significant progress in recognising family, community and traditional forums to resolve disputes outside of the formal justice system.

Although arrest and detention by the police remains a problem in some countries, as far as child-friendly justice is concerned, developments in legislation reform point to a trend towards avoiding physical arrest and detention at police stations and cells. A number of countries have instituted extensive provisions indicating that a child should not be detained in police cells, stipulating the duties of a police official in protecting children in conflict with the law, including through measures such as contacting their parents and providing nutrition and medical attention. There is still, however, a glaring need for

specialisation and training within the police, and it is unclear how new legislation is implemented in practice.

One of the areas that have received the most attention in law reform is the treatment of children during judicial proceedings. Although there is growing awareness of the importance of legal representation to safeguard the interests of children effectively, it is not clear whether there is sufficient provision of legal representation at state expense. New legislation in various countries explicitly states that a child has the right to have a legal representative during criminal and/or civil proceedings, but this legislation does not always include the right to have a legal representative assigned at state expense. Effectively this means the child's right to legal representation is dependent on his or her parent's ability to afford such services. Effective legal aid models should be developed to safeguard children's rights effectively during legal proceedings. This is also essential in order to ensure the effective implementation of the child's right to have his or her views heard during judicial proceedings. Although the majority of the legislation reviewed afforded the child the right and opportunity to express his or her views, children are often intimidated during the judicial process and may not always be personally empowered to participate. In addition, a legal representative is required to assist the child.

The problems surrounding delays in processes during judicial proceedings are extensively addressed in the legislation reviewed in this study. There are explicit measures to avoid delay right from the point of the child's arrest in criminal proceedings, or from the moment the child comes into contact with the justice system in civil proceedings. It is difficult to assess implementation, but most laws aim to avoid any unnecessary delay,



and this points to positive developments in the future.

An area that still requires focussed attention in practice and in law reform is the treatment of child victims and witnesses during judicial proceedings. There is a dearth of legislative provisions and protections for child victims. These children require more protection during proceedings to avoid secondary traumatising. Such protection requires the use of child-friendly courtrooms and facilities where the child may testify comfortably without having to confront the accused. The use of intermediaries and trained multi-disciplinary child protection units that work with the child from the date of reporting the offence until the child has to testify must be incorporated into legislation, in order to ensure there is focused attention on how each individual child may best be assisted during the process. Legislation, policy and practice must be developed to ensure that children with disabilities are afforded any necessary special assistance – for instance, the provision of sign language interpreters.

Sentencing of children has received much attention in new acts relating to child offenders. There is particular focus on alternatives to imprisonment and restorative justice sentences, which are aimed at an individualised approach to sentencing and which encourage reintegration of the child into his or her community. It is notable that most countries have included a reminder that the child's best interests must also be considered during sentencing. To this end, provisions include the submission of reports by probation officers or welfare officers prior to sentencing. Furthermore, the right to review or appeal a decision of informal traditional forums and formal court hearings is included in most new acts.

African countries must still work harder to reduce custodial sentences, although it is positive that many countries have capped the length of time for which a child may be sentenced. Nevertheless some countries have sentences such as life imprisonment and 'detainment at the President's pleasure'.

The Lilongwe Declaration recommended that countries in the Eastern and Southern African region should:

...enhance capacity for research, data capturing, intra-agency data sharing, [and] monitoring and evaluation of the processes and systems that support justice for children.

Despite this, little could be found in legislation or practice that shows good practice models of monitoring and assessment of children after judicial proceedings are concluded. This is an area in which there is still a need for extensive development of processes and procedures to review, monitor and assess how legislation is implemented, and to trace the development of practice following the implementation of a new act.

It is clear from the study that there is a wealth of treaties, policies and guidelines at international and regional level aimed at the protection of children and their rights. African countries have made great strides towards the protection of children in the justice system; however the challenges in relation to implementation call for an enhanced approach that will ensure that children's rights on paper become rights in reality. In this regard, a fitting outcome would be the adoption of 'African guidelines for action on child-friendly justice', to assist African nations in establishing, maintaining and improving justice systems so that they respond to the specific needs of children.

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