

IN THE BEST INTERESTS OF **THE CHILD**



Credit: Liba Taylor

Harmonising laws in Eastern and Southern Africa



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Foreword by Professor Jaap Doek
Chairperson, UN Committee on the Rights of the Child (2001 - 2007)



The African Child Policy Forum (ACPF) is a leading pan-African policy and advocacy centre on child rights. The ACPF was established with the conviction that putting children first on the public and political agenda and investing in their wellbeing are fundamental for bringing about lasting social and economic progress in Africa and its integration into the world economy. The work of the Forum is rights-based, inspired by universal values and informed by global experiences and knowledge. The Forum aims to provide a platform for dialogue; contribute to improved knowledge about the problems facing children in Africa; identify policy options; and strengthen the capacity of NGOs and governments to develop and implement effective pro-child policies and programmes.

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FOREWORD

This report - In the best interests of the child: Harmonisation of Laws in Eastern and Southern Africa - is the first attempt of its kind to examine the implementation of appropriate legislative, administrative and other measures in a region, in the context of the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC, or 'the African Charter'). It is a landmark study because similar large scale comparative and analytical studies have not yet been conducted in any other region of the world, so I would like to commend the African Child Policy forum for this important initiative.

The study covers nineteen countries in Eastern and Southern Africa, and provides a wealth of information on the legislative measures taken by these countries to implement the CRC (as required by Article 4 of the CRC) and the African Charter. It shows the progress that is underway, but also identifies the gaps that remain between aspiration and practice.

Ratification of the CRC obliges states to ensure that existing as well as new legislation on children adheres to the principles and standards established in the Convention. This entails auditing and reviewing laws to address gaps and inconsistencies. However, owing to the lack of systematic surveys or studies, there is very little comparative analysis that provides information and insight into the extent to which national laws on children are harmonised with international instruments. This initiative to undertake a regional analysis and synthesis is therefore most opportune.

This report identifies specific issues that need immediate attention and recommendations that need to be considered in order to address the gaps and challenges. In so doing, it provides an excellent starting point for further legislative actions in the countries of the Eastern and Southern Africa Region. It gives an overview of states' performance in all the general principles of the CRC and the African Charter. Issues addressed range from whether states have an overarching definition of a child to looking at provisions protecting children from violence and exploitation, and children's participation.

Harmonisation of laws cannot be a one-time event, nor is it enough to limit it, in an ad hoc manner, to some provisions of the national laws. Harmonisation is an ongoing activity, based on a systematic review of existing or proposed legislation. This report provides practical tips for harmonisation, drawn from experiences in the countries reviewed. I am pleased to say that they reflect the views of the UN Committee on the Rights of the Child, expressed in its General Comments as well as in its Concluding Observations.

The year 2007 marks eighteen years since the adoption of the CRC by the General Assembly of the UN, on 20 November 1989. This report is therefore a timely reminder for the countries involved, as well as for the whole of Africa and indeed for all of us, to reflect on whether states are complying with the provisions of the CRC and the African Charter. This will assist with addressing the remaining shortcomings and encourage states to live up to their commitment to the full realisation of the rights of each and every child.

Professor Jaap Doek
Chairperson, UN Committee on the Rights of the Child (2001 - 2007)

EXECUTIVE SUMMARY

Children's rights come of age

Children's rights have come full circle: at least at the level of rhetoric and principle. It is now seventeen years since the UN Convention on the Rights of the Child (CRC) came into force, and eight years since African countries adopted the African Charter on the Rights and Welfare of the Child (ACRWC, or 'the African Charter').

Thanks to those ground breaking accords, the notion that children have rights is no longer an issue of debate or contention in Africa. However, the critical issue is the extent to which national laws are harmonised with the provisions of the CRC and the African Charter. As the UN Committee on the Rights of the Child has emphasised, all countries that have ratified the CRC need to ensure that their legislation is fully compatible with the provisions and principles of the CRC.

This report by the African Child Policy Forum reviews and analyses how far 19 Eastern and Southern African countries (Angola, Botswana, Burundi, Comoros, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe) have gone in harmonising and implementing the principles of the CRC and the African Charter. The report is targeted primarily at governments in the countries researched; however, it is hoped that other stakeholders in children's rights will also find it useful. Beyond that, it is hoped that the report will provoke debate on the harmonisation of laws relating to children across the whole of Africa.

Emerging issues

a) Continuing progress - but a long way to go

Despite important steps, children's rights are still not prioritised in Eastern and Southern Africa. Large numbers of countries have become party to the CRC and the African Charter, but child-centred bills have been pending for significant periods in some signatory countries, including Lesotho, Malawi, Namibia and South Africa. It is also demonstrated in delays in reporting back to the monitoring committees of the CRC and the African Charter; only Madagascar, Namibia and Rwanda submitted their initial reports to the CRC Committee within the stipulated two year deadline. The remaining countries sent their reports an average of four years late. From the countries in this review, only Rwanda has submitted an initial report to the African Charter's overseeing committee.

b) Building on the harmonisation momentum

There is a complex patchwork of existing legislation relating to child rights across Eastern and Southern Africa. This poses a significant barrier to the effective harmonisation of laws and legal protection of children. Provisions relating to children's rights are found in a broad range of laws, from penal codes and specific legislation on adoption, education and social welfare, to those on divorce and separation proceedings. The problem is further compounded by the pluralist nature of legal systems in the region, where common and civil law coexists with customary and religious law. As long as child-centred provisions remain in this fragmented and complex state, legislation relating to children will continue to suffer from inconsistency and poor implementation.

On the positive side, this review shows that nine out of the nineteen countries surveyed - Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa and Uganda - have undertaken comprehensive reviews of their legal systems. As a result, they have either enacted or drafted a comprehensive Children's Act or grouped their rights into thematic legislation, such as child justice and child welfare. This is a significant development, but it is important that such reviews should not be seen as a one-off exercise. Reviews and amendment of laws should be an ongoing process that continually addresses new or emerging issues, gaps and challenges in law and practice. It is particularly encouraging to see that Uganda has decided to look again at its landmark Children's Act ten years after it was first enacted.

c) Need for clarity on the definition of a child

According to both the African Charter and the CRC, a child is anyone aged under eighteen. However some countries are still grappling with the issue of an overarching definition of a child. There are significant inconsistencies in setting minimum ages such as for criminal responsibility, sexual consent and marriage. As a result, children continue to suffer from inconsistent and ineffective legal protection.

Nine of the nineteen surveyed countries - Angola, Burundi, Ethiopia, Mozambique, Namibia, Swaziland, Tanzania and Zimbabwe - have **no official overarching definition of a child** in their legislation or constitution. Malawi defines a child as aged sixteen or under.

- Many of the countries surveyed have set the age of **criminal responsibility** very low, and do not have any special measures to recognise the child's ability or discernment. In Lesotho, Malawi, Namibia, South Africa and Swaziland children as young as seven can be held legally accountable for their acts under penal law. All these countries have legislation pending to change this situation, which needs to be enacted as soon as possible.
- In many countries the age of sexual consent - the minimum age at which a person can voluntarily agree to sexual acts with full knowledge of the consequences and risks involved - is too low or is inconsistent with other legislation, such as age of marriage. For example, in Tanzania the age of sexual consent is higher than the age of marriage for girls. There are also differences based on gender; for example, in Malawi the age for sexual consent is twelve for boys and thirteen for girls.
- There is considerable variation in the age that people are allowed to get married. In almost half the countries reviewed, it is under eighteen years of age and in Tanzania, it is under sixteen. There are differences between the minimum age of marriage for boys and girls in Burundi, Malawi, Mozambique, South Africa, Tanzania and Zimbabwe. In many countries the age for marriage under customary law is inconsistent with other laws.

d) Discrimination remains a serious problem

There should be no discrimination on any grounds regarding protective provisions and rights for children. However, discrimination against groups of

children still exists under the law, particularly on grounds of parentage, as well as sex, ethnicity and disability. Discrimination on the grounds of parentage applies to children who are orphaned or born out of wedlock. Children born out of wedlock where religious laws apply have no right to their father's name; for example, in Comoros and Tanzania.

e) Many births go unregistered

One of the most fundamental rights in the CRC and the African Charter is the right of a child to a name, nationality and immediate birth registration. If a child does not have an officially registered birth date, with a name and nationality, it is difficult for any legal system to protect that child effectively.

The review shows that the majority of the countries surveyed do not have adequate registration systems, including registration of birth, and in Ethiopia there is no formal birth registration system at all. This has consequences for many children's rights, such as their legal identity and proof of lineage. Children who have no formal proof of age are at risk of not benefiting from protective minimum ages and compulsory enlistment, among other issues.

f) Children caught up in the penal system are vulnerable

While there has been progress in developing appropriate measures for children, there are still significant gaps in dealing with children in the criminal justice system. Low ages of criminal responsibility mean that children as young as seven can be held criminally responsible, while children as young as twelve can be imprisoned. In South Africa, life imprisonment is a possible sentence for children under the age of eighteen, and there are several children currently serving this sentence. Justice systems in the region are primarily focused on child offenders, with little or no attention to child victims or witnesses of crime.

In a number of countries, corporal punishment is legally sanctioned within the penal system and alternative care institutions, particularly for boys. South Africa is the only country that specifically prohibits the use of corporal punishment in alternative care systems where children have been diverted from the formal justice system.

In an encouraging step, thirteen of the nineteen countries reviewed have established children's courts: Angola, Botswana, Comoros, Ethiopia, Kenya, Lesotho, Madagascar, Mozambique, Namibia, South Africa, Tanzania, Uganda and Zambia. However, there are concerns that in the majority of countries these courts are limited to capital cities and other major urban areas, and other children remain within the mainstream judicial system. Children's courts are hampered in the effective administration of justice for children on several grounds, including the lack of alternative care centres for diversion of children.

Ten of the nineteen countries do not have any alternative care centres for children, so children are regularly detained alongside adults in formal prisons. Diversion from the formal criminal system is not an option of first resort in the majority of countries, even where provision has been made for diversion. For example, the Children's Act in Kenya provides for diversion at the post-trial but not pre-trial process.

g) Children are still subjected to violence

The recent UN Secretary General's Study on Violence against Children highlighted the extent to which violence prevents the realisation of children's rights. A positive aspect of the study is that all the countries studied have laws that confer protection on all citizens in general or on children in particular against abuse, inhumane and cruel treatment, and torture. However, there is no country with an absolute prohibition on corporal punishment in all spheres, and children in the region are still being subjected to violence in homes, schools and other institutions, as well as within the justice system. Corporal punishment is still a legal penal sanction in some countries and is legal in the home in all the nineteen countries in this review; often under the defence of reasonable chastisement. In some countries there are discriminatory laws that allow the use of corporal punishment for boys but not for girls.

There are some notable initiatives in the region such as Women and Child Protection Units in Namibia that provide free 24-hour assistance - including medical, legal and psychosocial services - to survivors of violence. Special Gender Police Units do similar work in Lesotho.

In countries where harmful cultural practices like female genital cutting (FGC) and early marriage are still prevalent, such as Eritrea, Ethiopia, Kenya and Tanzania, there is specific legislation prohibiting the practices. However, there is serious lack of awareness about implementation of these laws among both authorities and communities. Child rights education is essential in order to change attitudes and behaviour regarding such violence towards girls.

h) Children's voices largely remain unheard

One of the most innovative features of the CRC is the emphasis on children's right to participate, to be heard and to have his or her views considered. This study found that children's participation is generally low in the countries studied, and that there is a need for change in cultural and societal attitudes towards children, as well as legal and policy developments.

There are some encouraging signs, despite the scarcity of formalised institutional mechanisms for children's participation. The constitutions of the majority of countries covered in this review include the right to freedom of opinion and expression for all citizens, including children, and some countries, such as Malawi, do have specific legislation on children and youth participation in national matters. Lesotho provides a good example of institutionalising child participation, via child law committees, which actively participated in a national review of laws relating to children. Other countries have national youth policies, whose objectives include facilitation of youth participation. Youth forums and parliaments, often spearheaded by civil society, are present in some countries, including Uganda and Zambia. Although they are not institutionalised, they nevertheless provide a space for children's voices to be heard.

All the countries reviewed have legislative provisions for limited participation of children in court proceedings. In the main the provisions apply to civil proceedings on family matters, such as divorce and adoptions, but in some cases there are also provisions for children to be heard in criminal proceedings, or when a child is a victim or witness of crime. All these provisions limit participation either on

grounds of age or in particular contexts, and so do not follow the principle of allowing children to participate in accordance with their evolving capacity.

Ways forward

Approaches to harmonisation

Harmonisation is an ongoing process that calls for constant review, monitoring and evaluation: no country can claim to have fully harmonised its laws relating to children. However, this review has identified common approaches and practices garnered from the experience of countries that have attempted harmonisation. It is hoped that these lessons can be constructive for other countries that are rising to the challenge of harmonising child-related laws.

- A comprehensive and consultative review of existing legislation, either broad-based or thematic, is the most common and effective way to begin the harmonisation process.
- The review process should be open, inclusive and participatory: institutional mechanisms for the participation of various stakeholders should be established to give the process momentum, validity and societal ownership. The principle of child participation should also be recognised, with children's perspectives solicited in child-friendly and creative ways.
- There are a number of options in pursuing harmonisation. Some countries have passed a single comprehensive Children's Act. In other cases, legislation is grouped into thematic issues, in accordance with specific national requirements and jurisprudence systems.
- Capacity building for a wide range of stakeholders, from government representatives to police and judiciary officials, should be an integral part of the process. This may involve training, briefing, study tours, sharing of good practices and participation in local and international conferences on various aspects of children's rights.
- Even the best-drafted legislation will have gaps. Therefore all relevant laws should expressly state that where omissions emerge, cases are interpreted in light of provisions in the CRC and the African Charter.
- There should be an institutionalised monitoring mechanism established by law to ensure implementation. This may be seated in the Attorney General's office, a Law Commission or any other suitable institution. It could also be responsible for the coordination and implementation of children's rights in the country, including advising government on preparation of state reports, and for institutionalising child participation in key decision making. Various models exist, and countries could draw best practice from each other according to the needs of their specific context.

Specific issues

In conclusion the CRC and the African Charter are bringing about a paradigm shift in understanding and attitudes towards child rights. The challenge is to translate the provisions

in the charters into concrete improvements in children's day-to-day lives. African states need to ensure that they move away from seeing the provisions as standards to aspire towards, to operational obligations. This requires the political will to commit to the harmonisation of international and regional provisions with domestic child-related laws and policies. An important part of the commitment is providing the requisite resources and capacity to provide for children's rights. Specific issues that need immediate attention by the countries in this review include:

- Harmonising the definition of a child
- Ensuring that the guiding principle in child-related laws and policies is 'the best interests of the child'
- Implementing appropriate justice systems for children, including raising the age of criminal responsibility and using child-focused procedures and systems for children in conflict with the law, and child victims and witnesses
- Guaranteeing legal protection for children against violence, abuse and exploitation, including sanctions for corporal punishment in any setting
- Providing free, compulsory and high quality primary education for all

OVERVIEW AND CONTEXT



Credit: Liba Taylor

INTRODUCTION

In May 2004, a large number of African government representatives, NGOs and international agencies gathered in Addis Ababa, Ethiopia, for the first International Policy Conference on the African Child¹. It did not take long for a clear message to emerge from the proceedings: that there was a real need for a comprehensive review of how effectively African countries have harmonised their national laws on child rights with the CRC and the African Charter. This study was set in motion as a response to that appeal.

Another key factor behind this study was the African Common Position on an 'Africa Fit for Children' adopted in Cairo in 2001. It urged that the provisions of the CRC and the African Charter should be 'treated as state obligations, in the framework of a rights-based approach to child survival and development'.² This study presents an overview of the harmonisation efforts in nineteen Eastern and Southern African countries³. Similar studies need to be done across the whole continent, but this document is a valuable beginning to the work of making Africa more child-friendly.

When the CRC first came into force, it established a framework for sweeping changes in the way children's rights were recognised across the world. However, it is not uncommon to find countries that have ratified the CRC and the African Charter still enacting laws that contradict provisions in the two treaties. Many countries have still not established an overarching definition of a child as someone aged under eighteen, and many still authorise the use of corporal punishment, in direct contradiction of the stated rights of children.

There are some positive developments: the governments of Kenya and Uganda have undertaken reviews of their laws relating to children and enacted new laws. South Africa has also reviewed its laws relating to children and passed a Children's Act dealing with maintenance, adoption and other issues, with a pending bill on child justice. Botswana has undertaken a review of laws, but not yet started drafting new legislation. Other countries, including Lesotho, Malawi, Mozambique and Namibia, have pending legislation seeking to harmonise and consolidate their laws relating to children.

Nonetheless, there is a long way to go before all the countries in this survey can say they have reformed their laws to reflect the children's rights standards set out in the CRC and the African Charter. Governments often see child rights issues as a secondary concern. While progress is noted in the recognition of children's participation - for example, in poverty reduction strategies and national development plans - legislative priorities and resource allocations underline the fact that children are not prioritised. Many of the promises states made when they signed and ratified the CRC and the African Charter are yet to be realised.

This report argues that states must be held accountable to their international commitments. Law reform is a long process, particularly when done thoroughly with proper consultation. However, that is no excuse for the huge delays in the majority of countries surveyed in bringing about legislation that conforms to the standards of the CRC and the African Charter. As soon as countries signed the two treaties, they effectively agree to start the process of bringing their domestic laws into line with the provisions and standards of those treaties.⁴ Following ratification, this is understood as an obligation.

There is no doubt that there are challenges. The countries involved in this study have differing legal systems, including common or civil law systems, or pluralistic systems encompassing aspects of common and civil law as well as customary and religious law⁵.

They therefore have to work out the implementation of the two treaties in different ways. In particular customary African laws have their own take on the status of children, their rights and entitlements⁶.

CONTEXTUALISING THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC), adopted as a UN treaty in 1989, was the culmination of a decade of work and negotiation between governments and non-governmental organisations. It heralded a critical shift in perspectives on children, from victims and recipients of welfare to individual rights holders.

There have been three key phases in the development of child rights from the beginning of the last century to the present.⁷

- The first phase began in 1924 with the adoption of the Geneva Declaration on the Rights of the Child by the League of Nations. This was later cited as the beginning of 'the formal establishment of an international movement for children's rights.'⁸
- The second phase saw the adoption of the Declaration on the Rights of the Child in 1959, followed by the International Year of the Child in 1979 to celebrate its 20th anniversary. This year also saw the beginning of the drafting of the Convention on the Rights of the Child, a process that was completed in 1989 when the General Assembly of the UN adopted the text. It was followed by a record number of ratifications, partly thanks to the World Summit on Children in September 1990.
- In the third and current phase, the focus is on implementation, accountability and monitoring of the CRC, following its unprecedented and near universal ratification.

The CRC remains the most rapidly and widely ratified international human rights treaty.⁹ The USA and Somalia signed the treaty in 1995 and 2002 respectively, but are the only two countries in the world yet to ratify it.

In 1990, Kenya, Namibia, Uganda and Zimbabwe were the first countries in the Eastern and Southern Africa region to ratify the convention. Uganda was the first of the four to review its legal system, a process that resulted in its landmark Children's Act of 1996. Kenya came up with its own Children's Act in 2001, operational since 2002, while Namibia drafted legislation in 2004 that is still pending. South Africa and Swaziland were the last in the region to ratify the CRC, in 1995, but they have both since undertaken reviews of their laws relating to children. In South Africa, that has resulted in a Children's Act and a Child Justice Bill.

The CRC has 41 substantive articles, setting out key rights covering everything from child justice and child labour to education and health. The importance of the near universal ratification of the CRC cannot be overstated, as it demonstrates the global commitment to the rights of children as a basis for action.

The Convention has been supplemented by two optional protocols: the Optional Protocol on the Involvement of Children in Armed Conflict, which raises the minimum age for involvement

in armed conflict to eighteen, and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which strengthens the CRC's protection in these areas.¹⁰

The African Charter on the Rights and Welfare of the Child

Member states of the Organisation of African Unity (OAU) adopted a Declaration on the Rights and Welfare of the African Child in 1979¹¹, the International Year of the Child. This prefigured the African Charter on the Rights and Welfare of the Child, which was adopted in 1990 by the Assembly of Heads of State of the Organisation of African Unity (OAU)¹² and which entered into force in 1999.

Like the CRC, the African Charter is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children. The African Charter and the CRC are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic, social and cultural rights.

The rationale for the African Charter was the feeling by member states that the CRC 'missed important socio-cultural and economic realities of the African experience'.¹³ It emphasises 'the need to include African cultural values and experience in considering issues pertaining to the rights of the child in Africa'.¹⁴ The African Charter challenges traditional African views that conflict with children's rights on issues such as child marriage, parental rights and obligations towards their children, and children born out of wedlock. It 'expressly proclaims its supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter'.¹⁵ It includes provisions addressing harmful cultural practices;¹⁶ outright prohibition on the recruitment of children (defined as any person under eighteen years of age) in armed conflict;¹⁷ the prohibition of marriages or betrothals involving children;¹⁸ prohibition of use of children as beggars;¹⁹ and grants girls the right to return to school after pregnancy.²⁰

The African Charter also explicitly tackles specifically African issues; for example, calling for apartheid and similar systems to be confronted and abolished.²¹ Apartheid may have been defeated in South Africa, but this provision is also 'applicable to children living under regimes practicing ethnic, religious or other forms of discrimination that justify special measures to be taken for the welfare of children in those countries'.²² By addressing the issue of conscription of children into the armed forces, 'the Charter deserves credit for addressing a critical issue affecting the African child'.²³ However, the African Charter does have some drawbacks,²⁴ including:

- The omission of a provision mirroring Article 4 of the CRC, which requires state parties to fully commit and apply resources to ensure the realisation of child rights. This omission is regrettable, as it means the African Charter has no mechanism to place a duty on a state to provide resources to ensure the realisation of children's rights.
- Although it makes provision for special protection measures for the disabled,²⁵ it fails to 'expressly include disability as a prohibited ground of discrimination'²⁶.
- Unlike the CRC, which specifically ascribes rights to children of minorities,²⁷ there is no similar provision in the African Charter, despite many countries in the region having significant populations of minority and indigenous groups.²⁸
- There is some criticism of the description of children's duties to parents included in the Charter.²⁹ However, others argue that, provided these duties fall within the

ambit of children's rights, they do not conflict with children's rights and are therefore arguably comparable with the principle in Article 29 of the Universal Declaration of Human Rights that states that everyone has a duty to their community.³⁰

The African Charter has been ratified by 41 of the 53 countries in the continent.³¹ Among the nineteen countries included in this study, Swaziland and Zambia are the only ones that have not yet ratified the African Charter.

Monitoring committees

Both treaties established committees³² charged with monitoring their implementation, via examination of state party reports. The African Committee of Experts on the Rights and Welfare of the Child³³ began meeting in 2001, but has only received four state reports to date, with Rwanda the only country in this review to have submitted a report.³⁴

The African Committee can entertain individual complaints from 'any person' in matters relating to the Charter,³⁵ in addition to its mandate of promoting and protecting the provisions of the charter.³⁶ In this regard it is much stronger than its CRC counterpart. Nonetheless, a critical flaw of the African Committee is that its reports can only be published upon the approval and scrutiny of member states. This poses a challenge to the independent monitoring role it is supposed to play.³⁷

The African Committee has established Rules of Procedure and Guidelines for Reports of State Parties³⁸ that seek, as far as possible, to complement those of the UN Committee and avoid duplication, particularly on reporting by state parties. The African Committee acknowledges reports presented to the UN Committee and concentrates on areas of difference between the CRC and the African Charter.

There have been calls for the African Union (AU) to give greater attention to children's rights, including through strengthening the African Committee by allocating resources and making children's rights a substantive agenda item on the Summit of the Heads of State, the overall decision-making body of the AU.³⁹

Figure 1: Adoption and ratification of the CRC and the African Charter

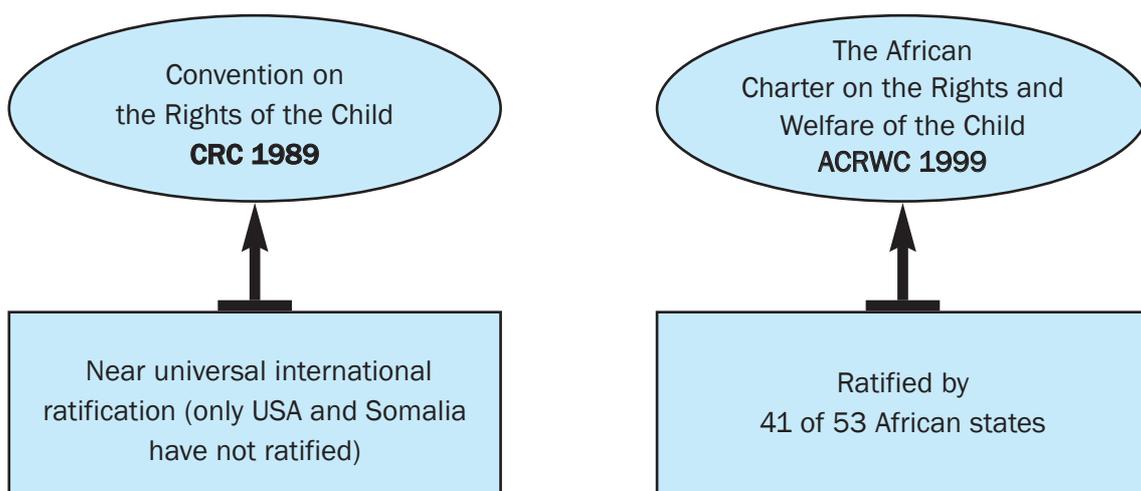


Table 1: Ratification of international and regional instruments in Eastern and Southern Africa

No.	Countries	CRC	ACRWC
1	Angola	1990	1999
2	Botswana	1995 *	2001
3	Burundi	1995	2004
4	Comoros	1993	2004
5	Eritrea	1994	1999
6	Ethiopia	1991	2002
7	Kenya	1990	2000
8	Lesotho	1992	1999
9	Madagascar	1991	2005
10	Malawi	1991	1999
11	Mozambique	1994	1998
12	Namibia	1990	2004
13	Rwanda	1991	2001
14	South Africa	1995	2000
15	Swaziland	1995	-
16	Tanzania	1991	2003
17	Uganda	1990	1994
18	Zambia	1991	-
19	Zimbabwe	1990	1995

* Entered reservation on Article 1 of CRC, but in 2004 the Committee welcomed the information that the reservation will be withdrawn when review of the law is completed⁴⁰

THE CHILD RIGHTS FRAMEWORK

The CRC constitutes a comprehensive listing of obligations towards the child that states recognise upon becoming party to the treaty, rather than a catalogue of children's rights. These obligations are both direct - for example, providing education facilities and ensuring proper administration of justice for children - and indirect; for example, enabling parents and guardians to carry out their primary roles and responsibilities as caretakers and protectors.

The CRC covers the whole range of human rights that have traditionally been classified as civil and political on the one hand, and economic, social and cultural on the other. Although reference is made to this classification in Article 4 of the CRC, the substantive articles themselves are not explicitly divided in this way. A common overall classification of the rights contained in the CRC is known as the 'three Ps':

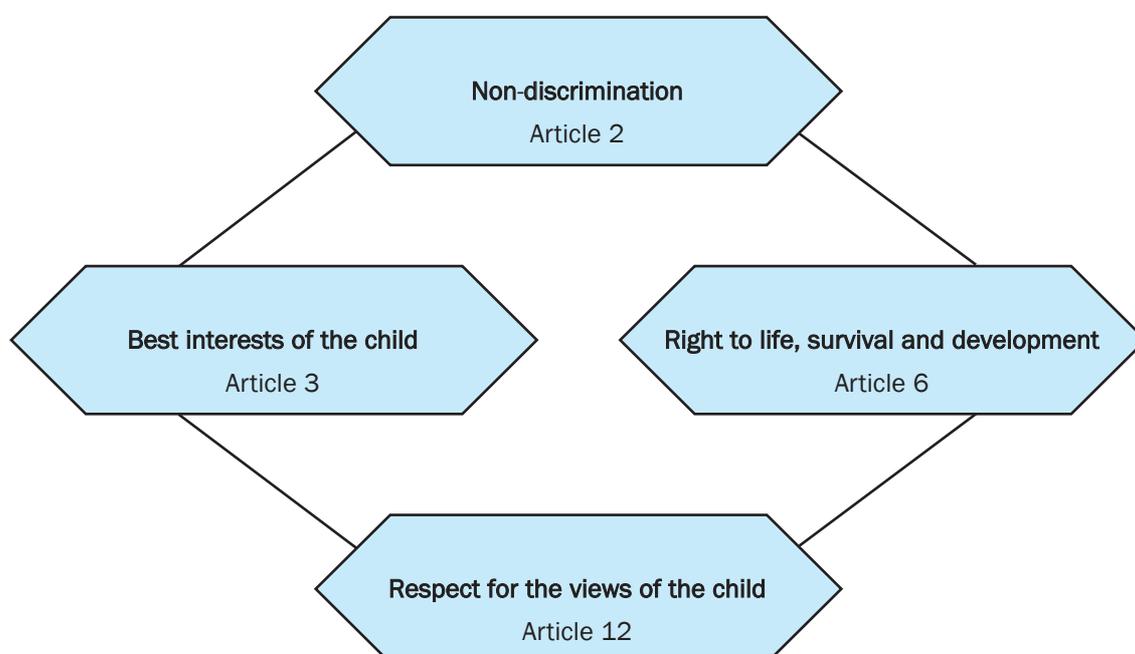
- **Provision:** children's right to be provided with social and other services, from health care and education, to social security benefits and an adequate standard of living
- **Protection:** children's right to be protected from all kinds of violent acts, including abuse; neglect; commercial, sexual and other forms of exploitation; torture and arbitrary detention; and unwarranted removal from parental care
- **Participation:** children's right to have their say in all matters affecting them and to participate in decisions affecting their lives and society as a whole

The Committee on the Rights of the Child requests state parties to report on implementation under the following clusters of articles:⁴¹

- **General measures of implementation:** Art 4, 42 & 44, para 6
- **Definition of the child:** Art 1
- **General principles:** Art 2, 3, 6 & 12
- **Civil rights and freedoms:** Art 7, 8, 13-17 & 37(a)
- **Family environment and alternative care:** Art 5, 9-11, 18-21, 25 & 27, para 4, & 39
- **Basic health and welfare:** Art 6, 23, 24, 26 & 27, paras 1-3
- **Education, leisure and cultural activities:** Art 28, 29 & 31
- **Special protection measures:** Art 22, 32-36, 37(b)(d) & 38-40

Figure 2: The general principles of the CRC

Also known as the 'four pillars', these principles underlie all the rights in the CRC:



HARMONISATION

Article 4 of the Convention on the Rights of the Child *mandates state parties to take 'all appropriate legislative, administrative and other measures' for implementation of the rights contained therein⁴².*

Article 1 of the African Charter on the Rights and Welfare of the Child *obliges states to 'recognise the rights, freedoms and duties enshrined in this Charter and...undertake the necessary steps... to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter'.*

Following ratification, state parties are obliged to align national laws to reflect the commitments in the treaties: this is what is referred to as 'domestication' or 'harmonisation'. Domestication is done either via countries' constitutional provisions and/ or by enacting new legislation giving international law the status of domestic law. These legislative, administrative and other measures intended to reduce the discrepancies between national legal systems and procedures relating to children and the CRC and/ or the African Charter. Either mode of domestication is necessary to give effect to international treaties and roll out implementation, legally and in policies.

There are different levels at which harmonisation can be achieved:

- a) a broad review of existing policies and legislation and consolidation of laws relating to children into a single piece of legislation
or
- b) ad hoc amendments and/or formulation of laws relating to children targeting existing or new issues and leading to specific amendments or statutes on particular issues.

Box 1: The CRC Committee's position on harmonisation

As the body charged with monitoring compliance and implementation of the provisions of the CRC, the CRC Committee has called for harmonisation of laws relating to children stating:

'The Committee believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. The review needs to consider the Convention not only article by article, but also holistically, recognising the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation...

The Committee welcomes the incorporation of the Convention into domestic law, which is the traditional approach to the implementation of international human rights instruments in some but not all States. Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention.'
(General Comment No. 5 paras 18 & 20)

The CRC Committee advocates for:

- **A comprehensive, systematic legislative review.** Where the legislation review process is not done in a comprehensive and systematically coordinated manner, it has been cause for concern for the Committee⁴³
- A well **qualified advisor to Parliament** to assist in technical matters⁴⁴
- State parties to provide **Law Reform Commissions with concrete directions and necessary resources** to perform their mandated tasks⁴⁵
- **Harmonisation on all applicable provisions of different jurisdictions**, namely customary/ traditional, religious and regular law⁴⁶
- All **efforts and resources necessary** for the enactment of comprehensive children's legislation, as a matter of priority⁴⁷

Following a legislative review, states may choose to consolidate all their laws on children in a single comprehensive children's statute, or opt for separate thematic statutes; for example, on child justice, or child welfare, depending on their particular needs. Whatever the choice, it is important that the legislation is comprehensive on all the rights of the child.⁴⁸ Countries should continue to strengthen their efforts to amend or adopt legislation that conforms fully with the treaties⁴⁹ in the most user-friendly and effective manner.

In Kenya, the result of legislative review was the Children's Act of 2001, which consolidated three former statutes relating to children. In South Africa, on the other hand, the Children's Act deals with adoptions and child protection issues, among others, and a separate Bill on Child Justice, awaiting enactment by Parliament, deals with children in conflict with the law.

The CRC and the African Charter require states to take administrative or other measures to give effect to their provisions.⁵⁰ Measures such as the establishment of institutions and domestication of the treaties can pave the way for the realisation of this requirement, by obliging the state to create appropriate organs and structures. Domestication of children's rights instruments serves to show a country's commitment to their provisions. It also has an impact on the enforceability of the rights before the courts in the respective countries. At the international level, domestic legislation may be employed as evidence of a state's compliance or non-compliance with international obligations⁵¹.

MECHANISMS FOR DOMESTICATION OF INTERNATIONAL LAW

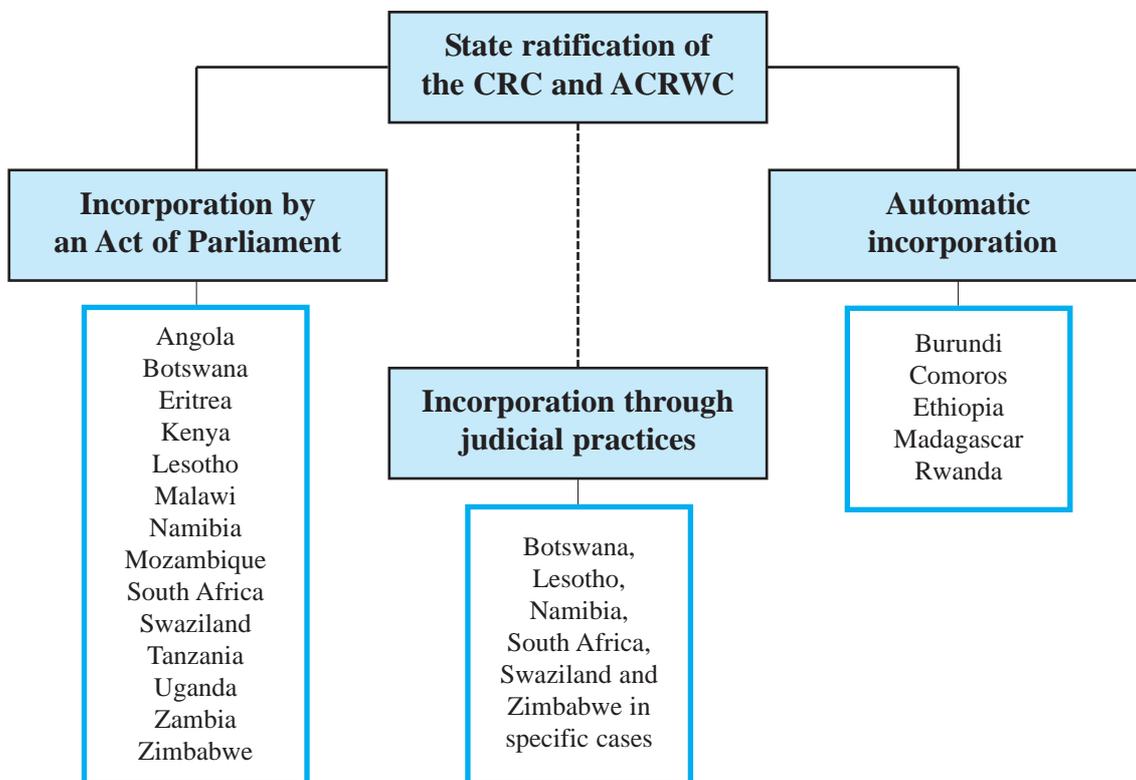
A country's approach to domestication of international law, such as the CRC and African Charter, depends on their legal system. From a legal perspective, any legal form of treaty ratification is equally binding. This study focuses on the legal domestication process, but it is important to bear in mind that a country's political system, whether a democratic parliamentary system or an authoritarian presidential system, may have an impact on the ratification and domestication process.

Law systems

Common law systems generally follow the English legal system, where jurisprudence mainly stems from national and international case law from other common-law jurisdictions seen

together with legislation. In civil law systems, codified law or legislation takes prominence over case law; courts make decisions based on specific legislative provisions. They also apply rules of interpretation to specific legislation where there are gaps, rather than rely on previous judgements in other cases. Other countries have a dualist legal system, which incorporates aspects of common and civil law, together with aspects of customary and religious law.

Figure 3: Domestication of international standards



Incorporation by Act of Parliament: These are countries with a dualist approach to international law, where a national or domestic version of the treaty is necessary before it is applicable nationally.

Automatic incorporation: Countries that follow a monist approach to international law, where there is no distinction between international and national law. Once ratified, the treaty automatically becomes binding law in the country and can be directly invoked and applied as soon as its ratification is published. However, it is not always clear whether international law prevails in case of conflict with national law.

Incorporation by judiciaries: Judiciaries, particularly in countries with a dualist approach to international law, can and do play a role in domestication of provisions of international treaties. Where the legislature (parliament) has not enacted laws to incorporate the treaty, the judiciary

may nonetheless rely on provisions of the treaty by adopting the position that international law to which the country is a party should apply where there are no national laws to address the issue in question and/or when national law conflicts with international law.

EXPERIENCES OF HARMONISATION IN THE EASTERN AND SOUTHERN AFRICA REGION

This review of experiences has identified a number of practical steps and approaches that have already been used to harmonise national laws with the provisions of the CRC and the African Charter. These approaches are based on the strategies deployed by Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa and Uganda. They do not represent all the steps these countries undertook, nor were they followed in all the countries. However, they can be considered as good practice for countries seeking to harmonise their laws relating to children.

Harmonisation is both a technical exercise and a process. It requires a political commitment to respect international obligations on children's rights, and entails taking stock of national policies and laws, and identifying the actions that need to be taken. Finally, implementation is vital to the harmonisation process.

Comprehensive review of all laws relating to children

A comprehensive, consultative and multi-sectoral review of all laws relating to children is a first and essential step in the harmonisation process, in order to identify inconsistencies and gaps. Specific actions include:

1. Consultative process

A review of existing legislation is best done through a widely participatory process. This can help to build strategic partnerships amongst various stakeholders, including government departments, technical experts, civil society organisations, children and young people, and international partners, and create the foundation for an understanding of child rights and effective implementation of new legislation. This process was adopted by several countries in the region, including Uganda, Lesotho, Mozambique, Swaziland and Zambia. Uganda constituted a Child Law Review Committee to undertake research and consultation on children's issues for a period spanning nearly two years. Its consultation methodology included visiting relevant institutions, such as schools, prisons, police, probation officers and remand homes, and soliciting views from a wide range of participants in both urban and rural areas. There was also wide public consultation in the form of leaflets and questionnaires directed at targeted individuals and groups.⁵²

2. Multi-sectoral inclusion

As children's rights span various disciplines, it is beneficial to have multi-sectoral representation, including law and justice, health, education and social welfare, to ensure that all aspects of the convention are covered. It is particularly important that the review process should not only be confined to legal or justice sector experts. A multi-disciplinary approach fosters open and transparent reform and facilitates comprehensive legislation, policy and ownership by stakeholders. This is critical for the credibility of the reform process and to mobilise support for the

successful implementation of ensuing legislation. The multi-disciplinary and multi-sectoral approach is exemplified by the Lesotho experience, where the Lesotho Law Reform Commission undertook the process headed by Dr Itumeleng Kimane, a leading academic with a background in sociology and criminology.

The review process may also incorporate thematic groups targeting specific issues; for example, on vulnerable children. This targeted approach ensures comprehensive and informed statutory provisions. This was the case in the Lesotho review process, as well as in Uganda, where the Child Law Review Committee identified 'young offenders', 'child care' and 'domestic relations' as their three key areas of focus.⁵³

3. Building capacity

Capacity building through study tours enables national officials to learn from other countries that have carried out reform in similar or different systems, with the objective of evaluating the most appropriate models and practices. When the review has been completed and legislation is being enacted, it is particularly important to compare legislation from other countries with similar jurisdictions. Countries may replicate appropriate models where they exist; for example, the Lesotho Children's Protection and Welfare Bill and the Child Justice, Care and Protection Bill of Malawi draw substantially from the South African Child Justice Bill. Countries with comparable legal systems and common cultures and values can benefit from sharing experiences, including adapting or replicating legislation as applicable.

4. Child participation

The review process should also ensure wide and effective institutionalised child participation; for example, through partnering with schools to solicit children's perspectives, as in the Ugandan process. Other innovative and child-friendly means of soliciting children's views include developing children's drama and role-plays, as used in the Lesotho process. In Rwanda the Office of the First Lady organised the first National Conference on the Rights of the Child in 2000, followed in 2004 by children themselves organising a National Summit of Children.

In Malawi, the National Youth Council Act of 1996 provided a procedure for the registration and regulation of youth organisations, which resulted in the emergence of many youth organisations working in the areas of children's rights and development. Since 2001 there has been a biannual Youth Parliament in Malawi, with support from UNICEF and other child rights organisations. The representatives are elected through youth groups throughout the country and the resolutions of the Youth Parliament are submitted to the Ministry of Gender, Child Welfare and Community Services. Although the Youth Parliament is not organised within a legislative framework, it brings children and youth together to discuss issues of national development and matters of common concern.

5. Legal reform

Countries have the option of consolidating their legislation on children's rights into a single comprehensive act after the review process. This was the approach adopted by Uganda and Kenya with their Children's Acts. Lesotho and Malawi have also consolidated bills on children that are pending. The second option is thematic legislation on children where the review process yields more than one statute that

seeks to harmonise laws with the CRC. For example, in South Africa there is a Children's Act and a pending bill on Child Justice. Mozambique also has two bills pending, one on Child Protection and the other on The Jurisdictional Organisation of Minors.

Even the best drafted legislation will have gaps. It is therefore necessary that all laws emerging from the review process expressly state that where omissions emerge outstanding issues and cases should be interpreted in the light of provisions of the CRC and the African Charter, such as in Uganda's Children's Act. This is recommended for all legislation, particularly where the proposed legislation is a first attempt to harmonise domestic laws with international standards as gaps may only become evident as the law is implemented. An express provision enables the courts to look directly at the CRC and African Charter, as well as decisions of the respective committees, in guiding their considerations and decisions. The CRC Committee has commended situations in which the CRC clearly takes precedence over domestic law where the two conflict.⁵⁴ It is also advisable that domestic legislation reflects the identified 'general principles' in the CRC.⁵⁵

Box 2: Ensuring supremacy of international and regional standards

The Children's Act of Uganda comprehensively incorporates international standards on children's rights into domestic law.

'[T]o exercise, in addition to the rights stated in this ... [Act], all rights set out in the UN Convention on the Rights of the Child and the [AU] Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this [Act].'

6. Implementation of policies and procedures

Following the review and enactment of legislation comes the challenging task of implementation. There are several approaches that can be adopted:

- South Africa undertook a costing exercise on the proposed draft legislation. This approach can help address the crucial issue of resources for implementation in good time.
- Any law is only as effective as its implementation mechanism. In addition to law reform, governments must enact policies and guidelines and establish mechanisms and institutions for effective implementation of laws.
- The CRC Committee recommends that consideration is given to providing an independent monitoring mechanism through which children can make complaints about abuses of their rights, such as a children's ombudsperson.⁵⁶
- The Committee highlights the need to establish a single mechanism for the development of child rights policies, plans and programming, and for the coordination of implementation of the Convention.⁵⁷

Table 2: Selected examples of policies and mechanisms facilitating implementation of children' rights

Country	Policy initiative	Mandate
Botswana	National Plan of Action for Children, 1993-2003 & 2006-2016 National Child Welfare Committee	'The child is at the centre of programming for the next ten years and beyond'. Seven working groups have been created: Policy and Legislation; Education and Training; Health and Nutrition; HIV/ AIDS; Sport and Recreation; Environment and Safety; and Child Protection To oversee, develop and coordinate law and policy actions for and on behalf of children; publicise the CRC; and monitor its implementation
Comoros	National Multi-Sectoral Commission, 1999	To follow up on implementation of the CRC
Eritrea	CRC Committee, 1996; composed of the Ministries of Labour and Human Welfare; Health; Justice; Education; and Information; local governments, the National Union of Eritrean Women; and National Union of Eritrean Youth and Students	Established to examine implementation of CRC provisions in domestic law
Ethiopia	Ethiopia's National Plan of Action for Children 'from 2003 to 2010 and beyond'	The implementation of the CRC and UN Resolution on a World Fit for Children
Malawi	National Youth Policy, 1996	To promote the participation of children in national politics and socio-economic development

7. Monitoring

It is important that any laws enacted have a monitoring mechanism. States may choose which monitoring mechanism they establish, but an institutionalised form of monitoring is necessary to complete the harmonisation cycle. It is recommended that such monitoring bodies institutionalise children's participation in monitoring and treaty reporting processes.

A distinction should be made between independent monitoring and self-monitoring, or monitoring by a national governmental council or committee established for the purpose of supervising planning and evaluating the implementation of the CRC. The following are examples of both independent and self-monitoring mechanisms used by countries in the review:

- **An independent monitoring mechanism within the legislation itself**, as the Lesotho Children's Protection and Welfare Bill proposes. This monitoring mechanism is envisioned as an independent commission that reports directly to Parliament on the implementation of the CRC and other relevant children's rights instruments.
- **Multi-sectoral and multi-disciplinary national institutional mechanisms**, such as councils or commissions, for the implementation and monitoring of children's rights. Membership should be made up of various stakeholders, including government and civil society, and should ideally include representatives from both local and national levels, such as Ethiopia's Convention Implementation Committees, which have representation from national down to grassroots levels.

These national mechanisms are often vested with responsibility and supervision over planning, financing and coordinating of children's rights in the country. They may also supervise formulation or advise government on state reports to the CRC and the African Charter committees. It is recommended that states take all necessary measures to provide such institutions with adequate human, financial and other resources; a clear mandate; and sufficient authority to carry out their mission.⁵⁸ Such councils have been provided for in Kenya, Malawi and Madagascar.

Table 3: Selected examples of national monitoring mechanisms on implementation of children's rights

Country	Monitoring mechanism	Mandate
Lesotho	Independent Children's Commission in the Children's Protection and Welfare Bill: a small, independent commission reporting directly to Parliament that is empowered to solicit its own funding	<ul style="list-style-type: none"> • Monitor the general wellbeing of children, as well as promoting and protecting their rights • Investigate national and individual issues pertaining to violations of children's rights and make appropriate referrals following investigations • Monitor national compliance with international and regional treaty obligations • Coordinate awareness-raising activities with regard to children's rights
Kenya	National Council on Children's Services under the Children's Act: membership is drawn from government departments and non-governmental representatives	<ul style="list-style-type: none"> • Exercise general supervision and control over the planning, financing and co-ordination of children's rights and welfare activities and advise the government in this regard • Specifically tasked with ensuring the full implementation of Kenya's international and regional treaty obligations relating to children, including the formulation of state reports under the CRC and the African Charter
Madagascar	Multi-sectoral networks for the rights and protection of the child from national to local level, situated within the Ministry of Population	<ul style="list-style-type: none"> • To act as local focal points on rights and protection of children • To define local action plans on protection of children • To be anchor points for data collection for the Regional Observatory of the Rights of the Child in the Indian Ocean region

Table 4: Countries that have undertaken a comprehensive review of laws relating to children and the resultant legislation

Countries	Comprehensive review of all laws relating to children	Selected examples of resulting legislation
Kenya	1991-94, Law Reform Commission	Children's Act, 2001
Lesotho	2004, Lesotho Law Reform Commission	Children's Protection and Welfare Bill (pending enactment)
Madagascar	2005, Commission for the Reform of the Rights of the Child	Law of Adoption Act No 014, 2005 Law on Foster Care Act No 885, 2006 Law on Marriages Act No 008, 2007 Law on Protection of the Rights of Children in Difficult Circumstances Act No 009, 2007 Draft Decree on Juvenile Justice: Protection of the rights of the children in conflict with law Draft Decree on the Worst Forms of Child Labour
Malawi	2001, Special Law Commission Committee	Child Justice, Care and Protection Bill (pending enactment)
Mozambique	2003-04, Ministry for Coordination of Social Action, Ministry of Justice and UNICEF/ Technical Unit for Legal Reform (UTREL)	Draft Bill on Child Protection Draft Bill on the Jurisdictional Organisation of Minors
Namibia	1994 - ongoing, Ministry of Health & Social Services Ministry of Justice	Children's Status Act, 2006 (not yet in force) The objectives of this Act are 'to promote and protect the best interests of the child' and to 'ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents' Child Care and Protection Bill Child Justice Bill
South Africa	South African Law Reform Commission	Children's Act, 2005 (partially in force) Child Justice Bill (pending)
Swaziland	2005, Save the Children Swaziland	Kingdom of Swaziland Issue Paper for a new Child Law, 2005
Uganda	1990-92, Ugandan Child Law Review Committee	Children's Act, 1996

GENERAL PRINCIPLES AND PROTECTION MEASURES OF THE CRC AND THE AFRICAN CHARTER

PART

2



Credit: Liba Taylor

DEFINITION OF A CHILD

CRC - Art 1

'For the purposes of the present Convention, a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.'

The African Charter - Art 2

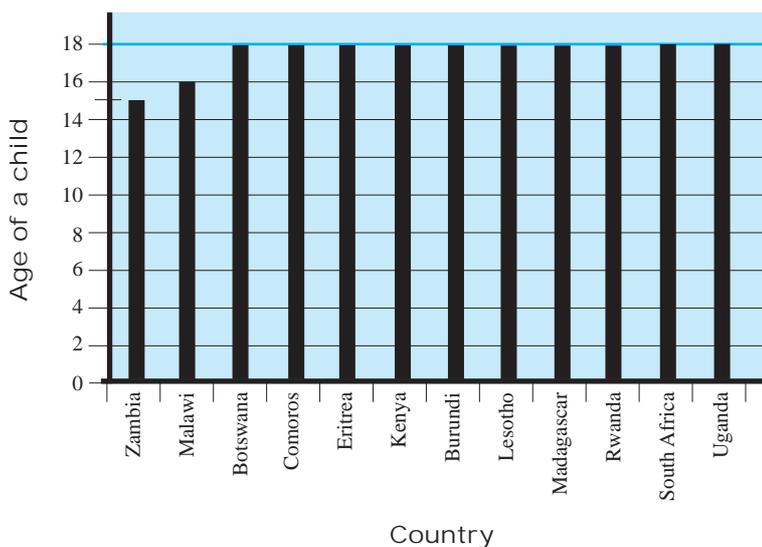
'For the purposes of this Charter, a child means every human being below the age of eighteen years.'

All the rights and protection accorded to children hinge on the definition of the child. As the above provisions show, according to the CRC and the African Charter, a child means every human being below the age of eighteen years. However, there is a threat to children's protection in the region due to the failure to have an overarching definition of a child and as a result of discrepancies and ambiguities on minimum ages of related issues, such as marriage and sexual consent.

In eight countries - Angola, Burundi, Ethiopia, Mozambique, Namibia, Swaziland, Tanzania and Zimbabwe - there is no overarching definitive age of a child in either the constitution or in legislation. They do have laws specifying that the age of civil majority is eighteen; however, this is not the same as having a definitive age for children to guide decision-making in all issues affecting children.

Other countries, such as Malawi, describe children in the constitution as anyone under sixteen, while Zambia⁵⁹ describes a young person as being up to the age of fifteen. Though these two constitutional definitions were set out prior to any ratification of the CRC, it is critical that they are amended to reflect current and adopted recommendations on the definition of a child.

Figure 4: Countries with an overarching definition of a child



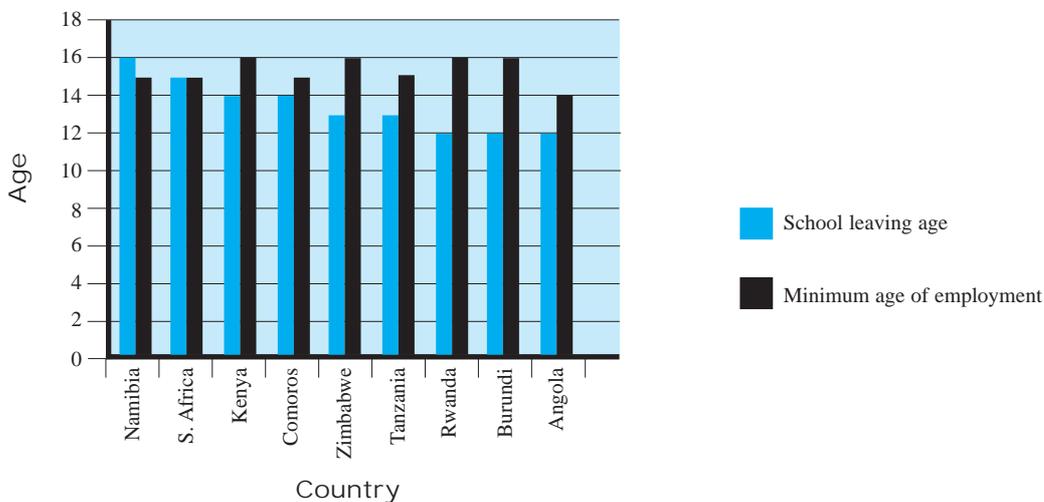
Inconsistencies in minimum ages

There are inconsistencies in legal definitions of minimum ages, such as for sexual consent, marriage, completion of basic education and eligibility for employment, which must be addressed in majority of the countries reviewed. Inconsistencies can often occur during legal reform processes that are not coordinated and do not look at child legislation holistically.

Age of employment and compulsory education

In Burundi, Comoros, Kenya, Rwanda, Tanzania and Zimbabwe, the age at which a young person can legally work is between one and three years higher than the expected age of completion of compulsory basic education. For example in Rwanda, the minimum age of employment is sixteen, but the school leaving age after compulsory education is twelve. Such gaps leave children vulnerable to exploitation in illegal employment. This risk also exists in countries where there is no compulsory education, further compounded by lack of free education, as it is impossible to enforce compulsory education where it is not free.

Figure 5: School leaving age and minimum age of employment



Discrimination based on gender: Different ages for sexual consent and marriage

There are considerable gender variations in the minimum age of marriage. In Tanzania girls can get married at fourteen, while boys are legally supposed to wait until they are eighteen. South African girls can get married at fifteen, but boys at eighteen. In Namibia there are low ages of marriage for both boys and girls, at fifteen and sixteen respectively, and in Angola girls can legally marry at fifteen and boys at sixteen. The Family Law in Comoros gives the court jurisdiction to allow a marriage of a person below eighteen years where both parties have consented to the marriage. Malawi's Constitution allows marriage between persons aged fifteen to eighteen with the consent of parents or guardians, with a disclaimer that obliges the state to discourage such marriages. (This contradicts the Marriage Act that sets the age at twenty-one for both genders.) With parental consent, boys can marry at sixteen and girls at fifteen in Mozambique.

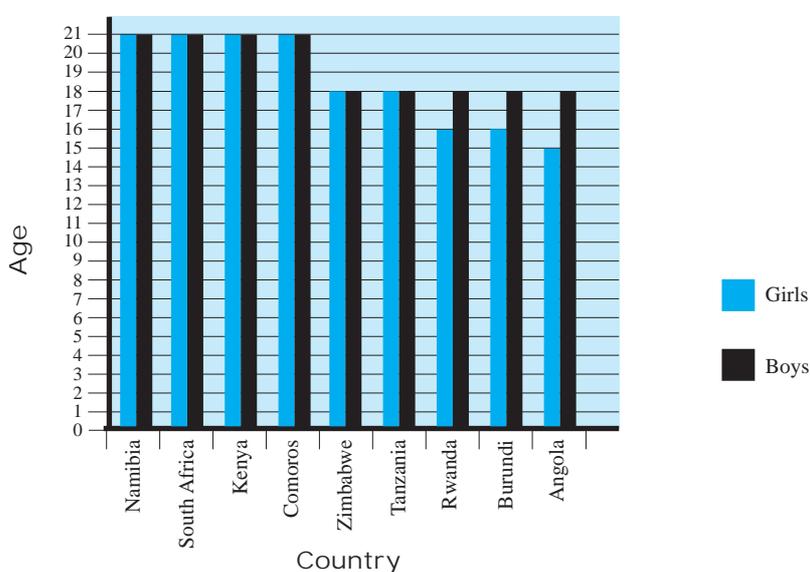
Customary law further compounds these discrepancies in ages. For example, in Eritrea and Swaziland girls' age of marriage under customary law is stated as 'upon attainment of puberty', which could be as low as twelve years old.

There are also discrepancies on the grounds of gender regarding minimum ages for sexual consent. In Malawi the age is thirteen for girls, and twelve years for boys. The Malawi Law

Commission has recommended increasing the age of sexual consent for girls from thirteen to sixteen years, but this is yet to be acted upon. In Zimbabwe, the age limit is sixteen for girls with no minimum age set for boys. In Comoros, it is fifteen years for both genders, while in Namibia, the age of consent is uncertain due to conflict in the law between the Combating of Rape Act 8 of 2000, which sets the age at fourteen for girls, and the Combating of Immoral Practices Act 7 of 2000, which gives sixteen as the age for sexual consent.

It is assumed that marriage implies an ability to consent to sex.⁶⁰ Accordingly, the Guidelines for Periodic Reports asks whether the non-discrimination requirements of CRC's Article 2 have been given ample consideration 'in cases where there is a difference in the legislation between girls and boys, including marriage and sexual consent...'⁶¹ The CRC Committee recommends that state parties fully enforce the age of marriage set out in their laws, for all forms of marriage and for both boys and girls.⁶²

Figure 6: Minimum age of marriage

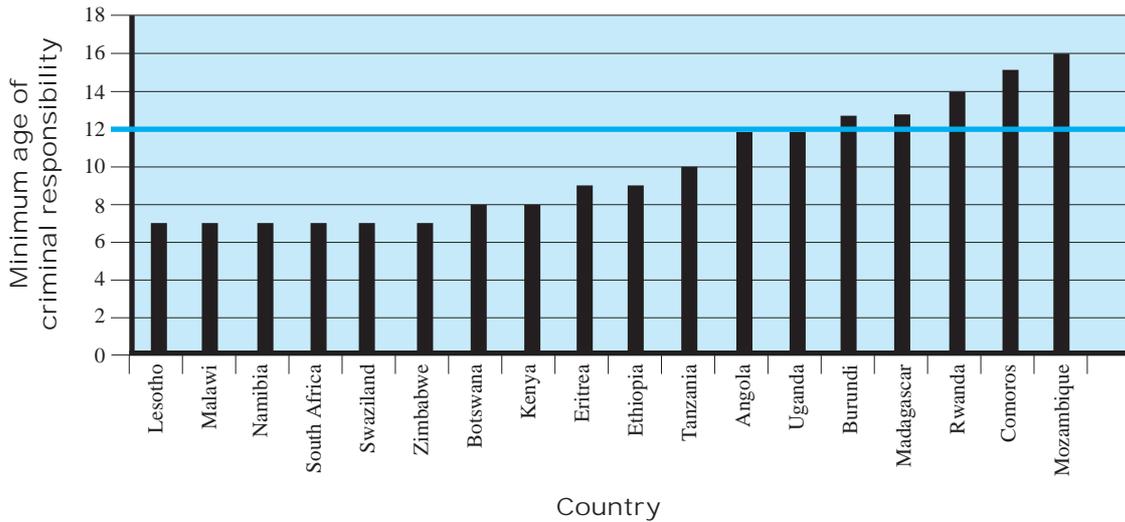


Madagascar is to be commended for passing new legislation, Law No 8/2007, which overhauls the previous marriage laws. The new law sets the minimum age for marriage at eighteen years, altering previous provisions, where girls could be married at fourteen and boys at seventeen, both with parental consent. With the new law, there is no room for parental consent below eighteen.

Low ages for criminal responsibility

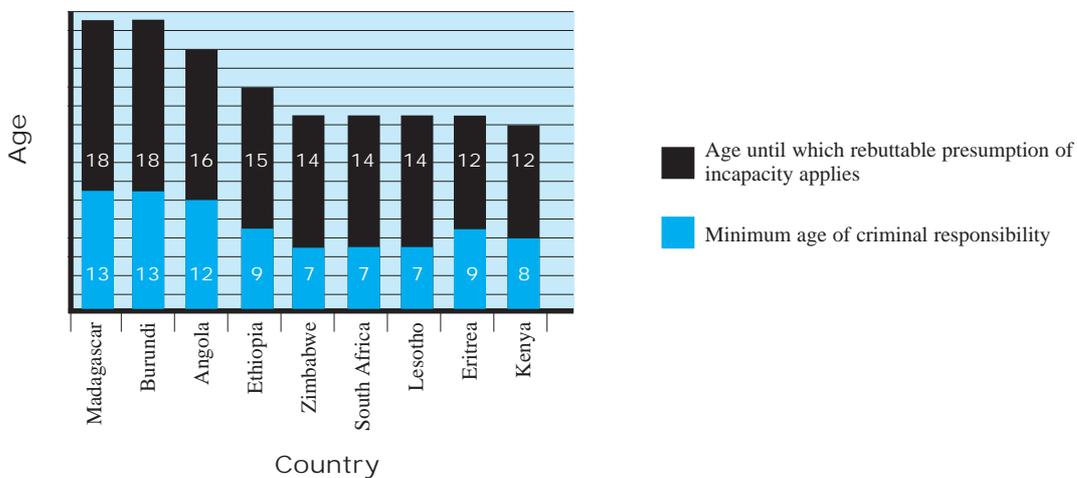
The majority of countries reviewed have low thresholds set for the age of criminal responsibility, with the lowest at seven years old in Lesotho, Malawi, Namibia, South Africa and Swaziland. All these countries are currently reviewing these provisions; for example, the Children's Protection and Welfare Bill in Lesotho seeks to raise the age of criminal responsibility to ten. Kenya has the age set at eight and Ethiopia at nine years. The Draft Penal Code of Eritrea (DPCE) proposes twelve as the age of criminal majority and nine years as the age of criminal responsibility.

Figure 7: Age of criminal responsibility



In addition to this minimum age, some countries also have a legal rule of *doli incapax* (a further rebuttal presumption of incapacity to commit a criminal act), where children are presumed to lack the capacity to discern right from wrong and to act in accordance with this understanding. However, the presumption is rebuttable upon the production of proof beyond reasonable doubt by the state.

Figure 8: Minimum age of criminal responsibility and age until which rebuttable presumption of incapacity applies



Regardless of special measures, the minimum age at which criminal responsibility is attributable remains the basis upon which children are subject to the justice system. Theoretically, children as young as seven continue to be held criminally responsible before the courts. Although neither the CRC nor the African Charter specifies a minimum age, recent recommendations from the CRC Committee in their General Comment No. 10 on Children's Rights in Juvenile Justice set the minimum age for criminal responsibility at twelve years and abolish the use of *doli incapax*.⁶³ By this criteria, as can be seen in the table above, the age of criminal responsibility in the majority of countries covered in this report is far below the twelve years set by the Committee.

Non-discrimination and best interests of the child

CRC - Arts 2 & 3

*'State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction **without discrimination of any kind**, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'* Art 2

*'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**'* Art 3

The African Charter - Arts 3 & 4

*'Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter **irrespective of the child's or his/ her parents' or legal guardians' race, ethnic group, colour, sex, language, relation, political or other opinion, national or social origin, fortune, birth or other status**'* Art 3

*'In all actions concerning the child undertaken by any person or authority **the best interests of the child shall be the primary consideration.**'* Art 4

The non-discrimination obligation within the CRC is active and requires states to review legislation, planning and education, and to raise awareness and disseminate information to address and redress disparities brought about by discrimination. This obligation addresses both legalised and de facto discrimination.

States are encouraged by the CRC to take all necessary measures to ensure that customary law does not impede the implementation of this general principle, notably through raising awareness among community leaders.⁶⁴ However, the country reports detail various forms of discrimination against children, both formally within the law and in communities, including discrimination against girls, children of minorities, such as migrants and refugees, orphans, children born out of marriage, and children with disabilities. Cultural norms and practices deeply entrenched in communities can foster and perpetuate discrimination.

The study reveals that all the countries have a principle of non-discrimination in their constitution or other laws that is generally applicable to all people within that state. Some countries have specific constitutional or legal provisions relating to non-discrimination and the principle of the best interests of the child. Constitutions are the supreme laws of a country, and hence afford the highest standard of legal protection.

However, as Table 17 below shows, even where constitutional or other legal provisions exist, there are sometimes inbuilt qualifications, 'claw-back' provisions or other contradictory laws, such as customary or religious laws, which in effect facilitate discrimination. Other instances of discrimination are found in laws regarding minimum ages of marriage, where at least seven of the countries in this review have different minimum ages depending on gender.

Discriminatory provisions based on conflict between formal codified laws and customary laws include issues such as inheritance of property. Children born out of wedlock may be

discriminated against, as well as boys being favoured over girls and adopted children. In Tanzania children born out of wedlock are not entitled to familial relationships with their fathers, including the right to take on their father's name. The Law of Marriage maintains that all children have the same rights, but the Affiliation Ordinance is unclear about the status of a child born out of wedlock, impacting on a children's right to a name and to inherit property. Furthermore, under the Births and Death Registration Ordinance, it is not mandatory for a father to register even where a court order declares him the father.

It is important to note that non-discrimination should not be equated with identical treatment, as the CRC Committee has highlighted.⁶⁵ This recognises measures, such as affirmative action or other legitimate differentiation, which states may use to reduce disparities.

Table 5: Selected examples of non-discrimination and best interests of the child provisions

Country	Provision	Comment
Botswana	<p>Constitution, Section 2, provides for the protection of all fundamental rights and freedoms without discrimination. Section 15(i) defines discriminatory as '...affording different treatment to different persons, attributable wholly or mainly on their respective descriptions by race, tribe, ...colour, creed...' There is no specific reference to age or gender, catering for non-discrimination against children and girls respectively</p> <p><i>Unity Dow v. Attorney General</i> 1991, held that Section 15 of the Constitution should be read broadly in the light of Section 3, which includes gender as a basis upon which discrimination should not be based</p> <p><i>Moremi v. Mesotlho Misca</i> 1996, enshrined the need for courts to consider the best interest of the child as a guiding principle for all actions involving children</p>	<p>Section 15(4) creates a list of exceptions where 'different treatment' may be allowed, including in adoption, marriage, death, devolution of estates, and matters relating to personal law: all areas that impact on children and their right to non-discrimination</p>
Burundi	<p>Constitution 2005, Article 19, incorporates provisions of the CRC</p>	
Comoros	<p>Constitution 2001, Preamble, proclaims equality for all in rights and duties without any distinction on the basis of sex, origin, race, religion or belief, and the right of equal protection of the law. Article 7 provides that all Comorians have the same rights, freedoms and duties everywhere in the Union</p>	<p>No specific reference to non-discrimination based on age, hence not specifically including children</p> <p>Discrimination based on parentage still exists in the law. For example, a child born out of wedlock is known as a 'child born of prohibited relations' and such a child cannot have a legal relationship with his or her biological father, as forbidden under Islamic Law</p>

Table 5 continued

<p>Eritrea</p>	<p>Constitution 1997, Article 14(2), states that all persons are equal before the law: '...no person shall be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, age, political belief or opinion, or social or economic status or any other improper factors'</p> <p>The Transitional Civil Code of Eritrea, Article 2, incorporates the principle of the 'best interests of the child' under the law of persons, family, contract and others</p>	<p>There is likely discrimination, especially against girls, on issues of marriage and inheritance, based on written and unwritten customary laws. If a female child is the only heir, she has the right to succeed to kinship- or family-owned land, but if there are male heirs, the kinship- or family-owned land will belong to him or them. There is possible discrimination on religious grounds based on sharia law, which states that a female is only entitled to half the portion of a male. If the heirs are only female their share is two-thirds of the estate, whereas if the sole heir is a female, she inherits half</p>
<p>Ethiopia</p>	<p>Federal Constitution 1995, Article 25, and corresponding regional constitutions provide for the right of equality before the law to all persons</p> <p>The principle of the best interests of the child is explicitly stated in Article 36(2) of the Federal Constitution</p>	
<p>Malawi</p>	<p>Constitution 1994, Section 20(1), prohibits discrimination of persons in any form and guarantees and guarantees equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status</p> <p>Constitution, Section 23(1), provides that '[a]ll children, regardless of the circumstances of their birth, are entitled to equal treatment before the law'</p>	<p>There is still discrimination within laws; for example, provisions relating to inheritance based on rules on intestate devolution of property that have their roots in patriarchal customary law. The Law Commission has recommended proposals that would abandon reference to customary law heirs and ensure the protection of the rights of women and children</p> <p>If adopted, the Children's (Care, Protection and Justice) Bill 2003 would be the first to act that expressly and consistently refers to the child's best interests</p>

Table 5 continued

<p>South Africa</p>	<p>Constitution 1996, Section 28, incorporates the key concepts found in the CRC, so that interpretations of the children's rights clause refer to the more extensive provisions in international law</p> <p>Section 39(1)(b) of the constitution provides that the courts 'must consider' international law, both binding and non-binding, in interpreting the Bill of Rights</p> <p>Section 233 instructs courts to afford preference to an interpretation of statutory law that is 'consistent with international law', whenever such an interpretation would be reasonable</p> <p>The Children's Act 2005, Section 6 General Principles, is binding in all proceedings, actions or decisions in any matter concerning children, which include protection of the child from unfair discrimination on any grounds, including health status, disability and provision to the child and his or her family the opportunity to express views where this is in the best interests of the child</p> <p>Section 7 elaborates on the principles of the best interests of the child, with the enumeration of fourteen discrete guiding factors which play a role in deciding what are the child's best interests in individual cases</p>	<p>Section 28 can be considered the most elaborate children's rights constitutional provision to date of any country in the world</p>
<p>Uganda</p>	<p>Constitution 1995, Article 34, requires that laws be enacted to further the best interests of the child</p> <p>The Children's Act 1996, Section 3, provides that 'the welfare principles and children's rights set out in the First Schedule to this Act shall be the guiding principles in the making of any decisions based on the provisions of this [Act].'</p>	

Best interests of the child as a primary consideration

This review noted there has been progress in enacting constitutional or statutory provisions that require the best interests of the child to be a primary consideration in all matters and decisions involving children; it is included in draft child-centred legislation from Mozambique, Malawi, Zambia, Namibia, Lesotho and others. As the table above shows, Ethiopia, South Africa and Uganda already have constitutional provisions catering for the best interests of the child, while constitutional provision in Namibia is limited to a child's right to know and be cared for by parents. Kenya, Rwanda and Uganda have enacted the principle in their children's statutes. Zambia and Zimbabwe limit application of this principle to proceedings involving child custody and maintenance.

RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

CRC - Art 6

'State parties recognise that every child has the **inherent right to life**.'

'State parties shall ensure to the maximum extent possible **the survival and development of the child**.'

The African Charter - Art 5

'Every child has an **inherent right to life**. **This right shall be protected by law**'.

'State parties to the present Charter shall ensure, to the maximum extent possible, **the survival, protection and development of the child**.'

'The **death sentence shall not be pronounced for crimes committed by children**.'

The right to life, survival and development is one of the four cardinal principles of the CRC. It relates to life expectancy, child mortality, immunisation, malnutrition, preventable diseases and other related issues.

The term 'survival rights' covers a child's right to life and the needs that are most basic to a child's existence. These include adequate living standards, shelter, nutrition and access to medical services.⁶⁶ Among other things, states are urged to take all possible measures to improve pre-natal care for mothers and babies, reduce infant and child mortality and create conditions that promote the wellbeing of all children. Ensuring survival and physical health are priorities, but states are reminded that Article 6 encompasses all aspects of development, and that a child's health and psychosocial wellbeing are in many respects interdependent.

Table 6: Selected examples of legal provisions protecting the right to life

Country	Legal provisions protecting the right to life
Botswana	Constitution, Section 3, guarantees the protection of the right to life for every individual without discrimination. It allows the imposition of the death penalty as a form of punishment, although it can not be imposed on a child who committed a crime below the age of eighteen ⁶⁷
Eritrea	The Civil and Criminal Codes and the 1997 Constitution ⁶⁸ enshrine the right to life, survival and development of the child. This provides that no person shall be deprived of his or her life without due process of law ⁶⁹ Customary laws recognise the foetus's right to life and penalise any act that results in the destruction of the foetus ⁷⁰ The Transitional Penal Code and Draft Penal Code put a limit on the imposition and application of capital punishment upon young offenders, as their age makes rehabilitation and reformation a more appropriate option ⁷¹ The Transitional Civil Code states provisions such as the right to maintenance, to ensure that children survive and strive ⁷²
Rwanda	Article 12 of the Constitution declares that everyone has the right to life and that no one shall be deprived of their life arbitrarily

Table 6 continued

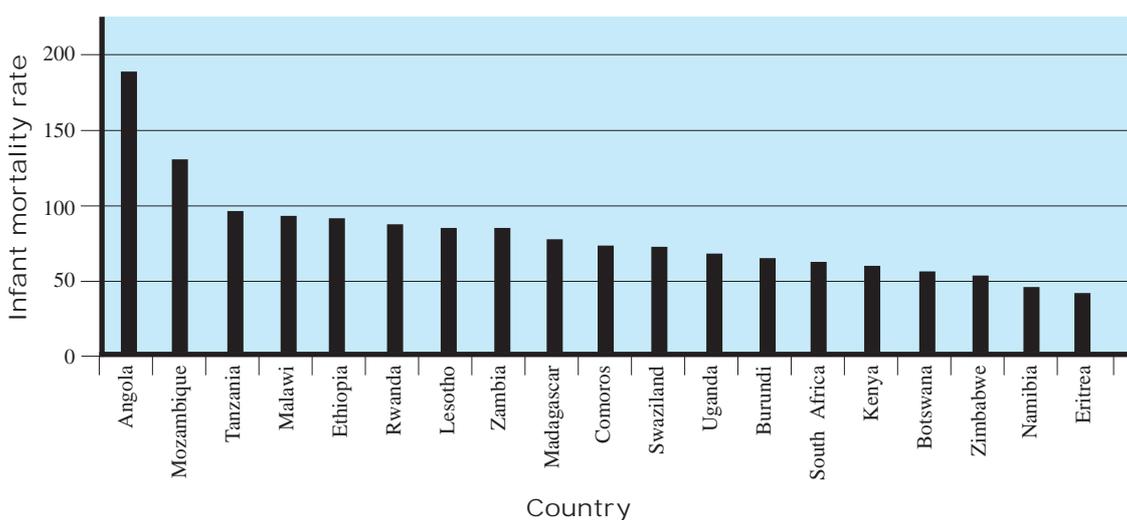
Zambia	Article 12 of the Constitution recognises the sanctity of life
Zimbabwe	Section 338 of the Criminal Procedure and Evidence Act exempts children from receiving the death penalty

The CRC Committee has noted that the right to life, survival and development is unduly threatened by the difficult socio-economic realities in some countries in the region. It encourages states to reinforce their efforts to provide greater protection and support to ensure realisation of this right.⁷³

From the nineteen countries in this review, Burundi, Eritrea, Ethiopia, Kenya, Lesotho, Malawi, Mozambique, Rwanda, Tanzania and Zambia were ranked as the 'least liveable' countries in the world, based on their low rating in the Human Development Index (HDI).⁷⁴ The HDI is a global comparative measure of life expectancy, literacy, education and living standards, and is a standard means of measuring wellbeing, in particular child welfare.

Understanding the right to life, survival and development as pertaining only to the death penalty, homicide and infanticide is a very limited perspective. Article 6 of the CRC refers not only to the child's inherent right to life, but also states' obligations to ensure, to the maximum extent possible, the survival and development of the child. Taking the infant mortality rate as an indicator of child welfare and wellbeing, the table below indicates that all countries in the region, in particular Angola, must do more to ensure the survival and development of the child by addressing the high rate of infant mortality.

Figure 9: Infant mortality rate (total deaths per 1,000 live births)⁷⁵



RIGHT TO A NAME, NATIONALITY AND TO KNOW ONE'S PARENTS

CRC - Art 7

*'The child shall be registered immediately after birth and shall have **the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.**'*

The African Charter - Art 6

'Every child shall have the right from his birth to a name.'

*'Every child shall be **registered immediately after birth.**'*

*'Every child has the right to acquire **a nationality.**'*

*'State parties to the present Charter shall undertake to ensure that their constitutional legislations recognise the principles according to which a child shall acquire **the nationality of the state in the territory of which he has been born** if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws'.*

One of the most fundamental rights enunciated in both the CRC and the African Charter is the right of the child to be registered immediately after birth and to a name and nationality. These rights revolve around how a child is identified and affiliated. The right to a name is critical for the protection and promotion of children's rights. Birth registration is important, as it:

- **Formally confers the child with legal personality** and provides them with the possibility to access services from health and education to protection rights in the law where their age is critical.
- **Enables protection** from practices such as early marriage, abuse and exploitation, as the child has legal proof of age that stems from registration.
- **Is proof of age in proceedings involving children** when they are in conflict with the law or otherwise before a judge.
- **Confers proof of lineage** that is important in regard to inheriting property, particularly for orphans or children born out of wedlock.
- Is associated with the **child's right to know and be cared for by their parents.**

Table 7: Selected legal and policy measures on nationality and citizenship

Country	Legal and policy measures	Comment
Botswana	Citizenship and nationality are regulated by the Citizenship Act, amended in 1985 and 1995. Under Section 14, all children born in Botswana obtain the citizenship of Botswana as well as that of their parents, but are obliged to choose one when they reach the age of 21	
Burundi	Nationality Code, Law No 1/013, 2000, Sections 21-29, allows for dual nationality to any Burundian, including to a child whose mother is accorded the Burundian nationality as her second nationality	The law does not cover children born to a non-Burundian father married to a Burundian mother
Eritrea	The Nationality Proclamation, Article 2(1)-(4) states that Eritrean citizenship is attained through descent, birth if the descent of the person born in Eritrea cannot be tracked, and naturalisation	An abandoned child is the only person vested with nationality based on birth, so there is risk of statelessness for refugee or displaced children
Madagascar	The Nationality Code 1960 provides that Malagasy nationality is a nationality of filiations	Children born to a Malagasy mother and a non-Malagasy father cannot claim Malagasy nationality until they reach majority and apply for naturalisation

Table 8: Selected legal and policy measures on the right to a name and to know one's parents

Country	Legal or policy measures	Comment
Botswana	Birth Registration Act 1968, No 48 Customary law	Sections 6 & 19 discriminate against a child born out of wedlock, as it does not recognise the rights of the father, even to visitation and consequently denies the child access to both parents Upon divorce the child's right to access both parents is not recognised. Custody is traditionally granted to the father's family, while the mother only has the right to visitation. The payment of <i>bogadi</i> , or bride price, affiliates children to their father's lineage, unless the child is born out of wedlock when he or she is deemed to belong to the mother's family
Burundi	Persons and Family Code 1993, 1/024, requires registration of birth within fifteen days in the nearest city	Lack of awareness of the need for registration, as well as displacement over the last ten years due to civil war, has affected compulsory registration. However, the government is implementing free registration for internally displaced persons, returnees and other displaced people

Table 8 continued

<p>Comoros</p>	<p>Act No 84-10, 1984 on Civil Status</p> <p>The Family Code, Article 2, recognises simple adoption. The adopted child maintains rights from their family of origin, including name and rights of inheritance</p>	<p>The Family Code distinguishes children born in wedlock from those who are born outside wedlock. A child born in wedlock bears the father's name, while a child born outside wedlock bears the name given by the mother, usually the maternal grandfather's name. During birth registration it is mentioned that the name is not that of the father; the child is known as 'a child born of a prohibited relation', or <i>mwana haram</i>, and may not have legal relationship under Islamic law with his biological father, including inheritance, even with the consent of all</p> <p>A new provision, Article 102, says that, where the law nullifies a marriage, children born from the marriage may remain legitimate with the good faith of the spouses; allows the establishment of filiation in case of acknowledgement by the father and the testimony of two witnesses; and accepts scientific proof to establish paternity</p>
<p>Kenya</p>	<p>Children's Act 2001, Sections 23-25, establishes parental responsibility and retreats from a paternalistic views of the welfare of children to the principle of the best interests of the child</p>	<p>Section 25(1) is discriminatory to children who are born outside wedlock: 'Where a child's father and mother were not married at the time of his birth, the court may, on application of the father, order that he shall have parental responsibility for the child; or the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child'</p>

Challenges to children's rights to a name, nationality and knowing his or her parents

Lacking or ineffective vital registration systems

According to UNICEF estimates, over 48 million children globally are not registered at birth. In the countries covered by the report, Eritrea and Ethiopia do not yet have any vital registration systems, so although there are laws mandating compulsory registration, there are no structures and systems to ensure and support it.

Insufficient resources and weak structures and institutions charged with birth registration were found in several countries, including Burundi, Comoros, Kenya, Madagascar, Swaziland and Tanzania. Corruption and poor governance impact on registration, with officials soliciting bribes to effect registration, particularly for displaced persons or those seeking to register after the stipulated maximum period of twelve to fifteen days after birth. Other problems include the absence of decentralised systems, requiring parents to travel to major towns or cities to access registration services, and lack of awareness on the law, and the need for and process of registration of the law by parents and the community in general.

Cost of registration

Costs related to birth registration were also cited as a barrier to ensuring universal birth registration. These include the actual cost of registering and obtaining an official certificate, and related costs, such as travel and medical expenses in the hospital where birth notification is available. Most countries also have a penalty for failure to register a birth, including imprisonment in some countries such as Eritrea. However, there were no reported prosecutions for failure to register, which implies recognition by governments of ineffective or non-existent structures to facilitate compulsory and universal registration.

Conflict and other displacements

In the past ten years, population displacement due to civil war has had a negative impact on birth registration, particularly in Burundi, Rwanda and Northern Uganda. Migration of refugees in countries such as Ethiopia, Kenya and Tanzania has also had an impact on registration.

Discriminatory laws

Despite laws that prohibit discrimination on any grounds, the following countries still have legal discrimination against children based on their parentage. The CRC Committee urges that as a matter of non-discrimination and in the best interests of the child, states should take the necessary legislative measures to ensure that a child can derive nationality not only from the father, but also from the mother.⁷⁶

- The Birth Registration Act in Botswana gives room for discrimination against a child born out of wedlock, as it does not recognise the responsibilities of the father. This consequently limits the enjoyment of the child's right to identity and affiliation.
- Comoros, Malawi, Madagascar and Tanzania have legislation that exempts fathers from being named on the birth certificate where the child is born out of wedlock. Although the Law Commission in Malawi pointed out this anomaly, the issue is yet to be addressed. Registration is only compulsory for children not of African race or origin born in Malawi. In Comoros, a child born out of wedlock is known as a 'child born of prohibited relation' and cannot have a legal relationship with their biological father under Islamic law. The Affiliation Ordinance in Tanzania discriminates against children born out of wedlock by denying their right to their father's name and the right to inheritance. These discriminatory provisions impact on the child's civil, political and cultural rights, such as the right to an identity and affiliation, as well as socio-economic rights, such as maintenance⁷⁷ and the right to property.

Risk of statelessness

There are risks of children being rendered stateless because of gaps in countries' laws. The CRC Committee has recommended that states consider acceding to the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).⁷⁸

- In Eritrea, the proclamation concerning nationality fails to take into account instances where a child is unable to trace his or her descent. A refugee child could therefore become stateless.
- In Ethiopia, the Nationality Act premises nationality on the parent's Ethiopian citizenship. Although it grants nationality to abandoned children found within Ethiopian territory, as the law presumes them to have been born to Ethiopian parents, there is still the possibility of children remaining stateless within Ethiopia if they are born to immigrants or refugees, whether legal or illegal, or are adopted by Ethiopian foster parents.
- In Madagascar, if an unregistered child is not a newborn, it is necessary to fulfil the criteria of presumption, under Article 11 of the Nationality Code, before being granted Malagasy nationality. This includes the name of the child, physical characteristics, the nationality of those who are raising him or her, and the conditions in which he or she came to be under their care. This category of children runs the risk of becoming stateless.

- Uganda may also render some children stateless, as children over five years old whose parents are unknown may fail to benefit from the constitutional presumption of citizenship.

Table 9: Selected ongoing measures to implement a child's right to a name, nationality and to know his or her parents

Country	Legislative or other initiative
Burundi	Free registration for internally displaced persons, returnees and other displaced people
Comoros	Training of civil service personnel, in particular midwives, nurses and doctors The establishment of municipal buildings in cities and villages to facilitate birth registration
Eritrea	The Ministry of Health and Eritrean Demographic and Health Survey have been conducting regular surveys to collect data on vital statistics
Ethiopia	The Population and Housing Census Commission Office drafted a National Plan of Action in January 2003. A draft proclamation has been submitted to the House of People's Representatives to establish a system of vital statistics, but has not yet been promulgated. Pilot projects are underway in two regions on model birth registration, using the health extension system to make birth registration feasible, especially in rural areas
Kenya	Review of the Birth and Death Registration Act
Lesotho	The Child Protection and Welfare Bill spells out rights related to Article 7 of the CRC
Madagascar	The Reinstitution of Birth Registration of Children, initiated by the Ministry of Population in collaboration with UNICEF, aims at systematic and retrospective registration, for unregistered children as well as newborns, with the objective of 'zero unregistered births' Reforms aim to introduce new procedures for unregistered children, make formalities less cumbersome, and train local organisers to create awareness among parents on the need for declaring births on time. Reforms concerning the granting of Malagasy nationality to any child born of a Malagasy mother are also underway, following public consultations organised by the Ministry of Justice in partnership with the Women's Legal Rights Initiative
Malawi	Draft National Registration Bill
Mozambique	A pending Bill on Child Protection
Namibia	The government has taken action to ensure a simple, low-cost and effective responsibilities, particularly by encouraging fathers to play a more active role in children's upbringing ⁷⁹
Zambia	Decentralisation of birth registration administration and systems

Recommended steps to ensure and accelerate birth registration

Governments need to adopt innovative approaches to ensure birth registration, including:

- Mobile registration
- Retrospective registration, especially for nomadic and other marginalised and hard to reach communities
- Abolition of registration fees
- Public awareness campaigns on birth registration involving children

The CRC Committee recommends the adoption of special measures to cater for the registration needs of refugee children⁸⁰ and has often criticised 'inaccessible, cumbersome and expensive' registration procedures.⁸¹ It also recommends that countries seek technical assistance in implementing these measures from partners such as UNICEF.⁸²

CHILDREN'S RIGHT TO PARTICIPATION

CRC - Arts 12 & 13

'State Parties shall assure to the child who is capable of forming his or her own views the **right to express those views freely** in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

Art 12

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

Art 13

The African Charter - Art 7

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

One of the most innovative features of the CRC, and a radical development in recent years, is the recognition of the child's right to participate and be heard at all levels. The constitutions of most countries covered in this project provide the right to freedom of opinion and expression. Although this right does not specifically refer to children, it can be interpreted to include children and should give them the right to participate according to their evolving capacities.

Table 10: Selected examples of child participation mechanisms

Country	Mechanism
Lesotho	A Junior Committee of the Child Law Reform Project was formed during the law reform process of 2004. Children on the committee had the opportunity to participate as active members in national and international initiatives, such as the formulation of the national Poverty Reduction Strategy Plan, and the following activities: <ul style="list-style-type: none"> • Receiving and disseminating child rights information • Participating in projects, workshops, dialogues and roundtable discussions • Presenting a drama on national radio • Attending regional and international meetings • Participating in committee meetings, end of year review and planning meetings
Malawi	A National Youth Council Act, which provides a framework for children to express their views on diverse national socio-political issues A bi-annual Youth Parliament, held since 2001, with representatives elected by youth groups throughout the country. The resolutions of the Youth Parliament are submitted to the Ministry of Gender, Child Welfare and Community Services
Rwanda	A National Conference on the Rights of the Child in 2000, under the patronage of Rwanda's First Lady National Summit of Children in 2004
Uganda	A parliamentary forum for children launched in 2005 by civil society organisations
Zambia	A Children's Summit held in 1994 set the stage for child participation in Zambia. Since then a Youth Parliament has been held annually on the Day of the African Child, with resolutions made being presented to the President in an effort to influence policy

Cultural norms hindering children's participation

There are some initiatives in the region to promote children's participation, and in some cases, customary norms facilitate the participation of children. For example, in Eritrea children's views on familial and communal issues are traditionally considered. However the review found that the overall picture shows that culture, tradition and religion are impediments to children's enjoyment of the right to participation. For example, in Botswana, Burundi, Comoros, Eritrea,⁸³ Kenya,⁸⁴ Malawi, Swaziland,⁸⁵ Tanzania⁸⁶ and Namibia, cultural perceptions and concepts of children are contrary to the principle of child participation:

- In **Malawian** customary law, in divorce, nullity or separation of marriages and custody proceedings, an unmarried person is not allowed to express any views, including children.
- In **Botswana** children do not attend *kgotla*⁸⁷ meetings, which mean that most decisions made there have little or no input from children even when these decisions affect them directly.
- The review on the **Comoros** noted that: *'in practice, children rarely have the right to express their opinion...in the family... in school (where the teacher teaches and the student listens), or in the community or court of laws, or anytime a decision that concerns them is taken. Actually very little importance is given in hearing the child in decisions that concern him / her'*⁸⁸.

Laws implementing a child's right to be heard and to have their views considered

The review noted that majority of the countries have laws that facilitate children's participation, albeit in limited forms, in either criminal or civil proceedings or both. Such participation may be limited by the age of the child and hence does not take into account their evolving capacities.

The CRC Committee advises that states 'amend [their] legislation to fully reflect Article 12 of the Convention so that any child "who is capable of forming his or her own views" can express those views freely, including in all administrative and judicial proceedings affecting them.'⁸⁹ This provision recognises that children can form opinions from an early age and accordingly, the minimum provision should be to facilitate their participation, taking into account the particular capacities of each individual child.

This right is mainly realised specifically in regard to civil proceedings; for example, in issues of child custody in divorce proceedings, as in Angola and Eritrea, where children over ten years can express their views in civil and adoption proceedings, or in Ethiopia and Mozambique, where children over twelve can express their opinions and have them considered. Such minimum age restrictions are arguably against the CRC, which stresses the need for participation in accordance with evolving capacities and does not set a minimum age limit for participation of children.

Comoros, Malawi, Rwanda and Zambia have provision for children to express their views in civil and criminal proceedings. In Zambia, this right extends to examining a witness, giving evidence or making a statement. Rwanda cited children's participation in national processes, including in the traditional *Gacaca* Tribunals that are inquiring into the 1994 genocide.

Table 11: Selected examples of children's participation in legal proceedings

Country	Civil proceedings	Criminal proceedings
Angola	The Family Code, Article 158(3), provides that a child over ten should be listened to by the court and Article 11, Decree 6/03, provide that a child should be heard when presented before the court	
Comoros		Act on the Protection of Childhood, Article 9, states that the juvenile judge shall hear children's views
Eritrea	Transitional Civil Code of Ethiopia, Article 4, grants children the right to express their views, taking into account their capabilities and ability to understand the issue or transaction Article 681(1): the view of a child over five is considered in the decision to be placed with his or her mother or father Article 804(1): the court is obliged to hear the view of an adopted child over ten years old before deciding on adoption	
Malawi		Although the Children and Young Persons Act provides for the views of the child to be heard during the juvenile court proceedings, it does not include sufficient procedural guarantees to ensure that a child's views are effectively presented to the court
Mozambique	The new Family Law provides for the consent of children over twelve who are to be adopted	
Rwanda	Law No. 27/2001, Article 9, provides that a child has the right to freely express his or her view on any matter concerning her or him and that the child must be heard in any judicial or administrative procedure concerning that child either directly or through a representative Law No. 42/1988, Article 340, says that a child being adopted should give their consent to the adoption, as well as, the adoptive person. However, if the child has not yet reached the age to be able to give consent, the parents should give their consent on his or her behalf	Children can be heard as witnesses in proceedings that concern their interests, including under the Gacaca jurisdictions throughout the country on events during the genocide of 1994. In all judicial or administrative procedure concerning the child, a child who is able to communicate should be heard

Table 11 continued

<p>South Africa</p>	<p>The Children's Act 2005, Section 10, grants children of an age, maturity and state of development who are able to participate in any matter concerning them, the right to participate in an appropriate way, and to have any views expressed given due consideration</p>	
<p>Zambia</p>		<p>The system recognises the child's right to participate directly in proceedings, either independently or with the help of a parent or legal guardian. Where a juvenile is not legally represented, she or he has the right to examine witnesses. A juvenile may also be asked questions with respect to the contents of a social welfare report before a court, and a juvenile must consent to a probation order</p>

RIGHT TO HEALTH AND HEALTH SERVICES

CRC - Art 24

'State parties recognise the right of the child to the enjoyment of the **highest attainable standard of health** and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services'.

'State parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To **diminish infant and child mortality**;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of **primary health care**;
- (c) To **combat disease and malnutrition**, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
- (d) To ensure **appropriate prenatal and postnatal health care for mothers**;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to **education and are supported in the use of basic knowledge of child health and nutrition**, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop **preventive health care**, guidance for parents and family planning education and services'

'State parties shall take all effective and appropriate measures with a view to **abolishing traditional practices prejudicial to the health of children**'.

The African Charter - Art 14

'Every child shall have the right to enjoy the **best attainable state of physical, mental and spiritual health**'

'State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures...to support through **technical and financial means, the mobilisation of local community resources in the development of primary health care for children**.'

The obligation to ensure 'the highest attainable standard of health' for children builds on and develops the right to life and to survival and development, as set out in Article 6 of the CRC, to the maximum extent possible. States must undertake four main measures to achieve this standard:

1. Reduce still-birth and infant mortality rates and ensure the healthy development of children
2. Improve all aspects of environmental and industrial hygiene

3. Prevent, treat, and control epidemic, endemic, occupational and other diseases
4. Assure medical attention for all who become sick

National health goals and targets in all the countries are included either as part of their Poverty Reduction Strategic Plans (PRSPs) or Millennium Development Goals (MDGs). Accordingly, in addition to stipulating the right to health either in their constitutions or other domestic laws, all the countries have recognised and harmonised the right to health. There are also institutional mechanisms to implement this right, through Ministries of Health and national health plans in most of the countries.

Challenges to implementing the right to access to health

Despite legal and policy provisions related to realising the right to health, countries face numerous challenges and issues that must be addressed.

- **Payment of user fees**

User fees, introduced to the countries in this review in the 1990s by the World Bank and International Monetary Fund, have proved a major barrier to access to health services. The majority of the countries in the review levy fees to access health services, although six - Burundi, Botswana, South Africa, Tanzania, Uganda and Zambia - provide free health care for mothers and children. Kenya has not yet abolished user fees, although the government introduced a new policy in 2004 that abolished previous user fees and introduced a standard payment of Ksh 10 (US\$ 0.14) for treatment at dispensary level and Ksh 20 at health centres. However, Kenya is a low-income country and for many, especially women and children, any fee is a barrier to accessing health services.

Table 12: Countries that provide health services free of any user fees

Country	Comment
Burundi	Free access to health services for maternal and child services, but not drugs (May 2006)
Botswana	Free health care services for children
South Africa	Free health care for mothers and children under six
Tanzania	Free health services for children under eighteen
Uganda	Free health care
Zambia	Free health care (April 2006)

- **Insufficient budgetary support**

Budgets for health are below 10% of the total national budget in over half the countries in this review. Insufficient budgetary allocations mean insufficient infrastructure and resources, including trained personnel, and this is manifested in high rates of maternal and infant mortality, as the tables below indicate.

- **Impact of HIV/AIDS**

The impact of HIV/AIDS in the region has negatively affected children's right to health: Botswana has one of the fastest growing infection rates, and South Africa has the highest prevalence rate in the world. The majority of the countries in this review also have high infection and prevalence rates, and allocate a large portion of the health budget to the management of HIV/AIDS. Despite this there is limited free or affordable access to anti-retroviral treatment for children living with HIV. Attention to HIV/AIDS has had the negative effect of marginalising traditional child health issues, including childhood diseases, nutrition and immunisation.

Children face malnutrition in the region because of poor agricultural practices and effects of climate change, such as famine, droughts and floods. Conflict leading to displacement in Burundi, Eritrea, Ethiopia, and Uganda, has also contributed to malnutrition levels in children.

Box 3: Debt cancellation leading to provision of free health services

On 1 April, 2006, the Zambian government introduced free health care for people living in rural areas. This was made possible by debt cancellation of US\$4 billion, as resources previously directed towards repaying the debt are now being utilised in providing free health services. User fees were introduced by the World Bank and IMF in the 1990s, making health care inaccessible to millions. Debt cancellation, coupled with increased aid from the G8 countries, has now enabled Zambia to roll out free health services.

Governments' financial investments in health services has a direct impact on the wellbeing of children and the enjoyment of their right to health (Figures 10, 11 and 12). For example, Burundi's low investment in health is evidenced in the low rates of births attended by skilled personnel, which in turn leads to a high maternal mortality rate. Conversely, in this review Botswana has the highest percentage of births attended by skilled personnel, which is reflected in their low maternal mortality rate, even though the national health expenditure is below 10% of overall government expenditure. States with high maternal mortality rates and low rates of births attended by skilled personnel must divert more resources to their health sectors, such as Tanzania.

Figure 10: Government expenditure on health (as a percentage of general government expenditure)⁹⁰

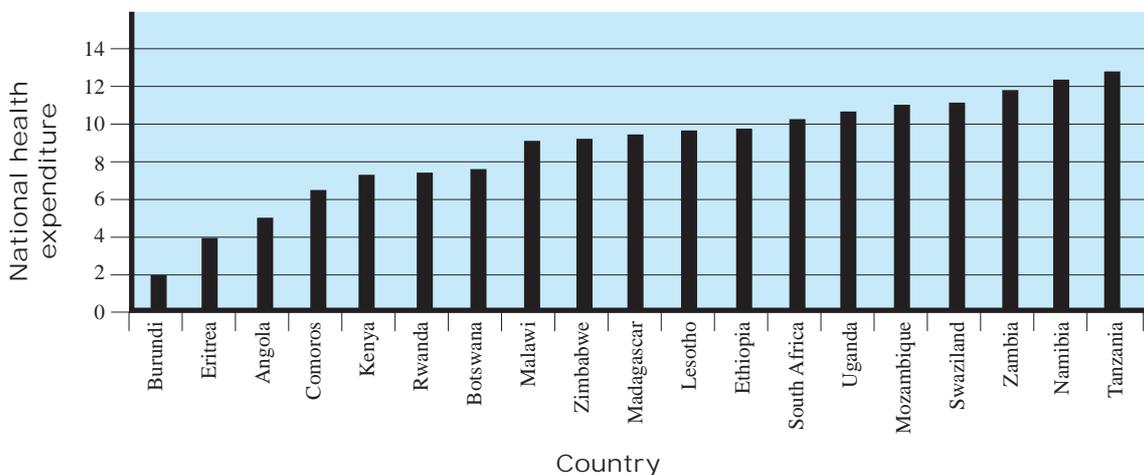
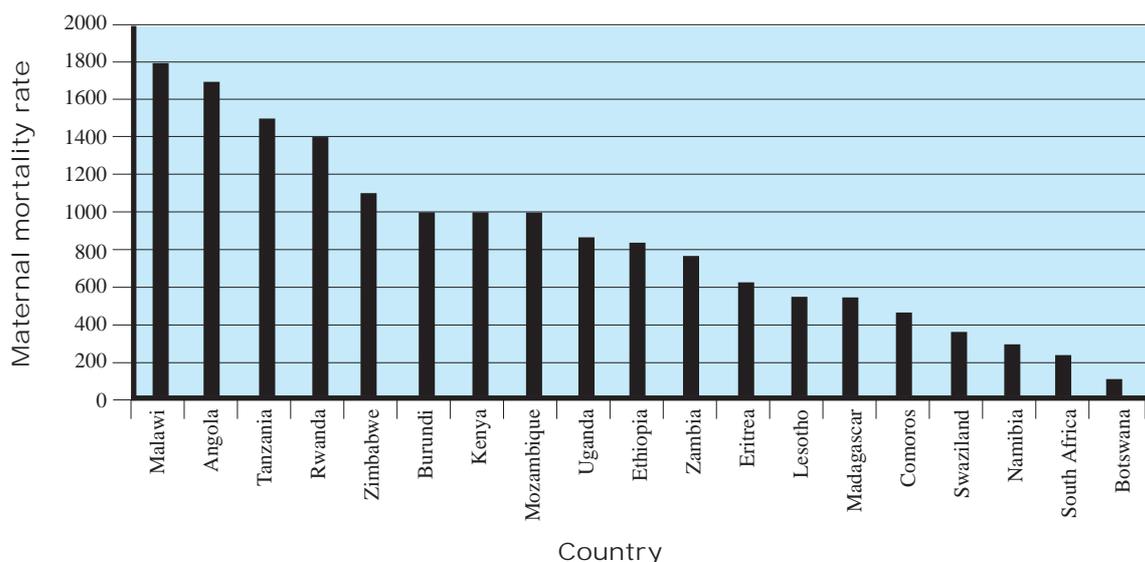
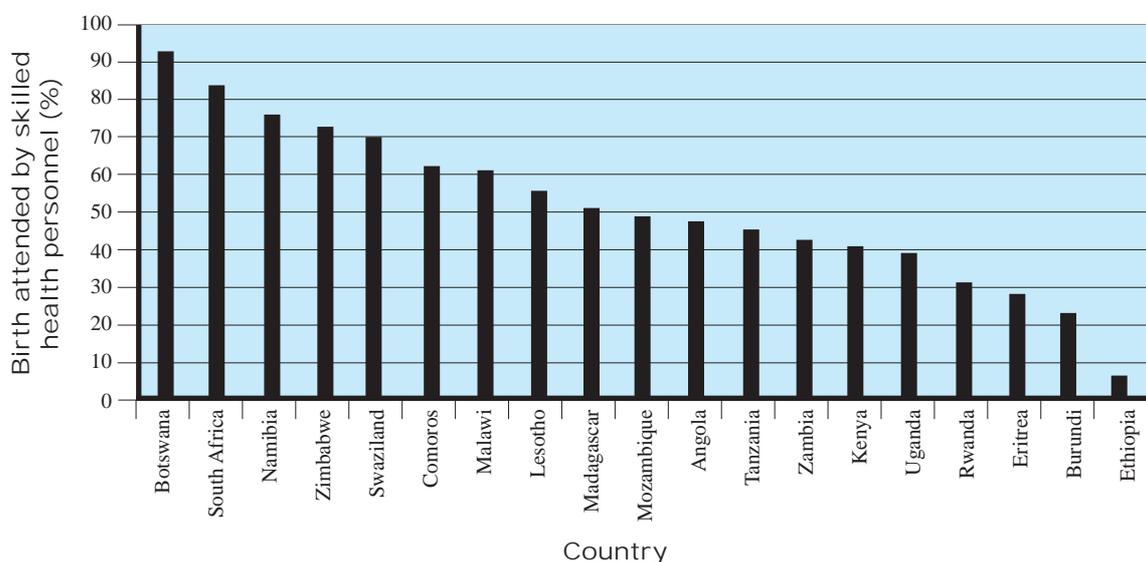


Figure 11: Maternal mortality rate (per 100,000 live births)⁹¹



Note: The maternal mortality rate is the annual number of deaths of women from pregnancy-related causes per 100,000 live births. Seven of the nineteen countries in this review are ranked amongst the top ten countries globally in maternal mortality ratios and ten are in the top twenty countries globally

Figure 12: Births attended by skilled health personnel⁹²



Note: A skilled birth attendant is defined as an accredited health professional, such as a doctor, nurse or midwife, but does not include trained or untrained traditional birth attendants

Harmful traditional practices

Harmful traditional practices have a negative impact on a child's right to health in some of the countries in this review. In particular, the practice of female genital mutilation (FGM) and early marriage affect the girl child's right to health. Despite legal measures as seen in the table below, harmful traditional practices are still widely prevalent and governments must raise awareness both on their harmful effects to children's health and their illegality.

Table 13: Selected examples of harmful traditional practices and the legal framework

Country	Harmful traditional practice	Legal, policy or judicial response
Eritrea	FGM	Not illegal; however, the National Union of Eritrean Women is in the process of drafting a law against it
Ethiopia	FGM and abduction of girls for marriage	Revised Penal Code, Articles 565, 566, 568, 589(2), criminalise FGM, abduction and trafficking of people
Kenya	FGM and early marriage of girls	The Children's Act, Section 14, abolishes harmful traditional practices such as FGM, early marriage and other cultural practices that are likely to 'negatively affect the child's life, health and social welfare'
Tanzania	FGM and early marriage of girls	Sexual Offences Special Provision Act 1998, Section 169(a) criminalises FGM, with judicial sentences of up to 30 years imprisonment for mutilators. The age of marriage for girls is fourteen under the Law of Marriage Act, Section 13(1)
Uganda	FGM	The Constitution, Article 33(b), prohibits harmful traditional practices and cultures (in reference to women rather than children)

Policy

Primary health care for pregnant mothers and for children under six is free and the general policy direction is to roll out more accessible primary health care services.

The Constitution

Section 28(1)(c) refers specifically to children's rights to basic health care services and Section 27(1)(a) provides for the rights of everyone to have access to health care services, including reproductive services. Section 27(3) provides for everyone's rights of access to emergency medical treatment.

The judiciary

The interpretation of constitutional socio-economic rights has increasingly occupied the attention of the courts since the adoption of the constitution. In *Grootboom v Oostenberg Municipality and Others* the Constitutional Court was obliged to consider the relationship between everyone's right to housing, as set out in Section 26(2), and children's right to shelter, contained in Section 28(1)(c). In *TAC v Minister of Health and Others* the Constitutional Court upheld a challenge to the government policy of restricting the provision of anti-retrovirals used to prevent mother to child transmission of HIV/ AIDS to certain pilot sites.

What the CRC Committee says

In its comments regarding states' implementation of the right to health and health services, the CRC Committee has made the following recommendations, in addition to other legislative and policy measures that states must take:

- The right to health and health services also extends to policies and legislation on paid maternity leave. This should be mandatory for employers in all sectors, in the light of the principle of the best interests of the child. Legislation should reflect the extension of the period of maternity leave where it is considered as insufficient.
- States must undertake serious efforts to educate the public, especially new parents, on the benefits of breastfeeding and the adoption of measures to counteract any negative impact on employment of women who wish to continue breastfeeding their children for a longer period of time.⁹⁴
- In the context of the rights of adolescents to health and development, states need to ensure that specific legal provisions include setting a minimum age for sexual consent, marriage and medical treatment without parental consent. These minimum ages should be the same for both genders and closely reflect the recognition of their evolving capacity, age and maturity.⁹⁵
- States have the obligation to strengthen through legislation sexual and reproductive health education for adolescents. This includes family planning measures, especially in schools and out-of-school programmes, to reduce the incidence of teenage pregnancy and provide pregnant teenage girls with the necessary assistance and access to health care and education.
- States must take effective measures, including training for practitioners and awareness-raising, to ensure the health of boys and protect against unsafe medical conditions during the practice of male circumcision, particularly in the context of South Africa and Lesotho.⁹⁶

RIGHT TO EDUCATION

CRC - Arts 28 & 29

'State parties recognise the **right of the child to education** and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make **primary education compulsory and available free to all**;
- (b) Encourage the development of **different forms of secondary education**, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.' Art 28

The African Charter - Art 11

'Every child shall have the right to education.'

'The education of the child shall be directed to the **promotion and development of the child's personality, talents and mental and physical abilities** to their fullest potential.'

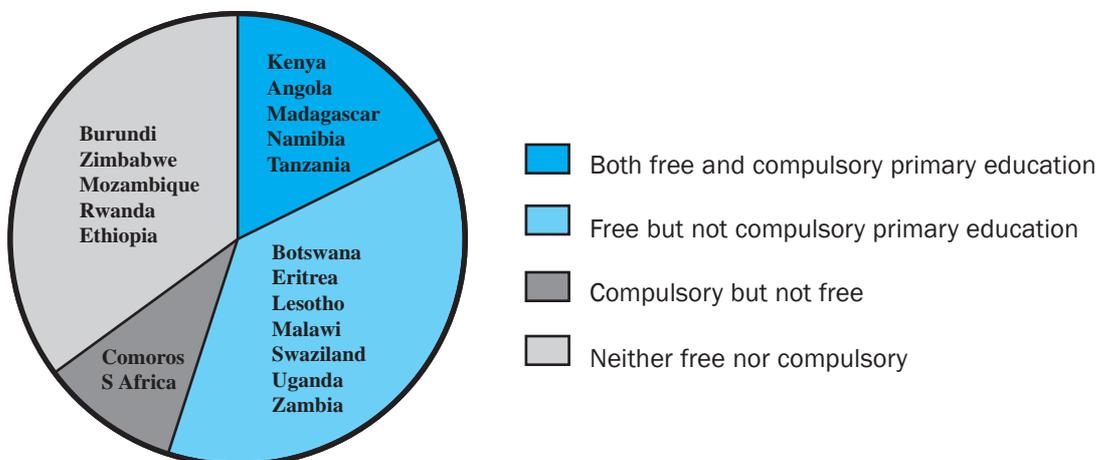
'State parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:

- a) provide **free and compulsory basic education**;
- b) encourage the **development of secondary education in its different forms** and to progressively make it free and accessible to all.'

As the CRC Committee has outlined, the concept of education is more than formal schooling involving literacy and numerical skills. It should 'embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.'⁹⁷ The CRC Committee also stresses that the right to education is not only a matter of access but also of content.⁹⁸

Most countries in this review have either constitutional provisions or policy directives on free and/ or compulsory primary education.

Figure 13: The right to education



Free and compulsory education

Among the countries that do not have laws specifying free and compulsory education, there are a number with special measures or pending legislation, including:

- **Ethiopia:** the Constitution imposes an obligation on the state to allocate resources to education⁹⁹, but has not translated this into nationwide provision of free and compulsory primary education.
- **Mozambique:** although it does not have free or compulsory education, a School Action Social Fund is accessible under various criteria to needy children. The Mozambique Draft Bill on Child Protection (2005) provides for education, but it does not mention free or compulsory education.
- **South Africa:** the Constitution recognises a positive obligation upon the state to provide basic education to everyone, including children, but there is no legislated free education. The South African Schools Act (1996) provides for compulsory education from the ages of seven to fifteen, or nine years of schooling. In 2006, this Act was amended to provide for changes to school fee laws, which when implemented will make some schools 'fee free'. The provisions will affect the poorest schools in the country, but these schools may continue to charge fees in Grades 9-12. The Exemption of Parents from the Payment of School Fees Regulation (1998) covers the criteria and procedure in detail for indigent parents to apply for exemption from paying school fees.

Major challenges and gaps in implementing free education

- **Financial and physical resource constraints.**

In Eritrea there is free education both at elementary and secondary level. However, data indicates that 49.87% of children are still out of school,¹⁰⁰ due to insufficient resources and facilities. Thus free and compulsory education is more of an aspiration than an actuality.

In Kenya there are formidable structural problems hampering the free primary education programme. The pupil to teacher ratio in many schools is very high and differs widely around the country, In urban schools, the ratio is 35 to 1, while in rural areas it is as high as 100 to 1. In addition, inadequate facilities mean many children have to sit on the floor and lack of appropriate sanitary facilities has a disproportionately negative impact on girls' participation.

In Ethiopia, there are minimal fees for public education, but facilities are insufficient and schools resort to shift systems to try and accommodate as many students as possible.

- The **quality of the education** is also an issue. High student to teacher ratios are bound to affect the quality of education, but even in Botswana, which has adequate facilities and an enrolment rate of 87%, there are questions regarding the quality of education.
- There are **low transition rates and high drop out rates** in secondary schools. Poor and inadequate resources and low quality education manifest themselves in low transition rates from primary to secondary school, and high drop out rates, particularly by girls. User fees for secondary education mean that many children who benefit from free primary education are unable to continue to secondary school.

According to a recent report on progress in achievement of education for all, Lesotho is the only country in this review that has a high chance of achieving universal primary education by 2015. Botswana, Burundi, Eritrea, Ethiopia, Kenya, Madagascar, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe have a low chance of achieving the goal and South Africa is at risk of not achieving it.

In regard to achieving gender parity in primary and secondary education, the UNESCO report states that Kenya has achieved this goal. Botswana is likely to achieve it by 2015, while all the other countries involved in this review are unlikely to achieve gender parity in education by 2015.

The overall picture regarding free and compulsory education is that more resources need to be allocated, in particular financial, technical and infrastructural resources, to get more children enrolled in school. Even where education is compulsory and free, there are instances of public schools levying other costs that pose barriers to access.

What the CRC Committee says

The Committee recommends that countries:

- Increase public expenditure on education, in particular pre-primary, primary and secondary education.¹⁰²
- Include children's rights under the Convention in school curricula.¹⁰³
- Be alert to the introduction of levies and other fees that act as barriers to access even where education within public schools is free.
- Undertake efforts to ensure access to informal education by vulnerable groups, including children living on the streets, orphans, children with disabilities, child domestic workers and children in conflict areas and camps, by eliminating the indirect costs of school education among other strategies.¹⁰⁴

RIGHT TO PROTECTION FROM VIOLENCE, TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

CRC - Art 19

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

The African Charter - Arts 16 & 21

'State parties to the present Charter shall take specific legislative, administrative, social and educational measures to **protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child**' Art 16(1)

'State parties to the present Charter shall take all appropriate measures to **eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child** and in particular those customs and practices:

- (a) prejudicial to the health or life of the child
- (b) discriminatory to the child on the grounds of sex or other status'.

'**Child marriage and the betrothal of girls and boys shall be prohibited** and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.' Art 21(1)

This review found that governments have both constitutional and legislative provisions that formally protect children from torture, inhuman or degrading treatment. These also include provisions prohibiting harmful traditional practices, such as FGM and early marriage. However, this formal protection is contradicted by the fact that none of the countries in this review has an outright prohibition on the use of corporal punishment in the home, schools and other institutions. In fact, many countries have provisions in their law that recognise corporal punishment as an acceptable form of 'administering discipline'. Some countries do prohibit corporal punishment in schools or other institutions, or as a penal sanction, but none prohibit its use in the home. When passed, South Africa's pending Children's Act Amendment could be the first of any country in the region to specifically prohibit the use of corporal punishment on children in any setting.

Table 14: Selected constitutional provisions that protect children from violence, torture, and cruel, inhuman and degrading treatment

Country	Constitutional provision	Comment
Comoros	Constitution 2001, Preamble, includes 'the right of children and youth to be protected by the authorities against any form of abandonment, exploitation and violence'	

Table 14 continued

Ethiopia	<p>Constitution 1995, Article 36: every child has the right:</p> <p>(d) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health, or well-being</p> <p>(e) To be free of corporal punishment or cruel or inhuman treatment in schools and other institutions responsible for the care of children</p>	<p>A defence of 'reasonable chastisement' for corporal punishment is available under the Revised Penal Code. Article 258(2) of the Revised Family Code seems to imply the same</p>
Eritrea	<p>The Constitution 1997 states that 'the dignity of all persons shall be inviolable. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'</p>	<p>Under the Transitional Civil Code of Eritrea, Article 267(2), parents are permitted to use corporal punishment in disciplining children</p>
Madagascar	<p>Constitution 1992, amended in 1995 and 1996, Preamble states 'adopting as its own ...the conventions concerning the rights of women and of the child, which are all considered an integral part of its positive law...'</p>	<p>Corporal punishment is banned only in state institutions</p>
Malawi	<p>Constitution 1994, amended 2001, Article 23(4): 'Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be hazardous; interfere with their education; or be harmful to their health or to their physical, mental or spiritual or social development'</p>	
South Africa	<p>Constitution 1996, Article 28: 'Every child has the right to be protected from maltreatment, neglect, abuse or degradation'</p>	<p>The Law Commission proposed the abolition of the defence of 'reasonable chastisement' for corporal punishment, but this recommendation was not included in the Children's Act 38 of 2005, although it is up for debate again in the Children's Act Amendment Bill</p>
Uganda	<p>Constitution 1995, Article 34: 'Subject to laws enacted in their best interests: (4) children are entitled to be protected from social or economic exploitation'</p>	

Table 14 continued

Zambia	Constitution 1991, amended 1996, Article 24: '(2) All young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation; (3) No young person shall be the subject of trafficking in any form; (4) In this section, 'young person' means any person under the age of fifteen years their health or to their physical, mental or spiritual or social development'	
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An overarching recommendation of the 2006 UN Secretary General's Study on Violence against Children was the prohibition of corporal punishment against children in all settings. In doing so, states would be unequivocally stating that 'all violence against children is unacceptable and unlawful'.¹⁰⁵ This recommendation would apply to all the 19 countries in this review, as none has yet prohibited corporal punishment in all settings, although South Africa has a law that is pending that would effectively do so.

Table 15: Selected legislative or policy provisions that protect children from violence, torture, cruel, inhuman and degrading treatment

Country	Legislation	Comment
Botswana	Development of a National Child Protection Protocol	A human rights based review of the Children's Act ¹⁰⁶ revealed that customary law encouraged corporal punishment, whilst the Education Act regulates the practice in schools, although it is not actually a finalised act
Burundi	Revision of Penal Code to include new sections, including protection of children against abuse, exploitation and violence	
Ethiopia	A National Plan of Action on Sexual Abuse and Exploitation, reviewed and adopted by the government incorporates some of the recommendations of the UN Secretary General Violence against Children Study	

Table 15 continued

<p>Kenya</p>	<p>The Children's Act 2001, No 8 is comprehensive legislation on children's matters. It recognises that: 'any child shall be entitled to protection from physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person.' The Act specifically prohibits FGM and early marriage of girls and establishes that every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's health or physical, mental, spiritual, moral or social development Criminal Law (Amendment) Act 5, 2003, amends a number of provisions in the Penal Code and abolishes corporal punishment as a sentence for all offenders, whether children or adults</p>	<p>There is legislative guidance allowing the use of corporal punishment as a 'disciplinary measure' in the home</p> <p>The Children's Act confers rights of a parent or any other person having lawful control of the child to administer 'reasonable punishment', but does not specify whether this includes corporal punishment</p>
<p>Lesotho</p>	<p>Children's Protection and Welfare Bill 2005, which prohibits corporal punishment in state institutions</p>	<p>The Bill is silent with regard to the use of corporal punishment in the home</p>
<p>Madagascar</p>	<p>Draft Law on the Family has provisions against early marriage</p>	
<p>Mozambique</p>	<p>Draft Bill on Child Protection 2005 prohibits inhuman, cruel, violent, exploitative, humiliating or discriminatory treatment Draft National Plan of Action for the Prevention of Violence, Abuse and Exploitation</p>	<p>Does not have specific prohibition or reference to corporal punishment</p>
<p>Namibia</p>	<p>Children's Act 1960, No. 33, includes mechanisms for protection of children from neglect, exploitation and harmful environments</p>	<p>Currently undergoing review</p>

Table 15 continued

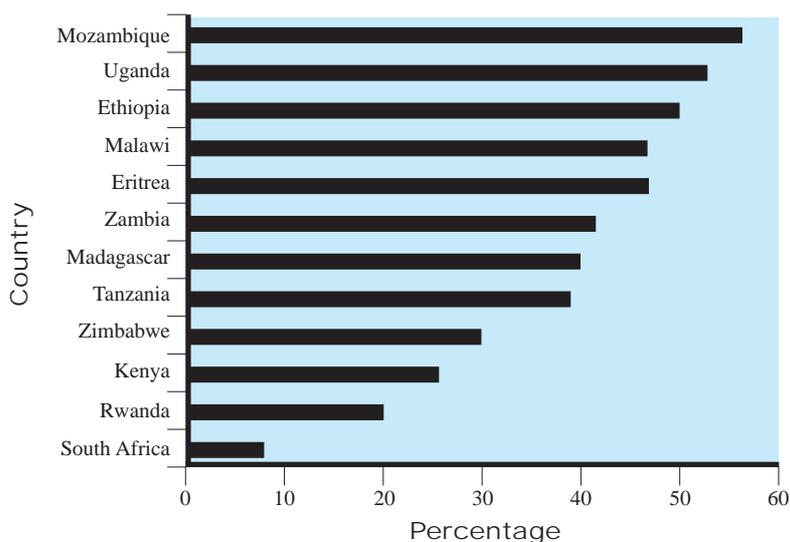
<p>South Africa</p>	<p>South African Schools Act 1996, Section 10, abolished corporal punishment in schools, by making administering corporal punishment at a school to a learner a criminal offence The Children's Act 38 2005 did not include a ban on corporal punishment Draft National Action Plan to End Violence against Children and Women, following a '365 Days to End Violence against Women and Children Conference' in May 2006 Children's Act Amendment Bill includes outright prohibition of corporal punishment, including in the home</p>	<p>This prohibition was constitutionally challenged by parents seeking the right to delegate their power to physically chastise their children to teachers in Christian Education South Africa v Minister of Education (2000).The Minister, who had banned corporal punishment in schools, relied on constitutional rights, including the right to human dignity in Section 10, the right to freedom and security of the person in Section 12, and the rights of children to be protected from maltreatment, neglect, abuse or degradation in Section 28(1)(d). The Constitutional Court did not uphold the appeal and ruled in favour of the Minister on the need to protect children from the potentially injurious consequences of parents' religious or cultural practices, and the constitutional duty of the state to diminish public and private violence in society, as incurred by the state upon ratification of the CRC</p>
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What the CRC Committee says

The CRC Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor does it establish limits on school discipline¹⁰⁷. The Committee recommends:

- **Complete prohibition of corporal punishment.**
- Raising awareness about **alternative forms of discipline** to reinforce the message that corporal punishment is abusive and violent, and that discipline should not be equated with violence.¹⁰⁸ The CRC Committee advises that states take due account of CRC General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.
- **Addressing violence against children by state actors:** governments should provide child rights training programmes for police and detention officials.¹⁰⁹ States should also consider compensation for the victims of torture and other acts.¹¹⁰
- Using the outcomes of regional consultations and findings from the UN Secretary General's Global Study on Violence against Children to develop strategies to combat violence against children.¹¹¹

Figure 14: Percentage of women married by the age of 18¹¹²



The UN Secretary General's Study on Violence against Children specifically recommended that states prohibit all forms of violence against children, including early and forced marriages.¹¹³ All the states in the table below must urgently take measures to protect girls from this practice, particularly Mozambique, Uganda and Ethiopia which all have over 50% of all women married below the age of eighteen. In particular, laws must be enacted to raise the legal age of marriage to eighteen for both genders, from sixteen in Zimbabwe and fifteen in Tanzania and South Africa.

Table 16: Legal status of corporal punishment of children in ESAR¹¹⁴

Country	Prohibited in the home	Prohibited in schools	Prohibited in the penal system		Prohibited in alternative care
			As a sentence for crime	As a disciplinary measure in penal institutions	
Botswana	No	No	No	No	No
Burundi	No	No	No	No	No
Comoros	No	No	Yes ¹	No	No
Eritrea	No	No	No ²	?	No
Ethiopia	No	Yes ³	Yes	Yes	Some ⁴
Kenya	No	Yes	Yes	Yes ⁵	Some ⁶
Lesotho	No	No ⁷	No	No	No
Madagascar	No	No	Yes	?	No
Malawi	No	Yes ⁸	Yes ⁹	Yes ¹⁰	Some ¹¹
Mozambique	No	No ¹²	Yes	No ¹³	No
Namibia	No	Yes	Yes ¹⁴	Yes ¹⁵	Some ¹⁶
Rwanda	No	No ¹⁷	Yes	Yes	No
South Africa	No ¹⁸	Yes	Yes	Yes	Yes

Table 16 continued

Swaziland	No	No	No	No	No
Uganda	No	No ¹⁹	Yes ²⁰	Yes ²¹	No
Tanzania	No	No	No	No	No
Zambia	No	Yes	Yes ²²	Yes ²³	No
Zimbabwe	No	No	No	No	No

1. Information unconfirmed; possibly lawful under Islamic Law
2. Lawful under Transitional Penal Code but prohibited in Draft Penal Code
3. Constitutionally prohibited and by government directive, but defence of 'reasonable chastisement' is potentially available
4. Constitutionally prohibited in institutions, but 'reasonable chastisement' defence is available
5. As of 2005, some legislation not amended
6. Prohibited in alternative care institutions
7. Prohibition is in the pending Child Protection and Welfare Bill
8. Constitutionally prohibited
9. Constitutionally prohibited, but sanctioned in other legislation
10. Constitutionally prohibited, but sanctioned in other legislation
11. Constitutionally prohibited, but only in state institutions
12. Prohibited by government directive
13. Information unconfirmed
14. Declared unconstitutional as a sentence for juvenile crimes in 1991 by the Supreme Court; there is a pending review of child care and protection law
15. Ibid.
16. Not prohibited in privately administered settings
17. Pending in 2005 legislation
18. Prohibition is contained in pending Children's Act Amendment Bill
19. Prohibited in state schools by Ministerial guidance
20. As of March 2006, some legislation not amended
21. Ibid.
22. Ruled unconstitutional by Supreme Court in 1999, but this has not been confirmed in legislation
23. Ibid.

RIGHT TO PROTECTION FROM ECONOMIC EXPLOITATION

CRC - Art 32

*State parties recognise the right of the child to be **protected from economic exploitation** and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'*

The African Charter - Art 15

*'Every child shall be protected from all forms of economic exploitation and from **performing any work that exposes him/her to possible danger**, or is likely to interfere with the child's education or compromise his/her health or physical, mental, spiritual, moral, or social development'.*

*'State parties to the present Charter shall take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers **both the formal and informal sectors** of employment and having regard to the relevant provisions of the International Labour Organisation's instruments relating to children, state parties shall in particular, provide through legislation, **minimum ages for admission to every employment**'.*

This study found that all the countries in the region have provisions within their constitution or in legislation that protect children from economic exploitation and work that is hazardous to their health or likely to affect their education. All the countries in this study have also ratified the International Labour Organisation Convention 182 on the Worst Forms of Child Labour (1999). However, not all the countries apply the recommended minimum age of fifteen for employment of children, nor do they all have parameters on the kind of work children can participate in, or conditions for their employment. There is also inadequate monitoring to ensure effective implementation of these standards.

Zimbabwe has the lowest minimum age for employment, at twelve, and Zambia the highest, at eighteen. Botswana's Constitution leaves open the possibility of employment of children under the age of twelve in certain industries, and does not outlaw their employment if it is proved to be hazardous to them. Eritrea, Ethiopia, Malawi, Namibia, Rwanda and Tanzania set the minimum age at fourteen years.

Table 17: Selected examples of constitutional provisions protecting children from economic exploitation

Country	Constitutional provision against economic exploitation
Comoros	Constitution 2001, Preamble, includes 'the right of children and youth to be protected by the authorities against any form of abandonment, exploitation and violence'
Eritrea	Constitution 1997, Article 16, states that 'the dignity of all persons shall be inviolable...no person shall be held in slavery or required to perform forced labour not authorised by law.' Labour Proclamation No 118/2001 defines forced service as when a young person performs work contrary to the provisions of the Labour Code. It also includes 'work performed involuntarily merely because of someone's influence as a result of his holding public office or traditional status of chieftaincy'

Table 17 continued

Ethiopia	Constitution 1995, Article 36 (1)(d), stipulates that every child has the right 'not to be subjected to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being'
Malawi	The Constitution 1994 provides that 'every person has the right to fair and safe labour practices and is entitled to fair wages and equal remuneration for work of equal value, without distinction or discrimination. The child is specially protected from exploitative labour that is hazardous or likely to interfere with his or her well-being and development'
Namibia	The Constitution 1990, Article 15(2), protects children under the age of sixteen against economic exploitation and hazardous employment. Article 15(4) also makes it unlawful for the children of an employee to be forced to work for the employer of the parent; a provision aimed at farm workers who live with their families on the farms where they are employed and are particularly vulnerable to exploitation

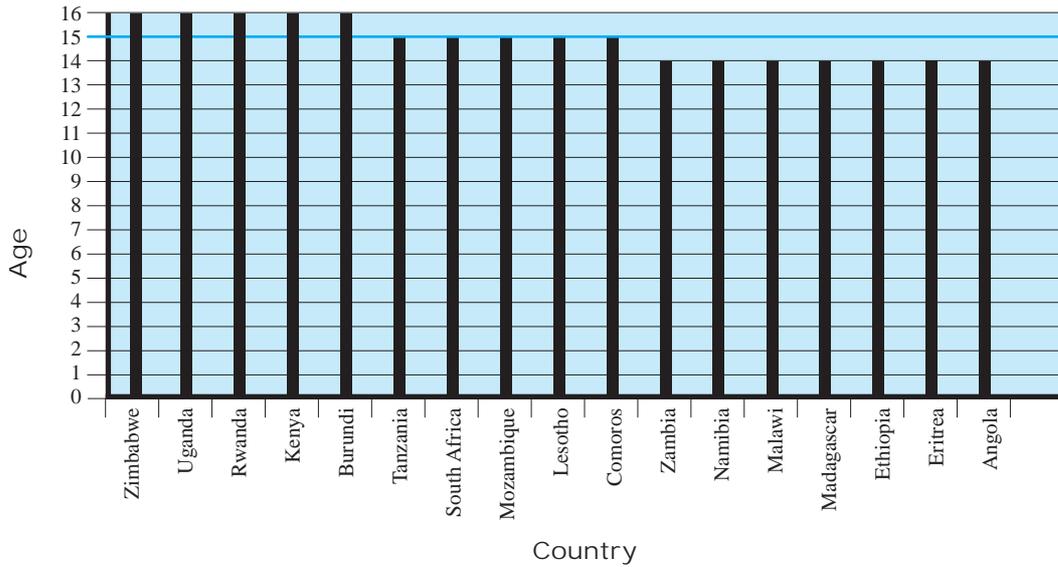
Table 18: Selected examples of provisions stipulating minimum ages for employment

Country	Minimum age specification	Comments and special provisions
Botswana	The Employment Act defines a child for the purpose of child labour regulations as below the age of fifteen	
Burundi	The minimum age to be admitted to employment is sixteen, except in special circumstances defined by the law	The civil war resulted in many displaced, abandoned and orphaned children, who are now engaged in work to provide for themselves and siblings
Comoros	The Labour Code has not set a minimum age for employment	Comoros has not ratified many international conventions related to conditions of work
Eritrea	Labour Proclamation No 118/2001 states that 'young employee...means a person above the age of fourteen and below the age of eighteen'	
Ethiopia	The Labour Proclamation prohibits the employment of persons under the age of fourteen and regulates the working conditions of young persons between the ages of fourteen and eighteen	

Table 18 continued

Lesotho	The Labour Code 1992, amended 1995 and 2000, prohibits the employment of children under fifteen, except in the immediate family or where a family establishment engages five or fewer people. The pending Child Protection and Welfare Bill comprehensively addresses child labour issues	
Madagascar	Act No 2003-044 of 2004 provides for a minimum age for admission to employment at fifteen years, and prohibits night work and overtime for children until they reach eighteen	
Malawi	The Employment Act 2000 sets a minimum age of employment at fourteen. Children between fourteen and eighteen may not be employed in any occupation or activity that is likely to be harmful to their health, safety or education	This prohibition does not apply to work done in homes, vocational technical schools or other training institutions
Namibia	The new Labour Act states that it is illegal to employ a child under the age of fourteen for any purpose whatsoever. It is illegal to employ a child between the ages of fourteen and sixteen for certain categories of hazardous work, such as mining. The Minister of Labour is empowered under the statute to further limit the types of employment which are permissible for children between the ages of fourteen and sixteen	
Rwanda	Labour Code, Article 65(1), prohibits the employment of a child below the age of fourteen. Children between fourteen and sixteen may only undertake work that is not dangerous or compromising to their health or education	A technical committee on issues related to the worst forms of child labour was established in January 2005
Tanzania	The Employment and Labour Relations Act 2003 prohibits employment of a child under the age of fourteen. From fourteen, a child may be employed to do undefined 'light work'. Children under eighteen cannot be employed in a mine, a factory or as crew on a ship	A Child Labour Unit was established in the then Ministry of Labour and Youth Development, which is obliged to inspect and prosecute cases concerning child labour, among other things

Figure 15: Minimum age for admission into employment

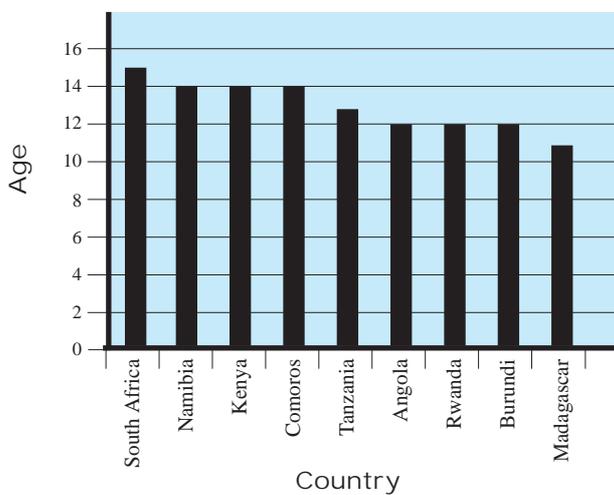


Linkages between child labour and free and compulsory education

Free and compulsory education, particularly primary education, can play an important role in ending exploitative child labour and securing children's future livelihoods. When comparing minimum ages of admission into employment and the age at which children complete basic education where it is compulsory, it is noted that only Namibia has no gap between these ages. In six of the countries reviewed, there is a gap of one to four years between the age of completion of compulsory education and the minimum age of admission into employment. In Burundi and Rwanda, this gap is four years, three years in Madagascar, two years in Kenya and Tanzania and one year in Comoros.

The CRC Committee has indicated the need to align the age at which compulsory education ends with the age for access to full-time employment. The guidelines for periodic reporting reinforce this by asking 'how the minimum age for employment relates to the age of completion of compulsory schooling'.

Figure 16: Years of compulsory primary education



'In Lesotho it is widely believed that working is part of growing up and of child socialisation and development. Herding has long been reserved as an activity for boys, while household chores are for girls. Children are also hired out to herd and perform household work for other families than their own.

The phenomenon of working children is not at all novel in Lesotho. However, what seems to have changed over time is the magnitude, range and type of work children now perform. This change is influenced by different factors, including urbanisation and the growth of the informal sector. Past conditions under which children performed work may have been equally as harsh or harmful, but engaging children was never conceptualised or labelled as child labour. Levels of awareness that work can be exploitative and hazardous to children have now increased.'

Why legal provisions still do not protect children from exploitation

There is a clear disparity between legal and policy provisions and the situation on the ground. Ethiopia reported the results of a survey in their second report to the UNCRC revealing that 83% of Ethiopian children aged five to fourteen are engaged in a productive activity or the performance of household chores. When the age cohort is pushed to the fifteen to seventeen year olds, the proportion rises to 97%. More worrying is that 62% of children aged ten to fourteen and 39% of children aged five to nine are engaged in at least one type of employment besides household chores.¹¹⁶

Such disconnection between formal protection and reality on the ground can be attributed to several reasons:

- **Inadequate and ineffective institutional monitoring mechanisms:** mechanisms for monitoring and reporting adherence to stipulated regulations are either lacking or insufficient. For example, in Tanzania a Child Labour Unit has been established to inspect and prosecute cases concerning child labour, but it is under-funded and under-staffed, rendering it ineffective. Despite rampant child labour, it has only managed a few prosecutions and has been ineffective in coordinating with other stakeholders to combat child labour. Still in Tanzania, the problem is exacerbated by lack of clarity about where institutional responsibility lies: the Ministry for Women and Children's Affairs deals with children's rights issues, but monitoring and implementation of child labour legislation lies with the Ministry for Labour and Youth.
- **Failure to regulate informal sectors** of work, where most child workers are found. Laws fail to specifically cover subsistence agriculture and self employment, including domestic labour, hard manual labour, herding, commercial sex, drug trafficking, street vending and operating as taxi conductors. For example in Tanzania, it is estimated that between 350,000 and 400,000 children under fifteen are engaged in child labour in various informal sectors of the economy, including agriculture, mining and domestic service.
- **Impunity for perpetrators** because of the above stipulated lax monitoring and enforcement mechanisms. Generally work performed by children is carried out under illegal conditions, with little or no consequences for the employers.
- **Poverty**, exacerbated by user fees for basic health and education services. Poverty means that children need to work, either because they are fending for themselves or to contribute to a meagre family income.

Sample legislation addressing exploitation of children

In an encouraging step, most of the countries in the review have laws relating to child labour within their labour or employment statutes. These have often been reviewed over time to reflect international obligations regarding labour practices.

Box 7: Tackling child labour; Lesotho's Child Protection and Welfare Bill 2004

This is the most recent legislation in the countries reviewed that addresses the economic exploitation of children. It is regarded as sufficiently domesticating all relevant International Labour Organisation conventions:

- It articulates what exploitative labour is and emphasises the need for protecting children from its different forms. The Bill recognises child labour as a child protection issue and stipulates in explicit terms that children have the right to be protected from different forms of exploitative labour that deprive them of access to health and education or in any way hinders their development
- The minimum age for admission to employment is set at fifteen and for light work at thirteen. Children below the age of eighteen are debarred from engaging in any form of hazardous work, including such activities as mining and quarrying; portering of heavy loads; chemical manufacturing and production; operation of machinery; and work in bars, hotels and places of entertainment where they may be exposed to immoral behaviour. It includes regulation on herding at cattle posts, commercial sex work, tobacco production and trafficking
- It empowers the Ministry of Employment and Labour to receive reports on child labour practices and to investigate and take appropriate action in relation to cases of children engaged in industrial undertakings

Policy interventions: the case of Madagascar

Policies and plans are necessary to give practical effect to the laws countries have implemented on child labour. In Madagascar, an Action Plan - Institutional Support for the Abolition of Child Labour in Madagascar - has been developed by the International Programme on the Elimination of Child Labour/ International Labour Organisation (IPEC/ ILO) and the Ministry of Labour and Social Laws. It aims to prevent child labour by:

- Creating awareness of the harmful consequences to the health and normal development of a child by work performed at an early age
- Improving relations between institutions working on child labour issues
- Immediate removal of children exposed to the worst forms of labour, such as those defined under Article 3 of ILO Convention No 182 on the Worst Forms of Child Labour and immediate action to abolish such employment for children
- Improving the living and working conditions of children not exposed to the worst forms of labour, but still compelled to work, through awareness creation and other measures

In addition, the Ministry of Justice has initiated a 29-month programme with IPEC/ ILO entitled 'Reform of the legal framework for the elimination of the worst forms of child labour', aimed at supporting the Ministry in its efforts to revise and raise awareness of child labour-related laws. Education on children's rights related to work, especially for parents, is an important aspect of the programme, through the development of information, education and communication materials.

RIGHT TO PROTECTION FROM SEXUAL EXPLOITATION, ABUSE AND TRAFFICKING

CRC - Arts 34 - 36

'State parties undertake to protect the **child from all forms of sexual exploitation and sexual abuse**. For these purposes, state parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
 - (b) The exploitative use of children in prostitution or other unlawful sexual practices;
 - (c) The exploitative use of children in pornographic performances and materials'
- Art 34

The African Charter - Arts 16, 27 & 29

'State parties to the present Charter shall undertake to protect the child from all forms of **sexual exploitation and sexual abuse...**' Art 27

'State parties to the present Charter shall take appropriate measures to prevent:

- (a) the **abduction, the sale of, or traffic in children** for any purpose or in any form, by any person including parents or legal guardians of the child.' Art 29

This review found that all the countries studied have laws in place to protect children from forms of abuse and exploitation, such as sexual abuse, exploitation and trafficking. Some protective measures are found within constitutions, others within child-specific legislation, and others within criminal law protecting children against sexual and domestic violence. Nonetheless, such legal protection is insufficient for protection due to poor implementation, including lack of treatment and rehabilitation for survivors; inadequate access to child-friendly justice procedures at police stations and courts; and ineffective sanctions for perpetrators. Most countries have no specific laws on the issue of trafficking as yet, although trafficking is dealt with in much of the pending legislation on child protection.

Table 19: Selected examples on legal provisions against sexual abuse

Country	Legal provisions on sexual abuse	Comment
Burundi	<p>Penal Code 1981, Article 372, in principle protects the child from all forms of sexual violence and exploitation</p> <p>There is a bill pending on special measures in case of abduction and rape that has been transmitted to Parliament for adoption</p>	<p>The country is in a reconstruction phase, following a decade of conflict in which acts of rape and sexual violence were rampant, perpetrators went unpunished and survivors had no access to medical or psychosocial treatment</p>

Table 19 continued

<p>Eritrea</p>	<p>In the Transitional Penal Code of Eritrea, Article 599, the consent of an abduction and/ or rape victim to marry the offender bars prosecution or terminates the sentence if the offender was convicted. The marriage of a victim and a sexual offender is deemed to be in the best interest of the child, as a victims of rape or sexual abuse are stigmatised by the family and community, and unlikely to have the chance to marry</p>	<p>The Local Drafting Committee was strongly against the provision and deleted it under the Draft Penal Code of Eritrea, saying that sexual offenders should not escape punishment and non-prosecution of a criminal offender sets a repugnant precedent of impunity, and the Article does not take into account the interests of the community or the victim</p>
<p>Ethiopia</p>	<p>The Revised Penal Code, Article 627, incorporates provisions that penalise the sexual abuse of children, including child prostitution, with imprisonment from 13 to 25 years for a man guilty of sexual activity with a child below the age of thirteen, and 15 years imprisonment where the child is between the age of thirteen and eighteen</p> <p>Articles 635-8 of the Revised Penal Code penalise child trafficking for prostitution and sexual exploitation. Article 589(2) deals with abduction of minors and imposes a prison sentence of up to twenty years where the minor is retarded, feeble minded or has been rendered incapable of rendering resistance</p>	<p>These severe penalties were incorporated into the Revised Penal Code due to the public outcry about abduction of children. This practice is widespread in Ethiopia and traditionally condoned as a legitimate means of finding a wife. The victims may be girls as young as eleven or twelve</p>
<p>Kenya</p>	<p>The Sexual Offences Act 2006 imposes stiff penalties for sexual offenders, including minimum sentences in particular circumstances. It enacts human rights-friendly criminal and evidentiary procedures for victims of sexual offences; provides for new forms of offences in law, such as sexual harassment and child prostitution; and guarantees the rights of victims of sexual offences to protection, including counselling and therapeutic services</p>	
<p>Madagascar</p>	<p>The Penal Code deals with indecent assault, rape and abduction of minors</p>	<p>If an abducted minor marries her abductor, the perpetrator can only be prosecuted upon complaint by someone asking for the annulment of the marriage</p>

Table 19 continued

<p>Namibia</p>	<p>The Combating of Rape Act 2000 is a very progressive law on rape and sexual offences that specifically recognises complainants under the age of thirteen as exceptionally vulnerable</p> <p>The Combating of Domestic Violence 2003, Article 4: in the interest of the wellbeing of a minor, any person, including the minor concerned, can lay a complaint and request a protection order. Behaviour defined as domestic violence includes that defined in the Combating of Immoral Practices Act as assault, kidnap, murder, rape and indecent assault</p>	<p>It was enacted to combat rape through the prescription of minimum sentences, abolition of the rule that a boy under the age of fourteen is presumed incapable of sexual intercourse, and to regulate circumstances when certain criminal proceedings should not take place in open court</p>
<p>Rwanda</p>	<p>Law No 27 2001, Article 33, on the rights and protection of the child against violence, defines rape as including any sexual relations or sex-based practices committed on a child in any form. It prohibits the abduction, sale and trafficking of children in Article 41, including abduction related to forced and early marriage</p>	<p>It prescribes much more severe punishment than previous laws (Articles 34 - 37)</p>
<p>South Africa</p>	<p>The Children's Act 38 2005, Children's Amendment Bill 2006 and the Sexual Offences Bill 50 of 2003, all incorporate aspects of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography</p> <p>The Hague Convention on the Civil Aspects of International Child Abduction Act 72, 1996 has been ratified and domesticated by South Africa</p>	<p>Draft trafficking legislation has been prepared by the South African Law Commission, although it is unclear when this will be finalised. In the interim, trafficking provisions are contained in the Children's Act 38 2005</p>
<p>Swaziland</p>	<p>Girl's and Women's Protection Act 39 of 1920 and the Crimes Act 1889 cover some forms of sexual abuse and child prostitution</p>	<p>These two laws are outdated, which seriously impacts on child protection as crimes against children have become more sophisticated and brutal. New children's legislation is under development</p>
<p>Tanzania</p>	<p>Sexual Offences Special Provision Act 1998 criminalises sexual intercourse with anyone under eighteen</p>	

Challenges in implementing protective laws

Children in the region are not reaping the protective benefits of laws that prohibit and punish sexual abuse for several reasons, including the following:

Unacceptable legal provisions

There are legal provisions in some of the countries in the region which must be considered as unacceptable, because they go against the provisions and the spirit of the CRC and the African Charter, particularly the principles of non-discrimination and the best interests of the child. For example:

- In **Botswana**, the Penal Code, Section 147, provides an excuse for a sexual offender who has 'reasonable grounds' to believe that the abused girl was old enough.
- In **Eritrea**, under the Transitional Penal Code, the consent of the victim to marry a sexual offender bars prosecution and, where the offender was convicted, terminates the sentence. This was deemed in the best interests of the child victim, who would otherwise be stigmatised in the community and have little chance of marrying.
- In the **Madagascan Penal Code**, in cases of abduction of a minor, if the victim agrees to marry her abductor, the perpetrator can only be prosecuted upon complaint by people who can ask for the annulment of the marriage.
- In **Zambia**, under the Local Courts Act, a person who has sex with a virgin who has reached puberty, only faces a minor charge and is not charged with defilement, in contrast to the Penal Code which defines defilement as sex with any girl under sixteen. The Penal Code allows consent of the victim, parent or guardian as a defence for some offences; for example, the abduction of girls under sixteen or detention of a girl between sixteen and eighteen for immoral purposes. A child may also have to undergo a rigorous judicial test to establish whether he or she may give uncorroborated evidence.

Discriminatory laws

Some laws that are meant to protect all children from sexual abuse have within them discriminatory provisions against the children they seek to protect; for example:

- The Penal Code of **Botswana** had to be reviewed to make it more responsive to sexual abuse against boys.
- **Swaziland's** Girl's and Women's Protection Act does not provide general protection for all children against 'unlawful carnal connection'. Its protective provisions are specific to girls and do not cover sexual abuse against boys. The Crimes Act, Section 42, also discriminates against boys, as well as girls who are prostitutes or have an 'immoral character', as they are excluded from the protections within this provision.

Lack of awareness on negative cultural beliefs and practices

By ratifying the CRC and the African Charter, countries agree to all their provisions, including their supremacy over any contrary cultural or other norms, as stated within constitutions and other laws domesticating provisions of the charters. However, most have not fulfilled their obligations to create awareness on the provisions of the CRC and the African Charter and cultural norms frequently still inhibit protection of children from sexual abuse and exploitation, even where formal protective laws exist. For example:

- **Cases involving sexual abuse are often withdrawn before they reach the courts**, particularly where perpetrators are family members, especially the family breadwinner responsible for providing material support to other children. A police study of rape in Botswana¹¹⁷ noted that there is 'leniency with which rape is dealt with by families'; victims often do not press charges and families ask only for an apology or financial compensation
- **In Comoros there is a degree of impunity for perpetrators**, with reports indicating that up to a quarter of cases are never investigated. Families often withdraw charges, or the files are closed by the police. Most cases of sexual abuse are adjudicated by the community or familial arrangements, irrespective of legal provisions and without the views or best interests of the child victim. Families hide cases of child abuse, particularly those perpetrated by family members and close relatives, in the name of safeguarding the honour of the family or for financial compensation
- In **Eritrea the betrothal or marriage of the victim of sexual abuse to the perpetrator** is encouraged and pursued, as non-virgin girls and pregnancy out of wedlock are deemed customarily, culturally and religiously unacceptable because they bring shame upon the immediate and extended family. Culture dictates that the child is better off socially and economically with the status of divorcee rather than rearing a child born out of wedlock

Despite legal provisions that provide for prosecution of perpetrators, similar cultures and belief were found across several countries in the region, including Comoros, Ethiopia and Tanzania. Marriages between sexual abusers and child victims facilitate impunity for abuse of children and are against the best interests of the child and of justice

- A recent survey in **Malawi** by UNICEF and other partners interviewed about one thousand school-age girls. The findings revealed that more than half had been abused by teachers and peers, but that only 2% of the victims had reported the abuse to the police or authorities

Poorly implemented laws

The laws enacted by governments are only as effective as their implementation. This review found that poor implementation of laws by duty bearers such as police officers inhibits the formal protection afforded by the law to children.

In Tanzania it was reported that even where cases are reported to the police stations, not all cases are prosecuted. In Ruvuma, Songea District, from 1998 to 2003, 175 child sexual abuse offences were reported to the police, but only 56 cases were sent to courts of law. One of the reasons was lack of medical evidence: a medical examination by a medical officer at the request of the police is required before the case can be prosecuted. The report is often either not issued or a bribe is solicited before it can be issued. Another reason for the lack of evidence to successfully pursue a prosecution is that medical examiners are not adequately trained to find and document evidence of many types of sexual abuse.

Lenient sentences and impunity for perpetrators

Ineffective sanctions and penalties for abusers mean that child victims of abuse do not benefit from satisfactory justice. This review found that lenient sentencing for perpetrators of child abuse is a problem. Sex offenders are given suspended, non-custodial or short sentences, which are often proscribed in the law. There is inconsistency in sentencing:

sentences can range from six months to twenty years imprisonment for the same offence. Sexual offences, including rape and defilement, are often bailable, where this may not be in the best interest of children.

Lack of medical and other services for child victims

Most laws that countries have enacted do not address care and rehabilitation of child victims of sexual abuse, through medical, legal and psychosocial support. Few countries in this review have free medical services and victims of abuse often cannot afford treatment. Even where health services are affordable, there are insufficient human and technical resources to adequately handle abuse cases. The risk of contracting HIV from sexual abuse means that medical care is particularly critical.

Minimum ages on sexual consent and marriage

If children are to be adequately protected from sexual abuse and exploitation, there is need for uniformity in the definition of a child and consistency in the minimum ages of marriage and sexual consent. As shown in the following boxes, the review found that there are contradictory legal provisions regarding the age of marriage and even when legal protections exist, they may be overridden by customary laws and tradition.

Box 8: Lowest age of sexual consent

Of the nineteen countries in this review, **Malawi has the lowest legal age of sexual consent at thirteen years old.** The Malawi Law Commission recommended that this be raised to sixteen.

Box 9: Conflict of laws

In **Tanzania**, the law has created the anomalous situation where the **age of marriage is lower than the age of sexual consent.** The Sexual Offences Special Provision Act 1998 sets the age of sexual consent at eighteen, but under the Law of Marriage Act, it is set as fifteen years for girls.

Police systems and other measures

In addition to laws on prevention of sexual abuse and exploitation, countries must put in place systems to protect children from abuse and to address abuse that may occur. Some examples are presented in the following table.

Table 20: Selected examples of mechanisms and plans to address sexual exploitation and abuse

Country	Mechanism
Burundi	A Special Unit for Minors has been established in the national police, which works closely with NGOs and other partners focusing on children's rights and addressing violence The Ministry of Health, together with multilateral partners, has developed a manual on the care of victims of sexual violence
Comoros	In Anjouan, Grande Comore and Moheli islands, the Ministries of Health and Social Affairs have put in place a communication desk for children who are victims of abuse, aimed at creating awareness about the prevalence of all forms of abuse against children and at providing assistance to victims There is a National Strategy on the Protection of the Most Vulnerable Children, which prescribes provisions to protect and reintegrate child victims of sexual exploitation and abuse, such as training of teachers and the establishment of village committees for vulnerable children that aim to fight sexual abuse of children

Table 20 continued

Lesotho	A dedicated Gender and Children Unit has been set up within the police to deal with rape, abuse and other related offences
Madagascar	Guidelines for the Criminal Investigation Department on how to handle cases of sexual exploitation have been elaborated, in partnership with the NGO Development Group, for the treatment of cases of sexual exploitation, in particular preventive measures, and procedures to be followed during the hearing of child victims
Malawi	A Zero Tolerance Campaign on Child Abuse was launched in November 2005 by the Minister of Gender, Child Welfare and Community Services, to create awareness on sexual abuse, including incest and early marriage
Namibia	Women and Child Protection Units (WCPU) have been established by the Namibian Police to provide integrated services to victims of violence and any form of abuse, including rape, sodomy, indecent assault and assault with intent to do grievous bodily harm, especially where the victim of either gender is under eighteen. WCPU services are free of charge and consist of providing police protection; basic counselling to survivors of rape and assault; temporary shelter for victims in dire need of protection; and advice and referral to other agencies where necessary
South Africa	The Education Department has drafted regulations to protect girls against sexual harassment and abuse, and to provide for the punishment of perpetrators of sexual harassment in schools. A Human Rights Watch report from 2000 found that one in four girl learners in South Africa experience sexual abuse perpetrated by other learners or educators. Victims of sexual abuse say that they find it difficult to concentrate in school after abuse or harassment, or that they drop out from school completely

Box 10: The Sexual Offences Bill (2006) in South Africa

This proposed legislation in South Africa seeks to comprehensively address sexual exploitation through:

- Repealing the common law offence of rape and replacing it with a new statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender
- Repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent
- Creating categories of particular offences that address the particular vulnerability of child victims
- Eliminating discriminatory differentiation between the age of consent for boys and girls for consensual sexual acts, by reducing the age of consent for boys from nineteen to sixteen and providing special provisions relating to consensual acts between children older than twelve and younger than sixteen
- Affording victims the right to apply for the alleged perpetrator to be tested for HIV, and to receive post-exposure prophylaxis

The case

South Africa domesticated The Hague Convention on International Child Abduction through The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. The provisions of this act were then subjected to a constitutional challenge in the case of *Sonderup v Tondelli* (2001)(1)SA 1171(CC).

The issue

The act required the prompt return of an abducted child to the country of his or her residence, even where this may be contrary to the best interests of that individual child. The case was an opportunity for the court to interpret and apply the provisions of the Act.

The ruling

The Constitutional Court rejected the challenge, with reference to the limitations clause contained in Section 36 of the South African Constitution, noting that it was generally in the best interests of children not to be abducted abroad in circumstances that frustrate access and custody rights of parents, and that the procedural remedy granted by the Hague Convention was thus in the best interests of children.

The court also ruled that Hague Convention proceedings made provision for the consideration of both short and long term interests of children who are the subject of individual applications, and that courts are further empowered to tailor orders and impose substantial conditions in order to mitigate any likely interim prejudice to the child. The Court finally noted that section 28(2) of the Constitution provided 'an expansive guarantee that a child's best interests are paramount.'

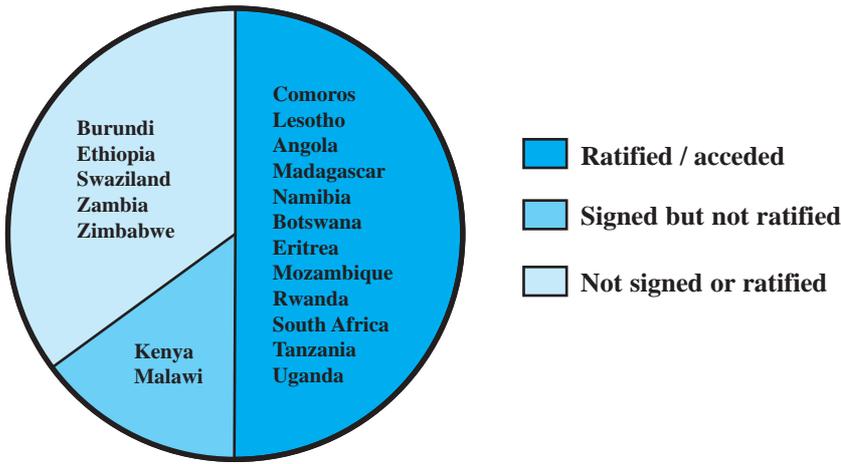
Ratification status on the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The figure below shows encouraging progress on the number of countries in this study, who have signed and ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Pornography. Only five of the nineteen countries in this review have yet to sign and ratify the Protocol, with two countries signing but not yet ratifying.

The challenge for states is to address factors that result in child sexual exploitation, including poverty, lack of free and compulsory education, and the low status of girls in many countries. Weak law enforcement and little or no international networking by law enforcement agencies enables child trafficking and sex tourism to flourish.

While a number of states have enacted laws particularly in regard to sexual offences; for example, Tanzania, Namibia, Lesotho, Zimbabwe and Kenya, there is need for specific legislation with stiffer penalties against human trafficking. There should also be sharing of information amongst law enforcement agencies internationally, and campaigns against sex tourism which acts as a 'pull factor' for child prostitution.

Figure 17: Ratification of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography



RIGHT TO APPROPRIATE JUSTICE PROCEDURES

CRC - Art 40

*'State parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the **child's sense of dignity and worth**, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'*

The African Charter- Art 17

*'Every child accused or found guilty of having infringed penal law shall have **the right to special treatment** in a manner consistent with the child's sense of dignity and worth and which reinforces the child respect for human rights and fundamental freedoms of others.'*

'State parties to the present Charter shall in particular:

- (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is **subjected to torture, inhuman or degrading treatment or punishment**;*
- (b) ensure that **children are separated from adults** in their place of detention or imprisonment...'*

*'The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her **reformation, reintegration into his or her family and social rehabilitation**.'*

*'There shall be **a minimum age** below which children shall be presumed not to have the capacity to infringe the penal law.'*

The need to promote a distinctive system of juvenile justice for children with specific positive rather than punitive aims is set out in the CRC. Article 40 provides for the need to accord special protection for all children alleged as, accused of, or recognised as having infringed the penal law. States should provide measures for dealing with children who may have infringed the penal law without resorting to judicial proceedings and should provide a variety of alternative dispositions to institutional care.¹¹⁸ The special treatment should cover all stages, from the time an allegation is made, through investigation, arrest, charge, pre-trial period, trial and sentencing.¹¹⁹ Article 40 also details a list of minimum guarantees for the child.¹²⁰

The review demonstrates that there are several positive initiatives related to justice for children in conflict with the law, as well as victims and witnesses. However, in most countries judicial proceedings, including detention, for children who have infringed the penal law are not the last resort. In ten of the nineteen countries involved, there are no alternatives to the formal criminal justice system for children who have infringed the law.

The majority of the countries reviewed here do have separate detention centres for children, but there are still instances of children being detained with adults, even where children's detention facilities exist. Rehabilitation and reform centres for children are often more punitive than rehabilitative and restorative.

Children's courts

The majority of the countries in this review have institutionalised children's courts. Such courts are not necessarily separate physical facilities for children, but rather a combination of physical facilities, systems and procedures that take into account the need for accommodating children's special needs before the justice system. There are some concerns that these courts are limited to capital cities and urban areas, so rural children have less opportunity to benefit from the system that takes into account their particular needs as children.

Generally, the laws establishing these courts enshrine basic safeguards contained in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) - Beijing Rules - as well as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990). These include presumption of innocence; the right to be notified of the charges; the right to remain silent; the right to counsel; the right to the presence of a parent or guardian; the right to confront and cross-examine witnesses; and the right to appeal to a higher authority. Principles stated in these rules relating to measures to be taken during investigation while deciding who has jurisdiction over the case also apply.

Table 21: Laws establishing children's courts

Country	Children's court
Angola	Law No 9/96 established the Minor Court
Botswana	The Children's Act established Juvenile Courts to hear matters involving children. It provided that all cases involving minors may be heard in camera, in the presence of a parent or guardian and/ or social worker or probation officer
Comoros	The Assembly has adopted an Act on the Protection of Childhood and the Suppression of Juvenile Delinquency. This law guarantees to the child the right to treatment that favours dignity and personal value and that takes the child's age into account, and aims to facilitate reintegration into society Judges are appointed at three juvenile benches at the First Instance Court. All children charged with a crime should be referred to a juvenile court, where cases are seen in camera. This means only the minor and his or her parents; legal guardian or representative members of the Bar; representatives of institutions or services working with children; and witnesses are allowed to be present
Ethiopia	The Juvenile Justice Project Office has facilitated the creation of child-friendly benches within Federal First Instance Courts in the towns of Mekele, Nazret, Awassa, Wolaita-Sodo and Arba Minch. The introduction of these benches is a major break with the past, in line with the Criminal Procedure Code and the Penal Code. However, child-friendly benches have not been institutionalised within the structural framework of the court system so they largely rely on the goodwill of Presidents of Courts and could easily be reversed

Table 21 continued

Kenya	The Children's Act Part II, 2002, adopts a child rights-oriented approach to provisions on juvenile justice. The Act establishes child specific courts with exclusive original jurisdiction to deal with cases involving children, except capital offences and where children are jointly charged with adults. Since its enactment the Chief Justice has invoked it as a legal basis to appoint more than 115 Children's Court magistrates across the country with the mandate of specifically handling matters related to the enforcement of the Children's Act, including juvenile justice
Uganda	The Children's Act, Article 40(3), establishes a Family and Children's Court (FCC) for every administrative district, presided over by a magistrate. In cases of trial by courts other than an FCC - offences committed by children with adults or those carrying the death penalty - the case has to be remitted to the FCC for an appropriate order. The Children's Act makes the procedures of the FCC friendly and non-stigmatising to children. The courts are supposed to be held in camera; to be as informal as possible; to be inquisitorial and non-adversarial in nature; and the child offender should have a right to legal representation

Table 22: Mechanisms for diversion of children from the formal justice system

Country	Legal mechanisms for diversion
Botswana	Under the Children's Act, juvenile courts are under obligation to use deprivation of liberty as a last resort and promote the use of alternative care, such as industrial schools, as much as possible. In exceptional cases warranting detention, it should be for the minimum period allowed. Detention centres for juvenile offenders must run programmes geared towards rehabilitation, education and skills training. The act does not consider the family to be an alternative care unit and fails to provide for adequate diversionary measures
Ethiopia	The family is recognised as an alternative detention option, so a young offender can remain in the custody of parents or guardians, or in their absence in the hands of a trusted person, as per Article 72 of the Criminal Procedure Code
Kenya	Within the Children's Act there is an array of alternative sentences or disposition measures as a way of post-trial diversion. However, the act does not explicitly recognise the possibility of pre-trial diversion or the referral of children away from formal criminal justice processes before trial

Table 22 continued

<p>Lesotho</p>	<p>The Children's Protection and Welfare Bill, 2004 draws substantially from the South African Child Justice Bill. Key mechanisms for the advancement of diversion are proposed at preliminary inquiry, a novel pre-trial procedure at which diversion can be considered at the earliest possible stage after arrest of a child. It identifies three levels of diversion¹²¹</p> <p>The Bill contains substantive and innovative provisions on restorative justice, including proactive use of families, communities, civil society groups and traditional leaders to take responsibility for the prevention, control and supervision of delinquency and child offenders. These structures are also empowered to deal with offending behaviour in the child's local environment, through the use of family group conferencing, victim-offender mediation and other restorative justice processes¹²²</p>
<p>South Africa</p>	<p>Assessment is one way of furthering diversion, and the Probation Services Amendment 2002, Act 35, defines assessment as a legal concept for the first time. It makes provision for the assessment of any arrested child by a probation officer as soon as is reasonably possible, but before first appearance in court, with the proviso that if a child has not been assessed before first appearance, such assessment must take place within a period specified by court not exceeding seven days following the first court appearance. The requirement that arrested children must be assessed as soon as reasonably possible, now has a legislative basis even in the absence of enactment of relevant provisions of the Child Justice Bill</p> <p>A secure care facility programme is in the process of development at provincial level, to provide alternative accommodation to children awaiting trial in lieu of prison. Legislation enacted in 1996 prohibits the pre-trial detention of children under fourteen. This rule may not survive debates in Parliament around the pending Child Justice Bill, which seeks to limit the use of detention to last resort, and limited exceptions may be created to permit children under fourteen to be detained in prisons</p>
<p>Uganda</p>	<p>The Children's Act 1996 promotes detention as a measure of last resort. Police have wide powers to release children without a formal charge and can also dispose of the case without having recourse to formal court proceedings. Unless arrested with a warrant, the police are authorised to release the child on bond on his or her own recognisance, unless the interests of justice require otherwise. As soon as a child is arrested the police are under duty to inform parents or guardians, as well as the local council secretary in charge of children's affairs in the area where the child resides</p> <p>The Children's Act has empowered village councils - Local Council 1 (LC1) - as grassroots administrative structures to try the following criminal offences at first instance: affray, common assault, actual bodily harm, theft, criminal trespass and causing malicious damage to property. LC1 courts operate in an informal manner, can be convened at any time and prohibit legal representation. In remedial terms, these courts are empowered to make orders including reconciliation, compensation, restitution, apology or caution. One of the nine LC1 members must be the designated secretary in charge of children's affairs, charged with monitoring children's welfare in that area of jurisdiction</p>

Diversion from formal justice procedures

Diversion from the formal criminal justice procedure, at every stage from investigation to pre-trial, trial and post-trial periods, should be the preferred standard procedure when dealing with child offenders. However, that is not the practice in all the countries reviewed. The table above highlights some selected legal provisions.

Community and other alternative care centres as diversionary measures

This review found commendable diversionary initiatives in several countries, including Ethiopia, Uganda and Lesotho. These are innovative in their use of community structures as means of rehabilitation of children and youth in conflict with the law. They are resource-friendly and sustainable ways of addressing the issue of children who come into conflict with the law within their communities, and, importantly, they are child-rights centred.

Box 12: Community-based correction programmes in Ethiopia

Community-Based Correction Programme Centres (CBCPC) work closely with Child Protection Units (CPUs), which are organised under the Addis Ababa Police Commission Crime Investigation Department and now exist in each of the ten sub-city police departments in the capital. They have helped improve the handling of accused children and child victims of violence and abuse, by ensuring follow-up and support during legal proceedings.

The objectives of the programme are to prevent children from starting anti-social activities, and to rehabilitate young first time offenders and petty offenders while they remain with their families, rather than in the custody of police or reformatory institutions.

After classification of a case by a CPU an 'individual treatment plan' is drawn up with active participation of the child, parents or guardians, and the CPU Police Officer, with assistance from a community worker and responsible team leader. Once the plan is drawn up, the child is supposed to regularly report to a CBCPC, of which there are currently six in Addis Ababa.

Box 13: Restorative justice in the Lesotho Children's Protection and Welfare Bill

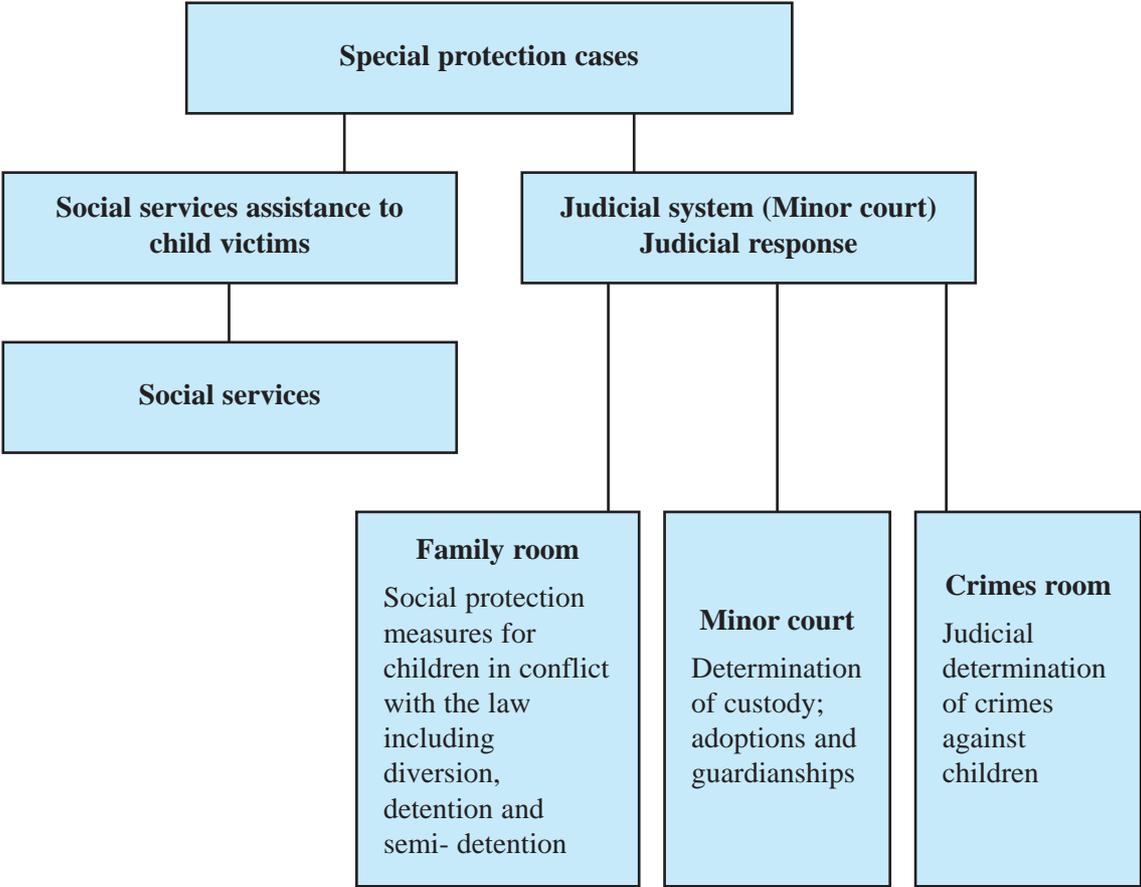
The Lesotho Children's Protection and Welfare Bill, Clause 131(7)(f), enacts substantive and innovative provisions on restorative justice: 'the principles of restorative justice and diversion embraced in the bill uphold the principles of reconciliation and restitution rather than retribution and punishment.'¹²³ The following are the salient features of child justice in the Bill:

- Families, communities, civil society groups and traditional leaders are empowered to take responsibility for the prevention, control and supervision of delinquency and child offenders
- The structures can deal with offending behaviour in the child's local environment through the use of family group conferencing, victim-offender mediation and other restorative justice processes

- Custodial sentencing measures are de-emphasised in favour of a number of diversionary options, including oral or written apologies, caution by a police officer with or without conditions, compulsory school attendance, good behaviour order, family time order or placement under supervision or guidance
- Sentences with a non-residential element are introduced, so provision is made for the establishment of institutions such as halfway houses for supervision and vocational, educational and technical training
- Communities and civil society organisations are mandated to run diversion programmes

Figure 18: Social protection system in Angola

In Angola, there is an integrated system of social protection of children which involves the Social Services, Public Security Police, Criminal Investigation and Minor Court. Both the Special Protection Law (No. 7/04) and special protection policies aim to protect children ranging from those lacking parental care (abandoned, institutionalised), child victims of abuse and children in conflict with the law. Resorting to a judicial solution should be the last resort.



Traditional mechanisms of diversion from the formal justice system: case of Lesotho

Box 14: African traditional mechanisms of diversion

African traditional mechanisms of adjudication are included in Lesotho's Children's Bill, including 'village child justice committees', a form of local courts; family group conferences; and victim-offender mediation.

Alternative dispute resolution may be subject to patriarchal and authoritarian structures. However, this issue has been ameliorated by requiring women to act as a proportion of the six members of the village justice committee, including the village chief, and that decisions must be reached by consensus.

Corporal punishment, the performance of community service for children aged below thirteen where it conflicts with schooling, public humiliation and diversion measures that require payment by a child or parent for eligibility are all specifically prohibited in the process of diversion.

Box 15: Open village healing circles

Open village healing circles are also envisioned in the Lesotho Children's Protection and Welfare Bill, Clause 128. These are to be convened by the chairperson of the village child justice committee in the following cases: two or more acts of antisocial behaviour perpetrated by the same child; where antisocial acts impact on all members of the community; where two or more children are involved; group-related conflict, such as that between two villages; or where there is a high probability that the anti-social behaviour or offence will be repeated. This is a locally developed response to communal resolution of conflict involved children or youth in trouble with the law.

Sentencing for child offenders

Detention is not an option of last resort for countries in Eastern and Southern Africa: child offenders are frequently more likely to be detained than to be diverted to alternative and rehabilitative centres. Sentencing children under eighteen to life imprisonment is possible in South Africa and in Eritrea, the minimum age for imprisonment is twelve, although pending legislation would raise this to sixteen. The minimum age for imprisonment is fourteen in Botswana and Swaziland, and fifteen in Comoros and Namibia.

The CRC Committee recommends that states consider deprivation of liberty only as a measure of last resort and for the shortest possible period of time. It says they should limit by law the length of pre-trial detention and ensure that the lawfulness of this detention is reviewed by a judge without delay and then at regular intervals.¹²⁴ Article 37(a) of the CRC requires that states ensure that no person below eighteen at the time of the commission of the offence is subjected either to the death penalty or a sentence of life imprisonment without the possibility of release. This was confirmed by recommendations in the report on the UN Secretary General's Study on Violence against Children and CRC General Comment No 10.

Table 23: Selected regional examples of legal provisions on sentencing of child offenders

Country	Sentencing procedures for children
Botswana	Courts cannot impose a prison sentence on a child below the age of fourteen, but can order corporal punishment for boys only The death penalty cannot be imposed on a child who commits an offence while below eighteen
Comoros	Although the Criminal Procedure Code does not specifically provide that the death penalty should not apply to anyone under eighteen, Article 51 sets out that where a child over the age of thirteen is sentenced to the death penalty or life imprisonment, the sentence should be reduced to ten to twenty years of imprisonment
Kenya	The Children's Act provides for alternative sentences for child offenders. A trial court may place a child offender in a probation programme; in the care of an adult or charitable institution; or commit the child to counselling, an educational institution, vocational training or community service. The trial court may also have recourse to the options of ordering the discharge of a child where appropriate; ordering a friendly settlement between the child and victim; or the payment of a fine or compensation. Section 190(1) specifically excludes imprisonment as a punishment for children for minor offences
Lesotho	<p>Corporal punishment is still a legal sentence for boys under the Criminal Procedure and Evidence Act, 1981. However, the Children Welfare and Protection Bill 2004, pending Clause 166(2), will outlaw corporal punishment as a sentence</p> <p>The Child Welfare and Protection Bill provides an extensive array of alternative sanctions, and limits the imposition of imprisonment upon child offenders over the age of fourteen to a maximum of three years imprisonment. Alternatives to custodial sentences for children, including suspended sentences; discharge or release on the parents' recognisance; probation orders; community service for children over thirteen; or fines. Novel orders include 'positive peer association orders' and 'family time orders' as community-based sentences. Explicit provision is made for restorative justice sentences, namely referral to a family group conference, victim-offender mediation or other restorative justice processes. There has been an increase in the use of probation as a sentence for children administered by Lesotho's Probation Unit since the mid-1990s</p> <p>Substantial and compelling reasons must exist before a sentence of imprisonment can be imposed, and the charge against the child must be of a serious and a violent nature or the child must have failed to respond to previously imposed alternative sentences Cl 164. The Bill provides that 'no sentence of imprisonment may be imposed on a child under the provisions in the [Act] for a period exceeding fifteen years on any charge' Cl.164(9) Child-specific facilities, such as juvenile training centres or approved schools, are given as options for residential sentences. Such sentences should be for a period of six months minimum or two years maximum (Cl. 164 (1))</p>

Table 23 continued

Madagascar	In addition to educational assistance measures and release on probation, sentences pronounced against minors usually consist of imprisonment, as there is no formal legal system of sentencing or alternatives to imprisonment for children. However, when criminal responsibility is pronounced, the extenuating circumstance of minority allows for the sentence to be reduced to half the sentence and adult would receive
Namibia	Under the Constitution, preventive detention is not permitted for children under the age of sixteen
South Africa	Life imprisonment may be imposed on a child who committed an offence whilst under the age of eighteen, and it is estimated there are around thirty people who committed offences as children currently serving life sentences
Uganda	<p>The Constitution, Articles 34(6) and 93(6), provide that child offenders kept in lawful custody or detention shall be kept separately from adult offenders and not be remanded in an adult prison. This is reaffirmed by the Children's Act, Article 90(8). Special protection is extended to female children, who must be under the care of a female officer while in detention. However, in practice Ugandan children are detained in adult jails</p> <p>The Children's Act, Section 94(1), provides that on conviction for offences punishable by death, a child should be detained for a period not exceeding three years. It also provides that detention or institutionalisation should be considered by the Family and Children's Courts (FCC) as a matter of last resort, in Section 94(4). Most of the orders that may be made by the FCC channel the child back into the community. Corporal punishment may not be meted out by the FCC</p>

Legal use of corporal punishment within the juvenile justice system

The review found that, despite laws prohibiting torture and cruel, inhumane and degrading treatment of children, the imposition of corporal punishment is permitted in the juvenile penal system of some countries, as Table 23 above shows.

Gaps and areas for action towards child-friendly justice systems

While most countries in the review have taken laudable steps in trying to realise appropriate justice systems for children, the following are areas of concern that need to be addressed:

1. Inadequate facilities and staffing resources, including access to child friendly police stations and judicial infrastructure. Even where legislation details proper treatment of children in contact with the justice system, there are often insufficient resources to implement the measures; for example, specially trained police officers, probation officers, social workers and judicial officers.
2. In Uganda an estimated two hundred Family and Children's Courts are required, but only thirty have been established to date. The jurisdiction of the FCCs also appears to be limited: they are not able to handle all matters relating to children because the presiding officers are Grade II magistrates, at the bottom of the judicial hierarchy.

3. Detention of children with adults, both in police cells and in jails in spite of legislation that specifically prohibits it. Police facilities are often cramped, so there are no alternatives except to put children in together with adult offenders, including violent criminals.
4. Failure to apply diversion at all stages of the criminal justice system means that many children are caught up in the formal justice system. There is a need for training and raising awareness amongst police on existing laws that call for diversion of children from formal justice procedures.
5. Lack of adequate and sufficient alternative detention centres for children. The review found that existing facilities are overstretched; that they house more child offenders than they should; that they are often located only in capital cities; and are inadequately staffed and resourced. They are often more retributive and abusive than rehabilitative in nature.
6. There is a need to pay attention to the rights and needs of child victims and witnesses of crime, in line with CRC General Comment No 10 and UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime 2005. In most of the countries reviewed, the predominant focus and attention is on child offenders, so countries must take the opportunity to review their child justice laws and procedures in light of these guidelines. UNICEF indicators on juvenile justice point to the need for adequate data collection mechanisms to ensure that states know how many children are deprived of their liberty, convicted and sentenced.

**SPECIAL PROTECTION
MEASURES**



Credit: Liba Taylor

RIGHTS OF ORPHANS AND VULNERABLE CHILDREN

CRC - Arts 20 & 21

'State parties that recognise and/ or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the **adoption of a child is authorised only by competent authorities** who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the **persons concerned have given their informed consent** to the adoption on the basis of such counselling as may be necessary
- (b) Recognise that **inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family** or cannot in any suitable manner be cared for in the child's country of origin.' Art 21

The African Charter - Arts 24 & 25

' State parties which recognise the system of adoption shall ensure that **the best interest of the child shall be the paramount consideration...**' Art 24

'Any child who is permanently or temporarily deprived of his family environment for any reasons shall be **entitled to special protection and assistance** Art 25

Eastern and Southern Africa have high numbers of orphans, with all the countries in this review seeing increasing numbers of orphans resulting from HIV/ AIDS. The threat to children's rights represented by large numbers of children needing care hangs over all the countries in the region, and the challenge for governments and communities is enormous. Botswana and Lesotho noted their concern that the impact of HIV/ AIDS, particularly the number of orphans and child-headed households, risks undoing the gains in children's rights made in recent years.

This review inquired into how countries in the region were responding to the increasing numbers of orphans and vulnerable children¹²⁵, and whether laws and policies relating to adoption were sufficient response to the crisis. Developing innovative and potentially unconventional systems of protection that can provide an adequate response to unprecedented circumstances is an urgent task for both national governments and the international community.

The review found that countries are developing and implementing policies to address the situation of orphans and vulnerable children and provide care and protection. However, the problem is of such magnitude as to require constant and concerted effort, attention and resources to adequately address the plight of millions of orphaned, abandoned and other vulnerable children. In particular, there is a need for proper structures for implementation, particularly relating to decentralisation to local level and coordination by different government bodies. In some countries, such as Lesotho and Malawi, limitations on adoption need re-examining in light of emerging issues.

While civil society organisations are stepping in to provide services for orphaned and abandoned children, the main duty bearer is the government. States need to seek means to financially support community-based and other organisations providing vital services to children in need of protection and care.

Table 24: Selected laws and policies regarding orphaned and vulnerable children

Country	Legal or policy provision
Botswana	Developed a Short Term Plan of Action for Orphans, for national registration of orphans in order to facilitate provision of services, including food, clothing and shelter The government provides anti-retroviral medication to HIV-positive children
Burundi	Conflict in the last decade has led to unprecedented numbers of orphans, displaced and abandoned children. Since 2004 there has been a National Policy for Orphans and Other Vulnerable Children
Comoros	National Strategy on the Protection of Vulnerable Children National Centre of Observation and Integration of Vulnerable Children, with the responsibility for monitoring physical and psychological rehabilitation, life skills training, and social reintegration of child victims of abuse, children deprived of familial support, orphans and children in conflict with the law
Eritrea	<p>War, displacement, drought and famine have resulted in large number of orphans. Under the Ministry of Labour and Human Welfare, there have been efforts to provide alternative care in order to reintegrate orphans and other disadvantaged children into the community rather than provide institutional care services. Reintegration, adoption, group home and foster home services have replaced the majority of large-scale orphanages. Financial assistance and income generating schemes aid families that host orphans and maintain children placed in group homes or foster homes.</p> <p>There is a four-step approach to orphans and abandoned children:</p> <ol style="list-style-type: none"> 1. Reunification of orphans and abandoned children into the community, where the nearest member of the extended family or another willing person, enters into a contract of adoption with the government 2. Identification of community-based group homes to which orphans and abandoned children who cannot be reunified into the community are admitted. There are currently 24 such homes throughout the country, funded by the government 3. Orphaned and abandoned children who cannot be reunified or placed in group homes are placed in foster homes 4. The final step is the last resort of admitting children into institutional care
Ethiopia	<p>The Constitution, Article 36(5), obliges the state to accord special protection to orphans and to encourage the establishment of institutions that promote their adoption and advance their welfare and education</p> <p>The Ministry of Labour and Social Affairs has a five-pronged alternative care approach and has developed guidelines relating to institutional childcare, community-based childcare, reunification, foster family care and adoption. Ethiopian children deprived of a family environment may be classified into three categories: orphans bereft of both parents, children who do not live with their biological mothers and children who reside in single-adult households</p>

Table 24 continued

<p>Kenya</p>	<p>The Children's Act makes provision for children in need of care and protection, a category which includes orphans and vulnerable children. Section 119 provides a non-exhaustive list of children in need of care and protection, including children with no parents or guardians, those abandoned or found begging, children who are terminally ill, and abused children. It confers power on children's and other courts to make appropriate orders that seek to redress the plight of such children. A role is envisaged for members of the public, relevant government officials and law enforcement agencies in relation to reporting on and handling such children. However it does not expressly specify the options open to courts or government officials in such cases, except for ordering the referral of a child to private charitable or foster care, or making an order for the adoption of the child where there is an application. The Act does not propose the development of 'places of safety' as a last resort for children with no parents, nor does it explicitly provide for the role of the family, whether nuclear or extended, in providing care and protection</p> <p>The government, in conjunction with UNICEF, piloted a programme of cash transfers to families that take in an orphaned or vulnerable child. There are now plans to roll this out nationally</p>
<p>Madagascar</p>	<p>The National Council for the Fight Against AIDS supports the government in taking charge of orphans and vulnerable children</p>
<p>Mozambique</p>	<p>The Technical Unit for Law Reform (UTREL) undertook the task of drafting the new Child Law for Mozambique. In December 2005, two pieces of legislation were released: the Draft Bill on Child Protection and the Draft Bill on the Jurisdictional Organisation of Minors. The former places a duty on families, communities, society and the state to ensure the rights contained in the Bill</p>
<p>Namibia</p>	<p>There is a National Policy on Orphans and Vulnerable Children and a permanent task-force to provide necessary funding for emergency assistance to orphans and vulnerable children</p> <p>A feeding and counselling programme for orphans and vulnerable children is constituted under the Child Protection Policy</p>
<p>Rwanda</p>	<p>A National Policy on Orphans and Other Vulnerable Children was adopted in 2003. Vulnerable children are defined as being under eighteen and exposed to conditions that do not allow them to benefit from their fundamental rights. Based on this criteria, vulnerable children are classified into fifteen groups, including children from child-headed households, those affected by armed conflict, children living in institutional care, and those affected by HIV/AIDS</p>
<p>South Africa</p>	<p>South Africa has the most institutionalised system of welfare provision in the region. The placement of orphans and at-risk children in foster care has been 'a key policy response to the escalating numbers of children without adequate parental care due to the HIV/ AIDS phenomenon.'¹²⁶ Grants for foster care have served as incentives for families to take in children in need of temporary care, but the contrasting lack of financial support for the permanent option of adoption has led to a glaring discrepancy between the number of adoptions and placements in foster care.¹²⁷ The state subsidises non-profit organisations that cater for children in children's homes and places of safety</p> <p>The Children's Act Amendment Bill of 2006 will recognise child-headed households as legal entities, in order to ensure that they access services such as grants and psychosocial support</p>

Table 24 continued

Swaziland	A draft policy that proposes the provision of free and compulsory basic education for orphans and vulnerable children has been formulated
Tanzania	National Guidelines for Care and Protection of Orphans and Vulnerable Children in Institutional Care have been developed
Uganda	<p>The Constitution provides for special protection to orphans and vulnerable children</p> <p>In 2003 the Ministry of Gender, Labour and Social Development established an Orphans and other Vulnerable Children Secretariat and commissioned a number of studies on the problem of orphans and vulnerable children</p> <p>The National Strategic Programme Plan of Intervention for Orphans and other Vulnerable Children, Fiscal Year 2005/6 - 2009/10 was adopted in 2004. The programme acknowledges the physical and emotional challenges faced by orphans, and the fact that over 80% of orphans do not receive any form of support from the government. The mission of the programme is to ensure that all orphans realise their full potential and have their rights and aspirations fulfilled, and it outlines a number of government priorities in relation to vulnerable children, including identifying caregivers for children living on their own and reaching out to vulnerable households</p>
Zimbabwe	National Orphan Care Policy, which includes assistance to orphans and vulnerable children through tuition fees, levies and examination fee assistance

Adoption: taking in children in need of care and protection

Domestic adoptions are one solution to the increasing numbers of orphans in the region. This review found that existing adoption procedures in the region are often bureaucratic and lengthy, and there is often stigma and discrimination attached to adopted children.

Challenges in taking care of orphaned and abandoned children

- **Legal and administrative barriers**, such as in Lesotho where nationals cannot adopt children or in Malawi, where adopted children do not legally count as children of adoptive parent for purposes of succession.
- **Weak institutional facilities and resources** coupled with the ever increasing numbers of orphaned and abandoned children are the biggest challenges faced by the countries in this review in regard to catering for children in need of care and protection.
- **Failure to ratify the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption** leaves children vulnerable to abuse and trafficking under the guise of adoption. Only Burundi, Kenya, Madagascar and South Africa have ratified this convention so far.
- The plight of orphaned and abandoned children is further exacerbated **by poverty and lack of access to basic education and health services**, leading to situations of economic and sexual exploitation.
- **Customary law practices and cultural taboos** often work against the best interests of children, even where legislation exists to prevent discrimination.

Table 25: Selected examples of national positions on adoptions

Country	Legal, policy and customary positions on adoption
Burundi	Has ratified the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoptions 1993
Eritrea	Adoption under customary law has an automatic presumption of parental responsibility without the need for formal contracts with the guardian or the adopted child. This leaves the adopted child vulnerable to discrimination under customary law, because the child may not have the material evidence needed to claim rights to inheritance in the adopted family and may have to depend upon recognition by the adoptive family's heirs
Ethiopia	<p>There are guidelines from the Ministry of Labour and Social Affairs on national adoptions as well as other alternative care mechanisms</p> <p>Ethiopia has not signed the Hague Convention. However, available figures indicate low levels of in-country adoptions particularly in comparison to inter-country adoptions. Between 1999 and 2003, 2,760 children are recorded for inter-country adoption and 130 for intra-country adoption.¹²⁸ This anomaly is a subject of concern for the CRC Committee</p>
Kenya	The Children's Act makes provisions dealing with children in need of care and protection and Kenya has ratified the Hague Convention
Lesotho	<p>The law currently prohibits local adoptions by Basotho nationals, which is an anomaly that the Child Welfare and Protection Bill will address. It has opened a gap for increasing numbers of inter-country adoptions without a regulatory framework, as Lesotho has not yet ratified the Hague Convention</p> <p>However, the proposed Bill has made good provision for regulating both national and inter-country adoptions, including the need for children's consent to adoption and the necessity of taking into account their best interests. Specifically in regard to inter-country adoptions, it proposes that the adoptive parent should have stayed in the country for at least three years; have fostered a child for at least two years under supervision of a social worker; not have a criminal record; have a recommendation concerning their suitability to adopt children from their country of origin; and have satisfied the High Court that their country of origin will respect and recognise the adoption order and grant residence status to the child.¹²⁹ The only caveat is that the draft Bill does not expressly incorporate the principle of subsidiarity, or that prospective adoptive parents within the country of birth should be the first priority, as provided for in international law</p>
Madagascar	Has ratified the Hague Convention and recently enacted legislation in regard to inter-country adoptions. ¹³⁰ It recognises the principle of subsidiarity and stipulates that initial efforts should be towards placing the child within their extended family, followed by placement in a foster or adoptive family in Madagascar. Legal national adoption must be given priority over international adoption. The last resort is placement in an institution

Table 25 continued

<p>Malawi</p>	<p>Although the law does not negate the right of the adopted child to inherit from their biological parents, an adopted child does not count as a child of the adoptive parents for purposes of succession¹³¹</p> <p>Despite a recent high-profile international adoption,¹³² the law prohibits adoptions by any applicant who is not resident in Malawi. The Malawi Law Commission has proposed amendments to this provision, including the option of inter-country adoptions as an alternative means of care for children who cannot be placed in foster care, with an adoptive family or cared for in any other suitable manner in Malawi. It also proposes that the adopted child must enjoy the same full rights as the natural children of adoptive parents</p>
<p>South Africa</p>	<p>Section 28 of the Constitution entitles children to family care or appropriate alternative care when removed from the family environment The Children's Act 2005 contains new guidelines for identification of children in need of care and protection, including abandoned and orphaned children, and also regulates adoptions. South Africa has ratified the Hague Convention</p>

RIGHTS OF REFUGEE CHILDREN

CRC - Art 22

*'State parties shall take appropriate measures to ensure that **a child who is seeking refugee status or who is considered a refugee** in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, **receive appropriate protection and humanitarian assistance** in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said states are parties.'*

The African Charter - Art 23

*'State parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, **receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human right and humanitarian instruments** to which the states are parties'.*

These articles address the rights of child refugees and asylum-seekers to appropriate protection and humanitarian assistance.¹³³ State obligations under the CRC apply to each child within the state's territory and to all children subject to its jurisdiction. The African Charter's provisions relating to protection of refugee children are substantially similar to the CRC, but their strength lies in the extension of protection to internally displaced children,¹³⁴ and in the formal synergies created between the African Charter and other authoritative international instruments.¹³⁵

Armed conflicts and natural disasters in Africa have caused massive dislocation resulting in mass movement of people seeking refuge from dangerous situations in their own countries. Although forced movement affects all members of the population, its impact on children is disproportionate. For example, in 2001 the total refugee population in Africa was estimated at approximately 3.6 million refugees,¹³⁶ with 56% of them children under the age of eighteen¹³⁷. Nearly 5% of refugee children in Africa are unaccompanied.¹³⁸

Due to their heightened vulnerability, it is generally accepted that refugee children require an increased level of protection and assistance in order to find durable solutions for their particularly tragic situation.¹³⁹ Critical provisions in legislation relating to children include their status in the country and access to rights, including their rights to basic services, education and civil liberties. Countries must also set up a central system of registration and monitoring of refugees, in order to provide accurate statistics and clarify the status of refugees.¹⁴⁰

Laws catering for refugee children in the countries under review are mixed. It is critical that all countries have provisions on the status and rights of refugees, especially in countries that have been recipients of large numbers of refugees and internally displaced people in the past decade, such as Botswana, Burundi, Eritrea, Ethiopia, Kenya, Rwanda, South Africa, Tanzania, Uganda and Zambia. From these ten, four - South Africa, Kenya, Tanzania and

Uganda - have laws specifically dealing with refugees, including refugee children. The CRC Committee has elaborated guidelines and recommendations on the rights of refugee and asylum seeking children in its General Comment No 6.

From all the countries in the review, Comoros and Eritrea are the only states not to have ratified either the 1951 UN Convention Relating to the Status of Refugees or its 1967 Protocol. This Convention is the key legal document that defines who is a refugee, the rights of refugees and the legal obligations of states. The 1967 Protocol removed geographical and temporal restrictions from the Convention.

Table 26: Selected examples of legislation on refugees

Country	Legislation on refugees and internally displaced people (IDPs)	Comment
Botswana	The Constitution, Section 10, entitles all persons within in Botswana to the protection of the law, but there is no specific law on refugees	The government has established a refugee settlement to facilitate the provision of support to refugees, including food, clothing and shelter. The educational needs of refugee children are catered for up to secondary level alongside local children
Burundi	No specific law on refugees	Burundi recently emerged from conflict and is in the process of reconstruction. It has to deal with large numbers of returning former refugees and IDPs
Eritrea	There is domestic law on the status of refugees, but the government has not ratified the 1951 UN Convention on the Status of Refugees In 1993 the Programme for Refugee Reintegration and Rehabilitation of Resettlement Areas in Eritrea (PROFERI) was launched and government-sponsored repatriation continued until December 2004. The Eritrean Relief and Refugee Commission is responsible for repatriation and resettlement of refugees from Sudan	Eritrea hosts refugees from Sudan, Somalia and Ethiopia. Government statistics illustrates that 25% of IDPs are female and 75% children. The government has been granting refugee status to people seeking refugee from Southern Sudan and Somalia
Kenya	Recently enacted the Refugee Act in 2006	Hosts refugees from Somalia, Ethiopia, Sudan and Northern Uganda

Table 26 continued

Rwanda	Has no specific law on refugees. However, it has a National Council for Refugees (Protection Service) and includes refugee children under the National Policy on Orphaned and Vulnerable Children	Hosts refugees from neighbouring countries as well as IDPs
South Africa	<p>The Immigration Act 13 2004 and Refugees Act 130 1998 both have provisions regarding non-South African national children</p> <p>In <i>Khosa and others v Minister of Social Development and others</i> the Constitutional Court ruled that the Constitution mandates special protection for children and that denial of support to children of permanent residents who are non-nationals infringes on their rights under Section 28 and their right to equality under Section 9. However, refugee children do not qualify for social security benefits</p>	The original version of the Children's Bill (70 of 2003) contained an elaboration of further protections for non-national children, but they were excised from the final text South Africa has a large refugee and migrant population for all over Africa, notably from Zimbabwe in recent years
Tanzania	<p>The Refugee and Control Act covers refugees in general, including children</p> <p>The Child Development Policy 2000 calls for the formulation of a new law, including the status and rights of refugee children</p>	
Uganda	The Refugee Act 2006 guarantees refugee children the same protection and rights as Ugandan children. It also provides that the family, including children, of a recognised refugee is entitled to the same rights as the recognised refugee	Refugees in Uganda are mainly from three countries: Democratic Republic of Congo, Sudan and Rwanda, with some refugees from Burundi and Somalia. Some local authorities have allowed refugee children to access education in schools outside camps, but this is not widespread. UNCHR provides free primary education in some camps

RIGHTS OF CHILDREN IN ARMED CONFLICT

CRC - Art 38

*'State parties undertake to respect and to ensure respect for **rules of international humanitarian law** applicable to them in armed conflicts which are relevant to the child.'*

*'State parties shall take all feasible measures to ensure that **persons who have not attained the age of fifteen years do not take a direct part in hostilities.**'*

*'State parties shall **refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.** In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, state parties shall endeavour to give priority to those who are oldest.'*

*'In accordance with their obligations under international humanitarian law to **protect the civilian population in armed conflicts**, state parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.'*

The African Charter - Art 22

*'State parties to this Charter shall undertake **to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.**'*

*'State parties to the present Charter shall take all necessary measures to **ensure that no child shall take a direct part in hostilities** and refrain in particular, from recruiting any child.'*

In 2006, the UN estimated that more than 250,000 children were actively involved in armed conflict in government armed forces, government militias and a range of armed opposition groups.¹⁴¹ Of the estimated 250,000 child soldiers in the world, 120,000 can be found in Africa alone.¹⁴² The most affected countries in this review include Angola, Burundi, Mozambique, Rwanda and Uganda.

The CRC requires states to ensure that children under fifteen do not take a direct part in hostilities and to give priority to the oldest among those between fifteen and eighteen. The African Charter is more comprehensive as it prohibits involvement of children, defined as anyone under eighteen, in armed conflict. In 2000, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted, seeking to strengthen standards regarding the use of child soldiers including raising the age for conscription to eighteen.¹⁴³

Box 16: Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, 2000

- Raises the minimum age of compulsory enlistment and direct participation in hostilities from fifteen to eighteen. In addition the age for voluntary enlistment must be raised to at least sixteen upon ratification of the Protocol by the state
- Prohibits rebel or other non-governmental armed groups from recruiting persons, regardless whether it is compulsory or voluntary, under the age of eighteen or using them in hostilities under any circumstances

- Requires governments to take all feasible measures to prevent the recruitment and use of children by such groups, including the criminalisation of such practices
- Recognises the vital need for proper rehabilitation and social reintegration, including through cooperation and financial assistance from other states

Although some of the countries in this review are in tandem with international law, a number fall short of the minimum standards for the protection of child soldiers. From the nineteen countries reviewed, only three have ratified and two acceded to the Optional Protocol on the Involvement of Children in Armed Conflict: Kenya, Lesotho, Namibia, Rwanda and Uganda.

Uganda still has an active, internal conflict between a rebel group and the armed forces, in which the rebels have been accused of using child soldiers. Burundi, Mozambique and Rwanda are in the process of post-conflict reconstruction and must ensure effective rehabilitation of former child soldiers of both genders.

Table 27: Ratification/ accession status of the Optional Protocol of the CRC on the Involvement of Children in Armed Conflict

Country	Ratification status
Angola	Not signed
Botswana	Signed 2003
Burundi	Signed 2001
Comoros	Not signed
Eritrea	Not signed
Ethiopia	Not signed
Kenya	Ratified 2002
Lesotho	Ratified 2003
Madagascar	Signed 2000
Malawi	Signed 2000
Mozambique	Not signed
Namibia	Ratified 2002
Rwanda	Acceded 2002
South Africa	Signed 2002
Swaziland	Not signed
Tanzania	Not signed
Uganda	Acceded 2002
Zambia	Not signed
Zimbabwe	Not signed

Table 28: Selected examples of legislation relating to children and armed conflict

Country	Law and policy regarding children and armed conflict
Botswana	Although there is no evidence of under-eighteens in the armed forces, there is no formal age for volunteers indicating that children aged under eighteen could be enlisted ¹⁴⁴
Burundi	Age of compulsory recruitment remains at sixteen, despite a 1999 government commitment made to the Special Representative of the UN Secretary-General for Children and Armed Conflict to raise the minimum recruitment age to eighteen ¹⁴⁵
Ethiopia	The Internal Regulation of the Armed Forces, issued by the Defence Council stipulates eighteen as the minimum age for joining the army. ¹⁴⁶ However, the Proclamation that establishes the Defence Force does not specify the minimum age for recruitment, but says that applicants simply have to be 'fit and willing'. ¹⁴⁷ Thus, the minimum age can be lowered to below eighteen if the Defence Council decides to amend the Internal Regulations of the Army to that effect. ¹⁴⁸ In order to prevent this, the Proclamation should be amended to make reaching the age of eighteen a requirement for recruitment ¹⁴⁹
Madagascar	Ratified the Optional Protocol in 2004, but has not enacted domestic laws or regulations to check the use of child soldiers
Rwanda	Recently passed a law on the Rights of the Child and Protection of Children against Violence, which states that military service is prohibited for children under eighteen. ¹⁵⁰ However, the UN Committee is concerned that not all former child soldiers, especially girls, are provided with the means of psychological recovery and social rehabilitation ¹⁵¹
Zambia	The Defence Act, Chapter 106 prohibits a child 'under the apparent age of 18' from being recruited into the armed forces without the consent of a parent, guardian or local District Secretary. ¹⁵² The CRC Committee recommends amendment of its legislation and all necessary measures to ensure that the minimum age for military recruitment is strictly fixed by law and leaves no room for interpretation ¹⁵³

Minimum age of compulsory enlistment

A major concern regarding enforcing minimum ages of enlisting - a challenge which also spans all other minimum protective ages for children - is the lack of birth registration. Without formal evidence of birth registration, it is difficult to ascertain the age of children. For example, the CRC Committee expressed concern in Uganda's recruitment process and possible gaps due to lack of birth registration,¹⁵⁴ among other issues. This concern has also been expressed in regard to Zambia's apparent age for voluntary recruitment noting that 'less than 10% of children were registered at birth in 1999, even less in rural areas'.¹⁵⁵ This is a problem that plagues many countries in this review, as there are challenges in universal and compulsory birth registration in most of the countries reviewed. Legislation to protect children against becoming soldiers should be supplemented by a systematic, affordable and accessible birth registration system.

PART

4

**TREATY REPORTING
OBLIGATIONS AND STATUS**



Credit: Liba Taylor

REPORTING TO THE COMMITTEES

International law lacks adequate direct enforcement means and therefore relies heavily on the principle of *pacta sunt servanda*,¹⁵⁶ which is heavily dependant on states' goodwill. Both the CRC and the African Charter have established committees¹⁵⁷ charged with monitoring their implementation via examination of state party reports. The committees are made up of independent experts with recognised competence in the field covered by the CRC (Article 43) or in matters of rights and welfare of children (Article 33, ACRWC), and from various legal systems. The CRC Committee meets three times a year in Geneva and considers regular periodic reports on the implementation of the CRC and initial reports on the implementation of the Optional Protocols.

Once states have ratified the treaties, they are obliged to submit regular reports to the monitoring committees detailing implementation of the rights they committed themselves to through legislative and other measures. The CRC Committee should receive the initial report two years after ratification and every five years thereafter. The African Committee should receive an initial report within two years of entry into force and every three years thereafter.¹⁵⁸

The reporting process is public and involves dialogue and discussion between government representatives and CRC Committee members. The Committee welcomes additional sources in reviewing the reports, including alternative reports from NGOs and UN agencies. After the review the CRC Committee issues its concluding observations and recommendations. The next periodic report should contain information on the measures taken to implement the recommendations. The review and reporting process should facilitate public awareness on the situation of children's rights in the country.

CRC reporting process

The CRC Committee has developed its own procedure through which it examines state parties' reports.

1. All members are invited to a **pre-sessional meeting**, in which the Committee meets with NGOs, UNICEF and other UN agencies to discuss the reports they have submitted that are complementary to the state party's report. After the meeting a 'List of Issues' is sent to the country concerned, with requests for further information.
2. In the next session of the committee, about three months after the pre-sessional meeting, the state party's report is presented **by state representatives** and discussed with the Committee.¹⁵⁹
3. On completion of reporting and discussion of the issues in the report, the Committee prepares a **formal written document, known as the Concluding Observations**, in which it details the positive aspects of the report and the factors impeding implementation of the CRC, together with concerns, suggestions and recommendations addressed to the state party.¹⁶⁰
4. The committee has developed **general guidelines regarding the form and contents of initial and periodic reports**, detailing how to prepare reports and the points that should be addressed in them.
5. The committee urges states to **ensure wide availability of all reports, as obligated by Article 44(6)**, together with additional information submitted to the Committee, summary records of discussions with the committee and the Concluding Observations.

The African Charter reporting process

The African Committee began meeting in 2001, but has only received four state reports to date. By **May 2007, only Rwanda from the countries in this review had submitted a report**¹⁶¹. The African Committee can entertain individual complaints from 'any person' in matters relating to the Charter¹⁶² as well as its mandate of promoting and protecting the provisions of the Charter¹⁶³

Table 29: Reporting status of countries to the CRC and the African Charter

Country	Time of ratification	Initial report	Second report	Third report
Angola	CRC - 1999	2003	-	-
	ACRWC - 1990	-	-	-
Botswana	CRC - 1995	2003	-	-
	ACRWC - 2001	-	-	-
Burundi	CRC - 1995	1998	-	-
	ACRWC - 2004	-	-	-
Comoros	CRC - 1993	1998	2005	-
	ACRWC - 2004	-	-	-
Eritrea	CRC - 1994	2001	-	-
	ACRWC - 1999	-	-	-
Ethiopia	CRC - 1991	1995	1998	2006
	ACRWC - 2002			
Kenya	CRC - 1990	2000	2005	
	ACRWC - 2000			
Lesotho	CRC - 1992	1998	-	-
	ACRWC - 1999	-	-	-
Madagascar	CRC - 1991	1993	2001	-
	ACRWC - 2005	-	-	-
Malawi	CRC - 1991	2000	-	-
	ACRWC - 1999	-	-	-
Mozambique	CRC - 1994	2000	-	-
	ACRWC - 1995	-	-	-
Namibia	CRC - 1990	1992	-	-
	ACRWC - 2004	-	-	-
Rwanda	CRC - 1991	1992	2002	-
	ACRWC - 2001	2006	-	-
South Africa	CRC - 1995	1997	-	-
	ACRWC - 2000	-	-	-

Table 29 continued

Swaziland	CRC - 1997	2001	-	-
	ACRWC X	-	-	-
Tanzania	CRC - 1991	2001		-
	ACRWC - 2003	-	-	-
Uganda	CRC - 1990	1996	2003	-
	ACRWC - 1994	-	-	-
Zambia	CRC - 1991	2003	-	-
	ACRWC X	-	-	-
Zimbabwe	CRC - 1990	1995	-	-
	ACRWC - 1995	-	-	-

X - Has not ratified the African Charter

For both initial and subsequent reports, most countries held consultations with key people from sector ministries, with technical advice and assistance from UNICEF and other UN agencies. Reports were circulated to government ministries and NGOs for approval and endorsement. However, without widespread dissemination and publication of the CRC amongst the public, there can only be limited effective feedback from ordinary citizens.

For most countries in this review, alternative reports were submitted by NGOs, as provided for under Article 45 of the CRC. These reports supplement state reports and shed light on gaps, inconsistencies and other issues that governments may not have reported on. Most states in this review have not yet submitted second and subsequent reports that address specific issues raised by the CRC Committee in their Concluding Observations, such as recommendations for changes in law and policy. States have largely not managed to make their reports widely known to their citizens.

RECOMMENDATIONS



Credit: Liba Taylor

This review demonstrates that, despite some progress, gaps continue to exist between standards in the CRC and African Charter on the one hand, and the realities of children's lives and the state of legal protection in Eastern and Southern Africa on the other. There is a need to devise and share strategies that will bring about harmonisation of national laws with the provisions of the CRC and the ACRWC and their effective implementation for the realisation of child rights. Reforms in Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland and Uganda are encouraging, and can serve as examples for other countries that have yet to start or complete the process of harmonisation.

The law does not operate in a vacuum and having a comprehensive legal framework on children's rights will not automatically lead to full observance of these rights. There must be accompanying political, economic, social and financial support for their effective realisation. Governments must keep the promises they made when they ratified the CRC and the African Charter, and citizens and stakeholders must keep them accountable to their promises.

The following recommendations cover the most pressing steps that need to be taken to bring about major changes for children's rights in the region.

- 1. Audit and review existing legislation on children.** Where audits of laws relating to children have not been undertaken, the first step should be a holistic, multi-sectoral and inclusive review. Where comprehensive assessments have been undertaken, there is need for continuous review and revision of laws.

All processes must entrench the principles of non-discrimination, the best interests of the child and participation of children in accordance to their evolving capacities. Ensuing legislation may either be in one consolidated statute or in several thematic based statutes. However, it is recommended that laws relating to child justice and child welfare should be separated and not merged.

- 2. Adopt and enact on a priority basis pending bills relating to children's rights** that have been submitted to parliament. Time and resources have been expended in undertaking reviews, and revising and drafting new legislation; this must not be in vain. Pending draft legislation in countries including Lesotho, Malawi, Mozambique, Namibia and South Africa should be enacted without further delay.
- 3. Ensure mechanisms and bodies,** with wide representation from government and civil society, to promote and own the process of national harmonisation, including coordination and monitoring. These could be existing bodies with the mandate to review and revise laws, such as Attorney Generals' Offices or Law Commissions.
- 4. Adopt a standard definition of a child:** countries should ensure that they adopt an overarching definition of a child as any person below the age of eighteen. This is particularly important for protective provisions, such as those that prevent children under eighteen from being conscripted into armed forces or from early marriage. In other legislation where age limits may be set in regard to children; for example, medical consent, the principle consideration should be the best interests of the child and their participation in accordance with their evolving capacity.

5. **Implement laws on non-discrimination** and ensure equal protection and enjoyment of rights to all children within state jurisdictions. There is a need to raise awareness of the fact that, in line with Article 3 of the African Charter, the duty of non-discrimination rests on all actors, including communities, and not just the state.
6. **Review the age of sexual consent and the age of marriage for both genders.** The age of sexual consent should ideally be sixteen, in the interest of protecting childhood. The best interests of the child require that children are protected from early marriage; so ideally, the minimum age for marriage should be eighteen for both genders, irrespective of whether the marriage is concluded under civil, customary or religious law.
7. Review and if necessary **raise the minimum age of criminal responsibility to at least twelve.**
8. **Ensure that universal free and compulsory primary education** is enshrined in the law, and ensure progressive access and completion of secondary education.
9. **Abolish any legal provisions that permit or excuse corporal punishment** in homes, schools or any other institutions.
10. **Develop legislative provisions for the protection of orphaned and vulnerable children,** in particular, the facilitation and promotion of national adoptions. Countries should also ratify the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoptions (1993).
11. **Reform child justice administration, in particular:**
 - a) Adopt and encourage restorative justice and rehabilitation schemes for child offenders, focusing on diversion from the criminal justice system at all stages. In addition to the CRC and African Charter, states should implement the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990), while fully taking fully into account the CRC General Comment No 10 on Children's Rights in Juvenile Justice and the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005) and adjust laws and policies accordingly to include child victims and witnesses of crime.
 - b) Legislate for the right to free legal representation for child victims and offenders and ensure access to this right.
 - c) Apply the principle of the best interests of the child and the child's right to be heard in adjudicating all cases involving child rights.
 - d) Establish child-friendly benches in both urban and rural areas around the country, to adjudicate on all cases relating to children with closed proceedings and quick adjudication timelines.
 - e) Apply stiff and effective sanctions and penalties for perpetrators of abuse against children.

- f) Establish proper data collection systems concerning children in conflict with the law to enable monitoring of improvements in juvenile justice to be measured over time
 - g) In line with CRC General Comment No 10, ensure that an effective complaints system is established for addressing rights violations of children deprived of their liberty
- 12. Report on a timely basis on application of laws** to the treaty committees and ensure children's participation in the reporting process.
- 13. Strengthen regional monitoring and peer accountability** under regional processes such as the Africa Peer Review Mechanism, and within institutionalised regional blocks such as the Southern Africa Development Community and the East African Community. Integration of regional policies and agendas should also include standards on children's rights in the respective countries.
- 14. Ensure that all member states ratify the African Charter on the Rights and Welfare of the Child** (Zambia and Swaziland, in the region included in this review) and fulfil their obligations by submitting reports to the African Committee.

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	<i>Harmonisation of Laws on Children in South Africa</i> (ACPF: 2006)
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Randrianantenaina, L	<i>Harmonisation of Laws on Children in Madagascar</i> (ACPF: 2006)
Tabengwa, M	<i>Harmonisation of Laws on Children in Botswana</i> (ACPF: 2006)
Tiki, D	<i>Harmonisation of Laws on Children in Namibia</i> (ACPF: 2006)

* All these reports are available on the ACPF website: www.africanchildforum.org

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ENDNOTES

- 1 Organised by The African Child Policy Forum, Addis Ababa, Ethiopia, 21-22 May, 2004
- 2 *Africa Fit for Children*, para 19
- 3 Countries that fall within the UNICEF Eastern and Southern Africa (ESA) regional programme. The methodology was to commission researchers from the 19 countries to undertake reviews on national-level harmonisation efforts, challenges and successes. They assessed the situation using various sources of information, including governmental and non-governmental materials, and consultations with local officials, civil society organisations and experts. State party reports, findings and recommendations to the UN Committee on the CRC, in their 'General Comments' and 'Concluding Observations' were also incorporated
- 4 *Vienna Convention on the Law of Treaties*, Article 26: 'Every treaty is binding upon the parties to it and must be performed by them in good faith'
- 5 Civil law has its roots in the Napoleonic Code and in this region it is common in former colonies of European countries such as Portugal, France and Netherlands. The common law system on the other hand, is based on English legal system and is common in former British colonies. However, South Africa inherited a common-law system from its history of British rule as well as Roman-Dutch law, which spread to former protectorates such as Botswana, Lesotho, Namibia, Swaziland and Zimbabwe. They therefore have Roman-Dutch law, common law, customary law and statutory law
- 6 For more information, see: Bennett, TW, *A Sourcebook of African Customary Law for Southern Africa* (JUTA, 1991a); Bennett, TW *Human Rights and African Customary Law* (JUTA 1995); Elias, TO *The Nature of African Customary Law* (Manchester Press, 1996); Letuka, Puleng & Armstrong, 'Which Law? Which Family? Which Women? Problems enforcing CEDAW in Southern Africa' in Lowe & Gillian (eds.) *Families Across Frontiers* (1996) p207; McClendon, Thomas V 'Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-era Natal' in *The International Journal of Historical Studies* vol. 28(3) (1995); Nhlapo, Ronald Thandabantu 'Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law' in Eekelaar and Šarëviã (eds.) *Parenthood in Modern Society* (1993) p35; Costa, Anthony 'The Myth of Customary Law' in *South African Journal on Human Rights* 525 (1998); Chancock, Martin 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform' *International Journal of Law & the Family* 72 (1989)
- 7 Alston & Tobin, pp3-8
- 8 Black (1986), p199
- 9 For commentaries on the CRC, see: UNICEF (2002); van Bueren; Detrick (1999). For a detailed account of the drafting history of the Convention, see: Detrick (1992)
- 10 Both protocols were adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000. Both the protocols are now ratified by almost 120 states
- 11 Adopted by the Assembly of Heads of State and Government of the Organisation of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, 17-20 July 1979
- 12 OAU Doc CAB/LEG/24.9/49
- 13 Viljoen, F 'The African Charter on the Rights and Welfare of the Child' in Davel
- 14 Olowu D 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* 10, pp127-136
- 15 Reference to Art 1(3) of ACRWC by Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* (2000), p158
- 16 Art 21 of ACRWC
- 17 Art 22(2) of ACRWC
- 18 Art 21 of ACRWC
- 19 Art 27(1)(b) of ACRWC
- 20 Art 11(6) of ACRWC
- 21 Art 26 of ACRWC

22 Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* (2000) p159

23 Ibid.

24 Kamchedzera, G 'The African Child Charter: Finally in Force amidst Enhanced Justification' in *Understanding Children's Rights: Ghent Papers on Children's Rights* No 6, p559

25 Art 13 of ACRWC

26 Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* (2000) p157

27 Art 30 of CRC

28 Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* (2000) p157

29 Art 31 of ACRWC

30 Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' in *The International Journal of Children's Rights* (2000)

31 As of August 2006, with Mauritania being the latest to ratify in September 2005. See www.africa-union.org/root/au/documents/treaties accessed Aug 2006

32 Art 43 of CRC (hereinafter referred to as the UN CRC Committee) and Art 41 of ACRWC

33 Hereinafter 'the African Committee'

34 The other countries are Egypt, Mauritius and Nigeria

35 Art 44 of ACRWC. However, the confidentiality of such complaints may be compromised by Art 44 (2) of ACRWC, which requires the committee to report such complaints to the AU assembly

36 Art 42 (2) of ACRWC

37 Art 45 (3) of ACRWC

38 www.africa-union.org/child/home.htm (accessed 15 Aug 2006) and Justice Joyce Aluoch, Chair of the African Committee, quoted in African Child Policy Forum (2004), p22

39 'The African Declaration on Violence Against Girls' in African Child Policy Forum (2006)

40 See *Concluding Observations on Botswana's Initial Report*, para 8

41 *CRC General Guidelines Regarding the Form and Content of Initial and Periodic reports to be Submitted by State Parties*, CRC/C/5 and CRC/C/58 (hereinafter 'CRC Guidelines for Periodic Reports')

42 Art 1 of the African Charter sets out a similar obligation on state parties

43 See, for instance, *Concluding Observations on Swaziland's Initial Report*, para 7

44 See, for instance, *Concluding Observations on Swaziland's Initial Report*, para 8

45 See, for instance, *Concluding Observations on Uganda's Second Periodic Report*, paras 12 and 13

46 See, for instance, *Concluding Observations of Comoros' Initial Report*, para 10

47 See, for instance, *Concluding Observations on Tanzania's Second Periodic Report*, para 9

48 See, for instance, *Concluding Observations on Burkina Faso's Initial Report*, para 15

49 See, for instance, *Concluding Observations on Mozambique's Initial Report*, para 12(a)

50 Art 4 of CRC; Art 1 of ACRWC

51 A critical role of the UN Committee on the Rights of the Child, whereby it looks at domestic legislation that implements provisions of the CRC

52 Mbazira

53 Child Law Reform Committee Uganda, pp3-4

54 Hodgkin & Newell, p66; see also *Concluding Observations on Syrian Arab Republic's Initial Report*, IRCO/Add 70, para 3

55 Arts 2, 3, 6 and 12 of the CRC

56 See *Concluding Observations on Lesotho's Initial Report*, para 14 and *Concluding Observations on Mozambique's Initial Report*, para 16(b)

- 57 *Concluding Observations on Mozambique's Initial Report*, para 14(a)
- 58 See, for instance, *Concluding Observations on Rwanda's Second Periodic Report*, para 8
- 59 Zambia has not ratified the African Charter, but has ratified the CRC. The 2005 Draft Constitution of Zambia includes the definition of a child as any person below the age of eighteen
- 60 Hodgkin & Newell, p36
- 61 *CRC Guidelines for Periodic Reports*, para 24
- 62 *Concluding Observations on Uganda's Second Periodic Report*, para 29. In *Concluding Observations on Madagascar's Second Periodic Report*, para 24, the Committee recommended the amendment of Art 3 of Ordinance 62-089, 1 October 1962 on marriage, which allows girls to marry from the age of fourteen, and increase this minimum age to align with boys. See also *Concluding Observations on Tanzania's Second Periodic Report*, para 25; *Concluding Observations on Kenya's Initial Report*, para 22(c); and *CRC General Comment No 4*
- 63 See, for instance, criticisms on the low minimum age of criminal responsibility in *Concluding Observations: United Kingdom of Great Britain and Northern Ireland CRC/C/15/Add 188*, 4 October 2002, para 59
- 64 See, for instance, *Concluding Observations on Zambia's Initial Report*, para 25, and *Concluding Observations of Comoros' Initial Report*,
- 65 *CRC General Comment No 5*, para 4
- 66 Ng'ambi, p24
- 67 Tabengwa, p22
- 68 Hagos, p50
- 69 The 1997 Constitution of Eritrea, Art 15(1)
- 70 Hagos, p52
- 71 Hagos, p51
- 72 Hagos, p52
- 73 See, for instance, *Concluding Observations on Kenya's Initial Report*, para 28
- 74 UNDP
- 75 CIA
- 76 *Concluding Observations on Swaziland's Initial Report*, paras 32 and 33
- 77 Art 18(3) of ACRWC: 'No child shall be deprived of maintenance by reference to the parents' marital status'
- 78 See, for instance, *Concluding Observations of Burundi's Initial Report*, para 35
- 79 Hodgkin & Newell, p399
- 80 'The Committee...is concerned in particular about the difficulties experienced in registering the birth of refugee children outside of the refugee camps and about the limited type of birth registration available in the camps.' See, *Concluding Observations of Burundi's Initial Report*, para 3
- 81 *Concluding Observations on Lesotho's Initial Report*, para 29
- 82 See, for instance, *Concluding Observations on Ethiopia's Third Periodic Report*, paras 19, 21, 32, 34, 56(f) and 64(f)
- 83 *Concluding Observations on Eritrea's Initial Report*, para 25
- 84 *Concluding Observations on Kenya's Initial Report*, para 29
- 85 *Concluding Observations on Swaziland's Initial Report*, paras 30 and 31
- 86 *Concluding Observations on Tanzania's Second Periodic Report*, para 29
- 87 A *kgotla* is a public meeting, community council or traditional law court of a Botswana village
- 88 Djabir, p27
- 89 See *Concluding Observations on Eritrea's Initial Report*, para 26
- 90 WHO
- 91 UNDP
- 92 WHO (data from 2000)

- 93 Sloth-Nielsen (2006 - South Africa),
- 94 See, for instance, *Concluding Observations on Luxembourg's Initial Report* Add 92, May 1998, paras 18 and 36
- 95 *CRC General Comment No 4*, para 9
- 96 *Concluding Observations on Lesotho's Initial Report*, para 44
- 97 *CRC General Comment No 1*, para 2
- 98 *CRC General Comment No 1*, para 3
- 99 Art 41 (Sub-section 4)
- 100 Eritrean Ministry of Education data from 2002
- 101 UNESCO
- 102 See, for instance, *Concluding Observations on Uganda's Second Periodic Report*, para 60(a)
- 103 One example from the region is Burundi. For further details, see *CRC General Comment No 1*, para 8. In considering Eritrea's State Party Report, the Committee has recommended that the state party include human rights education as part of the curriculum; see, *Concluding Observations on Eritrea's Initial Report*, para 52(f)
- 104 See, for instance, *CRC General Comment No 1* and *Concluding Observations on Uganda's Second Periodic Report*, para 60
- 105 United Nations(2006)
- 106 Kamchedzera
- 107 *CRC General Comment No 1*
- 108 See, for instance, *Concluding Observations on Tanzania's Second Periodic Report*, para 34 (c)
- 109 *Concluding Observations on Lesotho's Initial Report*, paras 33- 34
- 110 *Concluding Observations on South Africa's Initial Report*, para 21
- 111 *Concluding Observations on Ethiopia's Third Periodic Report*, paras 47-48
- 112 UNICEF (2005) (Data from 1996 -2003)
- 113 See, for instance, *CRC General Comment No 1* and *Concluding Observations on Uganda's 2nd Periodic Report*, para 18
- 114 Global Initiative to End All Corporal Punishment of Children, pp56-58
- 115 Kimane & Chipoyera, p33
- 116 *Second Periodic Report of Ethiopia*, para 203
- 117 Botswana Police Service
- 118 Hodgkin & Newell, p590
- 119 Ibid.
- 120 Ibid.
- 121 Odongo (2005)
- 122 Kimane (2004)
- 123 Kimane (2006)
- 124 *Concluding Observations on Madagascar's Second Periodic Report*, para 69(d); see also *Concluding Observations on Kenya's Initial Report*, para 64(a-h)
- 125 Orphaned and vulnerable children here refers to children who have lost one or both biological or adopted parents
- 126 Sloth-Nielsen (2004)
- 127 In 2005 approximately 3,000 adoptions nationally, against 270,000 placements in foster care
- 128 *Concluding Observations on Ethiopia's Third Periodic Country Report*, paras 116 and 122
- 129 Clause 65(1); see also the remainder of provisions in Clause 65, which spell out further protections for inter-country adoptions both by foreigners, and of foreign children by Lesotho nationals residing in Lesotho
- 130 Act No 2005/ 014 of 7 September 2005

131 Section 6(2) of the Adoption of Children Act
132 Adoption of a Malawian boy by Madonna in October 2006
133 Hodgkin & Newell, p305
134 ACRWC Article 23(4)
135 The interpretative provision of the charter sanctions the supervisory body (the African Committee) to draw
inspiration from international human rights law and other international instruments, such as the CRC; see
ACRWC, Art 46
136 UNHCR (2001), p7
137 UNHCR (2000)
138 In General Comment No 6, para 7, the UN Committee defines unaccompanied refugee children as
'...children, as defined in Article 1 of the Convention, who have been separated from both parents and other
relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so'
139 See, for instance, *UN General Assembly Resolutions on Protection and Assistance to Refugee Children*
140 For instance, in the context of Concluding Observations on Zimbabwe's Initial Report, para 13
141 Coalition to Stop the Use of Child Soldiers (Some Facts)
142 For instance, in Northern Uganda, the Lord's Resistance Army abducted at least 20,000 children during
twenty years of conflict with the government, with 5,000 children taken since June 2002, after ratification
of the Optional Protocol on the Involvement of Children in Armed Conflict
143 Optional Protocol on the Involvement of Children in Armed Conflict, Art 1
144 Coalition to Stop the Use of Child Soldiers (2004)
145 Ibid.
146 Adhana & Yohannes, p32
147 Federal Government of Ethiopia, Art 4
148 Adhana & Yohannes, p32
149 Ibid.
150 See *Concluding Observations on Rwanda's 2nd Periodic Report*
151 *Concluding Observations on Rwanda's 2nd Periodic Report*, para 62
152 Stop the Use of Child Soldiers (2004), section on Zambia
153 *Concluding Observations on Zambia's Initial Report*, para 66
154 *Concluding Observations on Uganda's 2nd Periodic Report*, para 65
155 *Concluding Observations on Zambia's Initial Report*
156 'Promises must be kept'
157 Art 43 of CRC and Art 41 of ACRWC
158 Art 43 of ACRWC
159 Hodgkin & Newell
160 Ibid.
161 The other countries are Egypt, Mauritius and Nigeria
162 Art 44 of ACRWC
163 Art 42(2) of ACRWC



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